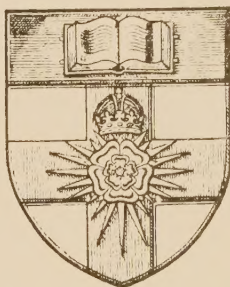


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THE
ALL ENGLAND
LAW REPORTS
REPRINT

ADDIS *v.* GRAMOPHONE CO., LTD.

E [HOUSE OF LORDS (Lord Loreburn, L.C., Lord James of Hereford, Lord Atkinson, Lord Collins, Lord Gorell and Lord Shaw), June 25, 28, 29, July 26, 1909]

[Reported [1909] A.C. 488; 78 L.J.K.B. 1122; 101 L.T. 466]

Master and Servant—Wrongful dismissal—Damages—Measure—Harshness and oppression accompanying dismissal—Difficulty in servant's obtaining fresh employment—Effect of tort accompanying dismissal.

F In an action for wrongful dismissal the jury, in assessing the damages, are debarred from awarding exemplary damages because of circumstances of harshness and oppression accompanying the dismissal and injuring the feelings of the servant, and also from taking into consideration the fact that the dismissal will make it more difficult for him to obtain fresh employment. If some tort, e.g., assault, libel, or slander, accompanies the dismissal, that cause of action G is not merged with or extinguished by the proceedings for the wrongful dismissal which the commission of the tort accompanied, but it remains available to the servant as a remedy for the tort which has been committed against him.
Maw v. Jones (1) (1890), 25 Q.B.D. 107, criticised.

H **Notes.** In certain cases of a breach of a contract of service, usually contracts for theatrical engagements, an action will lie for loss of publicity or loss of opportunity to enhance a reputation: see, e.g., the cases mentioned at 25 HALSBURY'S LAWS (3rd Edn.) 522, note (b).

I Followed: *Re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315. Considered: *Re Golomb and Porter & Co.'s Arbitration* (1931), 144 L.T. 583; *Withers v. General Theatre Corp'n., Ltd.*, [1933] All E.R.Rep. 385. Applied: *Bailey v. Bullock*, [1950] 2 All E.R. 1167. Referred to: *Quirk v. Thomas*, [1916] 1 K.B. 516; *Turpin v. Victoria Palace*, [1918] 2 K.B. 539; *Wilson v. United Counties Bank, Ltd.*, [1918-19] All E.R.Rep. 1035; *Marb  v. George Edwardes (Daly's Theatre), Ltd.* (1927), 43 T.L.R. 460; *Groom v. Crocker*, [1938] 2 All E.R. 394; *Gibbons v. Westminster Bank, Ltd.*, [1939] 3 All E.R. 577; *Foaminol Laboratories, Ltd. v. British Artid Plastics, Ltd.*, [1941] 2 All E.R. 393; *Moss v. Chesham U.D.C.* (1945), 172 L.T. 301.

As to wrongful dismissal, see 25 HALSBURY'S LAWS (3rd Edn.) 519-524; and for cases see 34 DIGEST 101-107.

Cases referred to:

- (1) *Maw v. Jones* (1890), 25 Q.B.D. 107; 59 L.J.Q.B. 542; 63 L.T. 347; 54 J.P. 727; 38 W.R. 718, D.C.; 34 Digest 106, 791.
- (2) *Hartley v. Harman* (1840), 11 Ad. & El. 798; 3 Per. & Dav. 567; 9 L.J.Q.B. 179; 113 E.R. 617; 34 Digest 107, 794.
- (3) *Engell v. Fitch* (1868), L.R. 3 Q.B. 314; 9 B. & S. 85; 37 L.J.Q.B. 145; 18 L.T. 318; 16 W.R. 785; affirmed sub nom. *Engel v. Fitch* (1869), L.R. 4 Q.B. 659; 10 B. & S. 738; 38 L.J.Q.B. 304; 17 W.R. 894, Ex. Ch.; 40 Digest (Repl.) 285, 2369.
- (4) *Sikes v. Wild* (1861), 1 B. & S. 587; 30 L.J.Q.B. 325; affirmed (1863), 4 B. & S. 421; 32 L.J.Q.B. 375; 8 L.T. 642; 11 W.R. 954; 122 E.R. 517; sub nom. *Sykes v. Wild*, 2 New Rep. 456, Ex. Ch.; 40 Digest (Repl.) 289, 2422.
- (5) *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078; 96 E.R. 635; 17 Digest (Repl.) 104, 187.
- (6) *Bain v. Fothergill* (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 23 W.R. 261, H.L.; 17 Digest (Repl.) 104, 188.
- (7) *Thorpe v. Thorpe* (1832), 3 B. & Ad. 580; 1 L.J.K.B. 170.
- (8) *The Notting Hill* (1884), 9 P.D. 105; 53 L.J.P. 56; 51 L.T. 66; 32 W.R. 764; 5 Asp.M.L.C. 241, C.A.; 17 Digest (Repl.) 114, 272.
- (9) *Lord Sondes v. Fletcher* (1822), 5 B. & Ald. 835; 106 E.R. 1396; 7 Digest (Repl.) 224, 613.
- (10) *Smith v. Thompson* (1849), 8 C.B. 44; 18 L.J.C.P. 314; 137 E.R. 424; 34 Digest 69, 466.
- (11) *Bell v. Midland Rail. Co.* (1861), 10 C.B.N.S. 287; 30 L.J.C.P. 273; 4 L.T. 293; 7 Jur.N.S. 1200; 9 W.R. 612; 142 E.R. 462; 17 Digest (Repl.) 105, 200.
- (12) *Bracegirdle v. Orford* (1813), 2 M. & S. 77; 105 E.R. 311; 17 Digest (Repl.) 105, 201.

Appeal by the plaintiff in the action from a decision of the Court of Appeal.

The appellant had been employed by the respondents as manager of their business in India, and was dismissed by them under circumstances which are set out in the judgment of the Lord Chancellor. He brought this action for wrongful dismissal, for commission, and for the unlawful detention of securities deposited by him with the respondents. The action was tried before DARLING, J., and a special jury; the jury found a verdict for the plaintiff for £600 damages for the wrongful dismissal, £340 for commission, and £300 for the detention of his securities; and DARLING, J., gave judgment for the plaintiff for £1,240. The Court of Appeal set this judgment aside, COZENS-HARDY, M.R., and BUCKLEY, L.J., holding that there was no evidence to go to the jury in support of the plaintiff's case, and FLETCHER MOULTON, L.J., holding that there should be a new trial. Judgment was accordingly entered for the defendants. The plaintiff appealed to the House of Lords.

Duke, K.C., and *Grosier* for the appellant.

Lush, K.C., and *Schiller* for the respondents.

Their Lordships took time for consideration.

July 26, 1909. The following opinions were read.

LORD LOREBURN, L.C.—The plaintiff was employed by the defendants as manager of their business at Calcutta at £15 per week as salary, and a commission on the trade done. He could be dismissed by six months' notice. In October, 1905, the defendants gave him six months' notice, but at the same time they appointed Mr. Gilpin to act as his successor, and took steps to prevent the plaintiff from acting any longer as manager. In December, 1905, the plaintiff came back to England. At that time the exact state of accounts between the plaintiff and the defendants was not ascertained. There had been debits and credits, and apparently no definite or periodical payments on account either of salary or com-

A mission. Thus there was a disputed account, though the limits of the dispute appear very narrow. In these circumstances the plaintiff brought this action in 1906, claiming an account and damages for breach of contract. That there was a breach of contract is quite clear. If what happened in October, 1905, did not amount to a wrongful dismissal it was, at all events, a breach of the plaintiff's right to act as manager during the six months and to earn the best commission he could make. Still another cause of action was included. The plaintiff had deposited some securities as guarantee of his good faith while absent from headquarters. In 1906 he demanded their return. The defendants unwarrantably refused to return the securities, and so the claim for detinue was included.

When the action came to trial it was agreed to refer the matters of account to arbitration. The causes of action for detinue and for breach of contract were tried by DARLING, J., and a jury. The jury found for the plaintiff in detinue, damages £300; for the plaintiff in respect of wrongful dismissal £600; and for the plaintiff in respect of excess commission £340, over and above what was earned by the plaintiff's successor during the six months from October, 1905, to April, 1906. Every one of these findings is impeached. [His LORDSHIP dealt with the question of detinue, and held that the plaintiff was only entitled to nominal damages.] As to the damages of £600 for wrongful dismissal, a controversy ensued whether the £600 was intended to include salary for the six months or merely damages, because of the abrupt and oppressive way in which the plaintiff's services were discontinued and the loss he sustained from the discredit thus thrown upon him. Finally, a question of law was argued whether or not such damages could be recovered in law.

To my mind, it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the salary to which the plaintiff was entitled for the six months between October, 1905, and April, 1906, together with the commission which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of LORD COLERIDGE, C.J. (*Maw v. Jones* (1), 25 Q.B.D. at p. 108), has been quoted as authority to the contrary. I doubt if the learned Lord Chief Justice so intended it. If he did, I cannot agree with him. If there be a dismissal without notice the employer must pay an indemnity; but, that indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. The cases relating to a refusal by a banker to honour cheques, when he has funds in hand, have, in my opinion, no bearing. That class of case has always been regarded as exceptional. And the rule as to damages in wrongful dismissal, or in breach of contract to allow a man to continue in a stipulated service, has always been, I believe, what I have stated. It is too inveterate to be altered now, even if it were desirable to alter it.

Accordingly, I think that so much of the verdict of £600 as relates to that head of damages cannot be allowed to stand. As there is an additional dispute how much of it does relate to that head of damages, the best course will be to disallow the £600 altogether, and to state in the order that the plaintiff is entitled to be credited in the account which is to be taken with salary from October, 1905, to April, 1906. [His LORDSHIP dealt with the question of the excess commission, and held that on the evidence the plaintiff was entitled to succeed on this point.] In the result I respectfully advise your Lordships to order judgment for the plaintiff for 1s. and for £340, in all £340 1s., with a declaration that the plaintiff is entitled to be credited in the account now under investigation, with salary from October, 1905, to April, 1906, and with all commission on business actually done during that period which he would have been entitled to receive if he had been acting as manager. In regard to costs, both sides have raised points which ought

not to have been raised, but I think the defendants acted oppressively in detaining the plaintiff's securities. The plaintiff has succeeded in recovering a substantial sum, and the judgment in his favour should be with costs here and below. A

LORD JAMES OF HEREFORD concurred.

LORD ATKINSON.—I entirely concur in the judgment of the Lord Chancellor. The rights of the plaintiff are, in my opinion, clear. He had been illegally dismissed from his employment. He could have been legally dismissed by the six months' notice which he in fact received, but the defendants did not wait for the expiration of that period. The damages which he sustained by this illegal dismissal were (i) the wages for the six months during which his former notice would have been current; (ii) the profits or commission which would in all reasonable probability have been earned by him during the six months, had he continued in the employment; and possibly (iii) damages in respect of the time which might reasonably elapse before he could obtain other employment. He has been awarded a sum of some hundreds of pounds, not in respect of any of these heads of damage, but in respect of the harsh and humiliating way in which he was dismissed, including, presumably, the pain which he experienced, as is alleged, by reason of the imputation upon him conveyed by the manner of his dismissal. This is the only circumstance which makes the case of general importance, and this is the only point with which I think it necessary to deal. B C D

I have been unable to find any case decided in this country in which any countenance is given to the notion that a dismissed employee can recover, in the shape of exemplary damages for illegal dismissal, in effect damages for defamation—for it amounts to that—except *Maw v. Jones* (1). In that case *MATHEW, J.*, during the argument, while counsel was urging, on the authority of *Hartley v. Harman* (2), that the measure of damages for the improper dismissal of an ordinary domestic servant was a month's wages and nothing more, interjected, no doubt in the shape of a question, the remark: "Have you ever heard the principle applied to a case where a false charge of misconduct has been made?" But the decision was that the direction of the judge at the trial was right. What was the character of that direction? The defendant had power to dismiss his apprentice, the plaintiff, on a week's notice, and had also power to dismiss him summarily if he should show a want of interest in his work. He dismissed the apprentice summarily, without notice, assigning as a reason that he had been guilty of frequent acts of insubordination, and that he had gone out at night without leave. The judge at the trial told the jury that they were not bound to limit the damages to the wages which the plaintiff had lost, but that they might take into consideration the time which the plaintiff would require to get new employment, and the difficulty which he would have, as a discharged apprentice, in getting employment elsewhere, and it was on this precise ground that the direction was upheld. E F G

I do not think that this case is any authority whatever for the general proposition that exemplary damages may be recovered for wrongful dismissal, still less, of course, for breach of contract generally; but, such as it is, it is the only authority in the shape of a decided case which can be found upon the first-mentioned point. I have always understood that damages for breach of contract were in the nature of compensation, not punishment, and that the general rule of law applicable to such cases was in effect that stated by *COCKBURN, C.J.*, in *Engell v. Fitch* (3) in these words (*L.R. 3 Q.B. at p. 380*): H I

"By the law, as a general rule, a vendor who from whatever cause fails to perform his contract is bound, as was said by *LORD WENSLEYDALE* in a case which has been referred to, to place the purchaser, so far as money will do it, in the position in which he would have been if the contract had been performed. If a man sells a cargo of goods not yet come to hand, which he believes to have been consigned to him from abroad, and the goods fail to arrive, it will be no answer to the intending purchaser to say that a third party, who had

A engaged to consign the goods to seller, had deceived or disappointed him. The purchaser will be entitled to the difference between the contract price and the market price."

In *Sikes v. Wild* (4) BLACKBURN, J., said (1 B. & S. at p. 594):

B "I do not know how misconduct can alter the rule of law by which damages for breach of contract are to be assessed. It may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself."

There are three well-known exceptions to the general rule applicable to the measure of damages for breach of contract, namely actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it; actions for breach of promise to marry; and actions like C that in *Flureau v. Thornhill* (5) where the vendor of real estate, without any fault on his part, fails to make a title. I know of none other. The peculiar nature of the first two of these exceptions justifies their existence. Ancient practice upholds the last, though it has often been adversely criticised, as in *Bain v. Fothergill* (6). If there be a tendency to create a fourth exception, it ought, in my view, to be D checked rather than stimulated, inasmuch as to apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to uncertainty and confusion in commercial affairs, while to apply them only in part, and in particular cases, would create anomalies, lead occasionally to injustice, and make the law a still more lawless science that it is said to be. For instance, in actions of tort, motive, if it may be taken into E account to aggravate damages, as undoubtedly it may be, may also be taken into account to mitigate them, as may also the conduct of the plaintiff himself who seeks redress. Is this rule to be applied to actions for breach of contract? There are few breaches of contract more frequent than those which arise where men omit or refuse to repay what they have borrowed, or to pay for what they have bought. Is the creditor or vendor who sues for one of such breaches to have the sum which F he recovers lessened if he should be shown to be harsh, grasping, or pitiless, or even insulting in enforcing his demand or lessened because the debtor has struggled to pay, has failed because of misfortune, and has been suave, gracious, and apologetic in his refusal? On the other hand, is that sum to be increased if it should be shown that the debtor could have paid readily without any embarrassment, but refused with expressions of contempt and contumely from a malicious desire to G injure his creditor? Few parties to contracts have more often to complain of ingratitude and baseness than sureties. Are they, because of this, to be entitled to recover from the principal, often a trusted friend who has deceived and betrayed them, more than they paid on that principal's behalf? If circumstances of aggravation are rightly to be taken into account in actions of contract at all, why should they not be taken into account in the case of the surety, and the rules and principles H applicable to cases of tort applied to the full extent?

In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress he may, no doubt, recover exemplary damages, or what are sometimes styled "vindictive" damages; but if he should choose to seek redress in the I form of an action for breach of contract, he lets in all the consequences of that form of action: *Thorpe v. Thorpe* (7). One of the consequences, is, I think, that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more. I can conceive nothing more objectionable and embarrassing in litigation than trying in effect an action of libel or slander as a matter of aggravation in an action for illegal dismissal, the defendant being permitted, as he must in justice be permitted, to traverse the defamatory sense, rely on privilege, and raise every point which he could raise in an independent action brought for the alleged libel or slander itself. In my

opinion, exemplary damages ought not to be, and are not according to any true principle of law, recoverable in such an action as the present, and the sums awarded to the plaintiff should, therefore, be decreased by the amount at which they have been estimated, and credit for that item should be allowed on his account. A

LORD COLLINS.—The question which at the close of the argument I desired time to consider was whether in an action for wrongful dismissal the jury, in assessing the damages, are debarred from taking into their consideration circumstances of harshness and oppression accompanying the dismissal, and any loss sustained by the plaintiff from the discredit thus thrown upon him. The jury in this case obviously did take these circumstances into consideration, for they assessed the damages at £600. The contention of the defendants is that the damages must be limited to the salary to which the plaintiff was entitled for the six months between October, 1905, and April, 1906, together with the commission which the jury should think that he would have earned had he been allowed to manage the business himself, and that the manner of dismissal has never been allowed, and ought not to be allowed, to influence damages in a case of this kind. This contention goes the length of affirming that in cases of wrongful dismissal it is beyond the competence of a jury to give what are called “exemplary” or “vindictive” damages, and it was this point that I desired to consider further. B C D

No English case was cited which decides this point against the plaintiff, and I have been unable to find one myself, though I am aware that Mr. SEDGWICK in his treatise on DAMAGES (8th Edn.) contends for that view. I think, however, that it is quite clear, and Mr. SEDGWICK apparently does not dispute it, that at one time it was competent for juries to give such damages. In s. 19 of his book he says: E

“In one case, as late as the reign of James I, it is said the jury are chancellors, and they can give such damages as the case requires in equity, as if they had the absolute control of the subject.”

In ss. 348-349 he goes on:

“Until comparatively recent times juries were as arbitrary judges of the amount of the damages as of the facts. This principle applies as much to actions of contract as of tort. . . . Even as late as the time of LORD MANSFIELD it was possible for counsel to state the law to be that the court cannot measure the ground on which the jury found damages.” F

He says in s. 351, in breach of promise of marriage cases, the jury were told that they could give damages “for example’s sake to prevent such offences in future.” G He says in s. 352 that vindictive damages, or “smart money,” could be given whether the form of action were trespass or case. In s. 354, on the right to give such damages, he says:

“The doctrine is to be supported mainly on the ground of authority and convenience. The historical facts show that it has its root in that jealousy of the exercise of arbitrary and malicious power to which the jury in our system of law has always been so keenly alive, and if it is a survival of a part of the old rule that the jury were judges of the damages, it must be inferred that it has survived because of its inherent usefulness.” H

Having thus explained and vindicated the right of juries to give exemplary damages “for example’s sake, and to prevent such offences in future,” he, nevertheless, in other parts of his work, seeks to put upon it an arbitrary and illogical limitation by confining it to actions in form of torts, as though a breach of contract, which, of course, is in itself an actionable wrong, might not be committed with accompanying circumstances just as deserving of the reprobation of a jury as those which might accompany the commission of a trespass. I

The rule with regard to remoteness of damage is precisely the same in actions of contract or of tort: see SIR F. POLLOCK ON TORTS (8th Edn.), p. 558, citing BRETT, L.J., in *The Notting Hill* (8). But it is from the standpoint of a difference

A of principle in the measure of damages in cases of contract and of tort that he ventures to impugn the position taken up by the late MR. CHITTY in the early editions of his well-known work on CONTRACTS, a position which has been adopted by all subsequent editors, and is again asserted in the last, the 14th, edition of 1894. In the 1834 edition MR. CHITTY says:

B “There are instances in which the defendant may be regarded in the light of a wrongdoer in breaking his contract, and in such case a greater latitude is allowed to the jury in assessing the damages.”

And he cites *Lord Sondes v. Fletcher* (9), decided in 1822. There the plaintiff had presented the defendant to the living of Kettering, taking from him a bond to resign it when either of two named persons should be capable of taking the same.

C The defendant, although requested, refused to resign. The defendant's life interest was worth ten years' purchase. The life interest of one of the two persons named, whom the plaintiff intended to appoint, was worth fourteen years' purchase. At the trial before ABBOTT, C.J., the jury found a verdict for the latter amount. On motion for a new trial, on the ground that the measure of damages was the amount by which the plaintiff was prejudiced in the value of the advowson—i.e., the value

D of the defendant's life interest, and that in estimating the annual value of the living the curate's stipend ought to have been deducted, the court held that the defendant, having entered into a bond to do a particular thing which he had refused to do, was a wrongdoer, and that he was not to be permitted to estimate the value of the living as if he were the purchaser of it, and that they were not prepared to say that the jury had formed a wrong estimate of the damages. The

E judges who usually sat in banc at that time were ABBOTT, C.J., and BAYLEY, HOLROYD and BEST, JJ. Thus we have the opinion of four eminent judges as late as 1822, notwithstanding the fact that in form the action was for breach of contract only, sanctioning the award of exemplary damages. It is true that MR. SEDGWICK impugns MR. CHITTY's position, but he has to admit that the Court of Carolina, whose high authority he acknowledges, has laid down the law in a sense contrary

F to his (MR. SEDGWICK's) contention. Again as late as 1847, on a question whether the damages given by a jury in a case of wrongful dismissal were excessive, no less distinguished a judge than MAULE, J., with whose judgment CRESSWELL and VAUGHAN WILLIAMS, JJ., expressly concurred, said (*Smith v. Thompson* (10), 8 C.B. at p. 61):

G “I also think that there is no ground for saying that the damages were miscomputed. It must be borne in mind that embezzlement was imputed to the plaintiff.”

Doubtless there are other dicta to the same effect scattered through the reports, some of which were cited in the argument; indeed it could hardly fail to be so in view of the authorities which I have cited, and the absence of any decided case to the contrary.

H At the same time it is quite possible that the strong opinion of so distinguished a text-writer as MR. SEDGWICK might lead casual readers to forget that the law of England was once clearly established to the contrary. But it does so happen that the only authority in recent times on the point is *Maw v. Jones* (1), decided in 1890, which in terms decides that a false charge may aggravate the damages in a case of wrongful dismissal. That case has the authority

I of MANISTY, J., as well as of LORD COLERIDGE, C.J., and MATHEW, J., by whom his ruling to that effect was upheld. LORD COLERIDGE, C.J., pointed out that dismissal with an imputation might well be thought by a jury to hurt the plaintiff's prospects of finding another situation, and that ground alone might give a legal claim to consequential damages within the ordinary rule. It was argued for the defendant that this case stood alone, and was quite an exception in our law, and ought to be overruled; and the like observation was made as to the exceptional character of actions for breach of promise of marriage, where it is admitted that such damages may properly be given. Dealing with this incident of breach of

promise cases, SIR F. POLLOCK, in his TREATISE ON THE LAW OF TORTS (8th Edn., 1908), says at p. 560 :

“like results might conceivably follow in the case of other breaches of contract accompanied by circumstances of wanton injury or contumely”;

and see the observations of WILLES, J., in *Bell v. Midland Rail. Co.* (11) (11 C.B.N.S. at p. 307). But when the law of damages is traced backwards it will be found that the so-called exceptions, including that of dishonoured cheques, are merely recurrences to the old rule which, it may be through the deference paid by our own text-writers to MR. SEDGWICK'S opinion, has been sometimes forgotten or ignored. For the reasons which I have given, I think that we are not bound to disallow such damages in this case, and I am not disposed, unless compelled by authority to do so, to curtail the power of the jury to exercise what, as MR. SEDGWICK points out, is a salutary power, which has justified itself in practical experience of redressing wrongs for which there may be, as in this case, no other remedy. Such discretion, when exercised by a jury, would be subject to the now unquestioned right of the courts to supervise, just as is done every day where the form of the action is tort. That a trespass carrying with it an imputation may be the subject of exemplary damages swelled by the fact of the imputation, was decided by LORD ELLENBOROUGH in *Bracegirdle v. Orford* (12), overruling the contention that the imputation could only be brought into consideration as the subject for a separate count for slander. In all other respects I agree with the judgment of the Lord Chancellor.

LORD GORELL.—I think that the difficulties in this case are caused by the very loose way in which the pleadings were framed, and the course which was taken by the parties throughout the proceedings and trial; but the case has now been very fully sifted on its merits, and there seem to be only two points which require consideration. I agree with the Court of Appeal that the plaintiff could not recover under the contract and also for wrongful dismissal, though he might recover under the contract and also for a partial breach of it if the facts proved showed such a breach, and damages in consequence. But if he were treated as suing for wrongful dismissal, he could recover damages based on the loss of the benefit of the contract for six months, and the factors for determining this loss would be the salary and commission which he would have earned. The defendants did not dispute that the plaintiff was entitled to this salary, and pleaded that they had given him credit for it, so that it was a matter of account. Nor did they dispute his right to have a share of the net profits actually made by the agency, and the amount of this was to be settled by reference.

The plaintiff, however, appears to have put forward two further claims for damages in respect of his alleged wrongful dismissal. The first was based upon a suggestion that he was entitled to substantial damages for the manner in which he was dismissed, and apparently it was left to the jury to say, if they thought that the plaintiff had been wrongfully dismissed, what damages besides the admitted sums were sustained by him in respect of this further head of damages. The other claim was based upon the suggestion that he was entitled to include in his damages the loss of the benefit of extra commission which he could have made if he had been allowed to remain to the end of the six months. He said in substance that if he had remained on, better business would have been done than was done. This question was also put to the jury. In substance, therefore, the case stood thus: The defendants said: “We did not wrongfully dismiss the plaintiff. If we did, the only damages which he has sustained are his loss of salary for six months, and his proper proportion of the net profits actually earned.” The plaintiff said: “There are more damages which I claim—namely, in respect of the two matters above mentioned.” As to the first, the jury found their verdict for £600; for the plaintiff it was stated that this sum was made up of £390 for six months' salary, and £210 for the manner of dismissal. The defendants contended that it was all

A given for the manner of dismissal. If the jury intended to include the six months' salary that was clearly wrong, because that was to go into the account, and must be so dealt with; and then the question is whether the £210 could be recovered. If the £600 did not include the salary, then the question is whether any of the £600 could be recovered.

B The legal point is thus raised, whether in the plaintiff's action for breach of contract to employ him the defendants can be made liable, in addition to damages for the loss to the plaintiff of the benefit of the contract, for damages for the manner in which the contract has been put an end to. The general rule is clear that damages in contract must be such as flow naturally from the breach, or such as may be supposed to have been in the contemplation of the parties as the result of the breach. The latter branch of the rule is inapplicable to the facts of this case, for it was not suggested that there were any consequential damages within the contemplation of the parties. Under the first branch of the rule the plaintiff recovers the net benefit of having the contract performed. He is, therefore, to be put in the same position as if the contract had been performed. If it had been performed he would have had certain salary and commission. He loses that and must be compensated for it. But I am unable to find either authority or principle D for the contention that he is entitled to have damages for the manner in which his discharge took place. According to my view, none of the cases which have been referred to establishes the proposition contended for. *Maw v. Jones* (1), which was relied on, does not, when examined, support the contention. The plaintiff has attempted to suggest that the manner of his dismissal has cast a slur upon his character, and he has really endeavoured to claim damages for defamation, E and to turn the action for the loss of the benefit of the contract into an action of tort, with the result of attempting to give the jury a discretion uncontrolled by the true consideration—namely: What is the money loss to the plaintiff of losing the benefit of the contract? I consider further that there was nothing in the manner of the plaintiff's dismissal which was different in any legal sense from what would have been the case if his employment had been terminated at the end of six months. F At the same time, his authority as agent and at the bank would have come to an end and been notified, and his successor would take his place. This was done six months sooner than the defendants had a right to act.

In my opinion, the verdict for £600 cannot, in the circumstances, stand. With regard to the £340 for extra commission, the plaintiff's right to this depends upon whether there was evidence which the jury were entitled to consider to show that G had he remained agent for the six months he would have been able to earn more profits for the agency than were actually earned. Having studied the evidence with care, I have come to the conclusion that there was some evidence upon the point, and I think that the jury were entitled to act upon it if they thought fit to do so. As to the remaining points, I do not think it necessary to add anything to the observations of the Lord Chancellor, and I concur in the judgment which H he has proposed.

LORD SHAW.—At the trial of this action certain questions were put to, and answered by, the jury. Thereupon DARLING, J., ordered judgment to be entered for the plaintiff for £1,240 and for delivery up to him of the certificates. By order of the Court of Appeal, dated Feb. 5, 1909, judgment in the action was entered for I the defendants. I am of opinion that this judgment was not warranted, either by the evidence in the case or by the verdict. [His LORDSHIP discussed the question of detinue.]

As to the question of wrongful dismissal, I should be sorry that verdicts of this kind should be upset on any question of terminology, and I cannot conceal from your Lordships my opinion that much of the discussion was based upon grounds which are rather terminological than real. It was much pressed upon us, for instance, in argument, that the plaintiff in the measurement of his rights or of his loss (to use a neutral term) must be either off or on with the contract, and that in

interpreting the language of the issue put to the jury, whether there was wrongful dismissal, the wrong in the word "wrongful" is something which must be treated as separated from a claim grounded on breach of contract. A contract of hiring or service may be broken or come to an end justifiably, as, for instance, by misconduct of the servant warranting instant dismissal; or it may be innocent, as, for instance, by the death of the master, when the personal contract thus comes to an end. But if neither of these things occurs, that is to say, if the dismissal represents the putting an end to or breach of the contract in circumstances which are neither justifiable nor innocent, the word "wrongful" appears to me, whether it is used in a legal or a commercial connection, to express quite aptly what has occurred. When a wrongful dismissal of this kind does take place, to my mind, no dilemma of election, such as the learned lords justices have figured, necessarily arises, and the present case appears to me a good instance of the manner in which the rights of the subject may be impeded or denied if it is allowed to enter into the discussion. In this case the contract of service stood for the purpose of reference. It contained within itself elements which would go to show what was the measure of those rights which the plaintiff would have enjoyed under it but for the breach of contract, and although the contract itself had been, as I hold it was, deliberately put an end to by the action of the defendants, it still remained for reference and measure as stated, although the contract itself had wrongfully come to an end. I can see for myself no impropriety or repugnance in putting to the jury the question as DARLING, J., did: "Did the defendants wrongfully dismiss the plaintiff?" And that question, in my opinion, would stand good whether the contract be treated as ended or treated, upon some ground which I do not appreciate, as only partially repudiated. The truth is that the real question, not the terminological one, is not whether the plaintiff was wrongfully dismissed, but what is the measure of damages in consequence of the dismissal. Quoad dismissal itself, I do not doubt that the affirmative verdict should stand. As to the measure of damages, it is agreed that £390 of the £600 (being the full balance of the stipulated salary which could have been earned up to the expiration of a due notice of dismissal) appears upon the accounts, and I gather that your Lordships' pronouncement upon that, in which I entirely agree, is that that sum must be credited in those accounts. It will be wrong, accordingly, to allow a verdict for a repetition of it in this action, and this was, of course, admitted.

A far more difficult question remains, whether the balance of the £600—viz., a further sum of £210—can be awarded to the plaintiff? It is impossible to deny the impressiveness and value of the citation of authority made by LORD COLLINS, and I am much moved by his definite opinion that the verdict is consistent with the practice of the law of England. But as the rest of your Lordships do not agree that the matter is concluded by authority or practice, I am willing and free to state my reckoning of the question as one of principle. So considered, the matter appears to me to stand in the following position. There can be no doubt that wrongful dismissal may be effected in circumstances, and accompanied by words and acts importing an obloquy and causing an injury, any reasonable estimate of which in money would far outreach the balance of emolument due under the contract. This is within the range of ordinary as well as professional experience, and I admit the highest regard for that judicial opinion which leans forward towards such a perfecting of the legal instrument as to enable it to provide a remedy in complete equation with the wrong suffered. There, however, my concurrence with that opinion stops, and I cannot carry it forward to what, in my view, would be a disregard of the limitations of the instrument itself. The present type of case—wrongful dismissal—provides a convenient illustration of both aspects of the position. Suppose that slander or libel accompanies the dismissal, nothing, as I understand, is here decided to the effect that the slander or libel, which is cognisable by law as a good and separate ground of action, suffers either merger or extinction by reason of proceedings in respect of the breach of contract which such slander or libel accompanied. The law still provides a remedy. This seems

A perfectly just and very elementary, and I only state it because judges and text-writers appear not infrequently to have forgotten it. In the very decisions cited by LORD COLLINS in England, the award of damages in respect of breach of the contract of service seems to have been improperly inflated by allowances made for "false charges," even a charge of embezzlement. I looked for possible assistance on this subject to the law of Scotland, but the same fallacy has taken some root in that country, a most eminent text-writer (FRASER, MASTER AND SERVANT (2nd Edn.), p. 135) remarking:

"In aggravated circumstances, e.g., where the master has calumniated the servant's character or injured his reputation, and so prevented his getting a new situation, damages to a much greater amount (than the whole emoluments, &c., due under the contract) might be given."

C It is sufficient for me in answer to such dicta to repeat that slanders, and the like, which are in themselves cognisable by law as grounds of action, do not undergo the merger indicated—a merger which might produce prejudice and confusion—nor do they suffer extinction. The remedies, therefore, remain unaffected, and also separately available at law.

D I may add that I do not think that the citation from POTHIER made by the last-named author strengthens his position, for when that great jurist says that in addition to payment to the servant of the "whole year" of his services, the master "peut être condamné aux dommages et intérêts du domestique," he may only be referring to those commissions, perquisites, and allowances which go to make up the full emoluments of the servant. There remains, however, a class of cases in

E which the injury accompanying the dismissal arises from causes less tangible, but still very real, circumstances involving harshness, oppression, and an accompaniment of obloquy. In these cases, unhappily, the limitations of the legal instrument do appear; these cases would not afford separate grounds of action because they are not cognisable by law. The very instance before your Lordships' House may afford an illustration. Here a successor to the plaintiff in a responsible post in

F India was appointed in this country, without previous notice given by the defendants; the successor enters the place of business to take, by their authority, out of the hands of the plaintiff those duties with which the defendants have by contract charged him; and he does so almost simultaneously with the notice of the defendants bringing the contract to a sudden termination, while, even before this notice reached his hands, the defendants' Indian bankers had been informed of the termination of the plaintiff's connection with and rights as representing their firm.

G Undenially all this was a sharp and oppressive proceeding, importing in the commercial community of Calcutta possible obloquy and permanent loss. Yet, apart from the wrongful dismissal, and on the hypothesis that the defendants are to be held liable in the full amount of all the emoluments and allowances which would have been earned by the plaintiff but for the breach of contract, there seems nothing

H in these circumstances, singly or together, which would be recognised by the law as a separate ground of action. If there should be, it will, on the principle I have referred to, remain; but if there be not, I cannot see why acts otherwise non-actionable, should become actionable or relevant as an aggravation of a breach of contract which, ex hypothesi, is already fully compensated. A certain regret which accompanies the conclusion which I have reached on the facts of this particular

I case, is abated by the consciousness that the settlement by your Lordships' House of the important question of principle and practice, may go some length in preventing the intrusion of not a few matters of prejudice hitherto introduced for the inflation of damages in cases of wrongful dismissal, and now definitely declared to be irrelevant and inadmissible on that issue. I concur in the judgment proposed by the Lord Chancellor.

Appeal allowed.

Solicitors: *Wansey, Stammers & Co.; Broad & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

LOWERY v. WALKER

[HOUSE OF LORDS (Lord Loreburn, L.C., the Earl of Halsbury, Lord Atkinson and Lord Shaw), November 9, 1910]

[Reported [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674;
27 T.L.R. 83; 55 Sol. Jo. 62]

Animal—Savage animal—Loose on owner's land frequented by public—Injury to plaintiff—Liability of owner.

An occupier of land who knows that the public are habitually going over his land, and has acquiesced in their doing so, is not entitled without warning, or notice, or any other precaution, to allow an animal, e.g., a horse, which he knows to be savage to be loose on that land, and is liable for any injury caused by such animal to a person crossing the land.

County Court—Judgment—Amendment—Explanation of ambiguous phrase.

A county court judge is entitled to amend his judgment after it has been delivered in order to explain the sense in which he has used an ambiguous phrase which might be misunderstood.

Notes. Considered: *Grand Trunk Rail. Co. of Canada v. Barnett*, [1911] A.C. 361; *Latham v. Johnson*, [1911-13] All E.R.Rep. 117. Considered and Distinguished: *Pritchard v. Torkington* (1914), 7 B.W.C.C. 719; *Coleshill v. Manchester Corpn.*, [1928] 1 K.B. 776. Explained: *Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] All E.R.Rep. 1. Referred to: *Mowlem v. Dunne*, [1912] 2 K.B. 136; *Clinton v. Lyons*, [1911-13] All E.R.Rep. 577, *Tofts v. Pearl Life Assurance* (1913), 110 L.T. 190; *Norman v. Great Western Rail. Co.*, [1914] 2 K.B. 153; *Brackley v. Midland Rail. Co.* (1916), 80 J.P. 369; *Hayward v. Drury Lane Theatre, Ltd.*, [1916-17] All E.R.Rep. 405; *Hardy v. Central London Rail. Co.*, [1920] All E.R.Rep. 205; *Fairman v. Perpetual Investment Building Society*, 1923 A.C. 74; *Manton v. Brocklebank*, [1923] 1 K.B. 406; *Gould v. McAuliffe*, [1941] 2 All E.R. 527.

As to liability for injury caused by dangerous animals, see 1 HALSBURY'S LAWS (3rd Edn.) 666, 667; and for cases see 2 DIGEST (Repl.) 330-335. As to county court judgments generally, see 9 HALSBURY'S LAWS (3rd Edn.) 254; and for cases see 13 DIGEST (Repl.) 439.

Cases referred to in argument:

Baker v. Snell, post; [1908] 2 K.B. 825; 77 L.J.K.B. 1090; 99 L.T. 753; 24 T.L.R. 811; 52 Sol. Jo. 681; 21 Cox, C.C. 716, C.A.; 2 Digest (Repl.) 380, 554.

Bird v. Holbrook (1828), 4 Bing. 628; 2 Man. & Ry.M.C. 198; 1 Moo. & P. 607; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 43 Digest 436, 630

Brock v. Copeland (1794), 1 Esp. 203; 2 Digest (Repl.) 379, 547.

Deane v. Clayton (1817), 7 Taunt. 489; 1 Moore, C.P. 203; 2 Marsh. 577; 129 E.R. 196; 2 Digest (Repl.) 375, 517.

Stiles (Stiles) v. Cardiff Steam Navigation Co. (1864), 4 New Rep. 483; 33 L.J.Q.B. 310; 10 L.T. 844; 28 J.P. 646; 10 Jur.N.S. 1199; 12 W.R. 1080; 2 Digest (Repl.) 384, 581.

R. v. Dant (1865), Le. & Ca. 567; 6 New Rep. 72; 34 L.J.M.C. 119; 12 L.T. 396; 29 J.P. 359; 11 Jur.N.S. 549; 13 W.R. 663; 10 Cox, C.C. 102, C.C.R.; 2 Digest (Repl.) 331, 227.

Lynch v. Nurdin (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 2 Digest (Repl.) 318, 179.

Cooke v. Midland Great Western Railway of Ireland, post p. 16; [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, 590.

- A** *Barrett v. Midland Rail. Co.* (1858), 1 F. & F. 361, N.P.; 36 Digest (Repl.) 64, 347.
Harrison v. North Eastern Rail. Co. (1874), 29 L.T. 844; 22 W.R. 335; 28 Digest (Repl.) 406, 650.
Gautret v. Egerton, Jones v. Egerton (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gantret v. Egerton, Jones v. Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, 247.
- B** *Murley Bros. v. Grove* (1882), 46 J.P. 360, D.C.; 36 Digest (Repl.) 73, 393.
Barnes v. Ward (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, 1100.
Hounsell v. Smyth (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 6 Jur.N.S. 897; 8 W.R. 277; 141 E.R. 1003; 36 Digest (Repl.) 65, 356.
- C** **Appeal** by the plaintiff in the action from a decision of the Court of Appeal (VAUGHAN WILLIAMS and KENNEDY, L.JJ., BUCKLEY, L.J., dissenting) reported [1910] 1 K.B. 173, affirming a decision of the Divisional Court (DARLING and PICKFORD, JJ.), reported [1909] 2 K.B. 433, reversing a decision of the county court judge for Cumberland sitting at Whitehaven.
- D** On June 3, 1906, the appellant, a labourer, was passing through a field in the occupation of the respondent, a farmer, when he was bitten and worried by a horse, the property of the respondent, which had been placed there by the respondent, and was seriously injured. On Oct. 27, 1908, he commenced an action against the respondent in the county court to recover £100 as damages for personal injuries
- E** "sustained by him, which injuries were caused by the defendant keeping a savage and ferocious horse in a field near the railway station at Moor Row, through which the public, to the knowledge of the defendant, were in the habit of passing, and such horse having, on June 3, 1906, bitten and worried the plaintiff while he was passing through the said field."
- F** The trial of the action took place on Dec. 14, 1908. It was admitted between the parties that (a) at all material times the respondent was tenant and occupier of a field adjoining the railway station at Moor Row, which was bounded on the south-east side by a footpath leading to the station, but divided therefrom by a wire fence, and on the north-east side by a highway leading from Moor Row to Montreal. (b) that the horse in question was the property of, and was placed in the field by, the respondent. (c) that the appellant was injured by the horse while crossing the field. After hearing the evidence the judge found the following facts: (i) The field in question had been habitually used by the public as a short cut, though they had no leave so to do; (ii) the respondent knew that the horse had bitten other people; (iii) the respondent was guilty of negligence in putting a horse which he knew to be dangerous into a field which he knew was habitually used by the public. There was a further finding of fact: "No doubt the plaintiff was a trespasser," which was subsequently dealt with by the judge by an alteration
- H** and an addition to his notes as follows:
- "On the question of trespass I came to no definite conclusion. The defendant had only occupied for fifteen years. I had evidence of the use of the path for thirty to forty years. The defendant objected, and put up a notice fifteen years ago, but would not prosecute."
- I** *Holman Gregory, K.C.*, and *W. A. Jowitt* for the appellant.
Leslie Scott, K.C., and *H. Beazley* for the respondent.

LORD LOREBURN, L.C.—I think that this case should be determined upon the actual findings of the learned county court judge. It is true that there has been some question about what he decided, and it appears that some little time after he had delivered his judgment he made an alteration in regard to a phrase which he had used. I think that it was quite legitimate to do so, because the word which he used was capable of being misunderstood, or understood in one sense rather than

in another; and I see no objection to his explaining to the court and to the parties **A**
the sense in which he used the word.

He has found certain facts. He has not found them according to the letter of legal phraseology, but he has presented to us a view of the facts; and I think that what that view—by which we are bound—amounts to is this. He will not find whether there was a right of way or not; therefore, the plaintiff did not establish that he was in the field according to a right to be in the field. Again, the learned **B**
judge, I think, found that there was no express leave given to the plaintiff to be in that field; but I think that the effect of his finding is that the plaintiff was there with the permission of the defendant, because he finds that the field had been habitually used by the public as a short cut, and he says that the defendant was guilty of negligence in putting a horse—which he knew to be dangerous—into a field which he knew was habitually used by the public. That being the case, **C**
I think that we ought not to refine upon the language which the learned judge has used. It would have been better had he been more explicit in saying what it was that he did find and what it was that he did not find; but I think that in substance it amounts to this—that the plaintiff was not in this field of right at all; that he was there as one of the public who habitually used the field to the knowledge of the defendant; and in those circumstances it cannot be right that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal. I will not enter upon the further field of law—itself somewhat wide and not free from many difficulties—because I do not think that the facts of this case require that we should enter upon that field. Under those circumstances and for those **E**
reasons I think that the appeal ought to be allowed.

The EARL OF HALSBURY.—I entirely concur with the judgment which the Lord Chancellor has delivered and with the reasons which he has given, and I only wish to say one additional word with regard to the question of what the learned county court judge has found. The learned judge used an ambiguous word. I **F**
suppose that nine out of ten people would distinguish between a person who was at a place as of right and a person who was a mere trespasser. The learned judge did, I think inadvertently, in the first instance use the word “trespasser,” which would have carried the learned counsel for the respondent all the way that he wants to get to a somewhat difficult and intricate question of law upon which various views may be entertained. But seeing that there might be a misapprehension of the sense in which he used the word “trespasser,” the learned judge **G**
points out in terms that he does not find, and did not intend to find—as I think indeed the whole substance of his judgment shows that he did not intend to find—that the injured man was a trespasser in the sense in which that word is used strictly and technically in law. I think that we are bound by the finding of the learned judge, and I should hesitate very much to assent to the view which **H**
VAUGHAN WILLIAMS, L.J., seems to have entertained, that there was something wrong in his adding that to his note. He admits candidly that it was added afterwards; but what he says in effect is this: “I have used an ambiguous word, and I wish it to be understood that when I used that word I did not use it in the technical sense of the law.” I think that we are bound not only by the original finding of fact, but by what he says that he intended to convey by his words. It is not, as counsel **I**
for the respondent suggested, that the learned judge has changed his mind afterwards, which I quite agree would be quite inconsistent with the Act of Parliament; but what he says is: “I have used a word which I think upon reflection is capable of being misunderstood, and I now want to explain in what sense I have used the word.” I think that he was entitled to do that, just as anyone of us here, in looking over a judgment afterwards, may think that we have used an inappropriate word and may substitute one which is more appropriate to the occasion.

A As to the other question which counsel for the respondent intended to argue, and I am afraid that he is disappointed because the view which we take prevents that question from being raised, I will only say that I myself would absolutely decline to give any judgment upon that subject, because in this case I am of opinion that what the learned judge has done has prevented that question from being raised. In his finding he has given, upon very familiar questions, the real proposition with which we are dealing—namely, whether or not a person who knows that the public are going over his ground, and going over it habitually, is entitled without warning, or notice, or any other precaution whatsoever, to put a dangerous beast where he knows it may be probable—and almost certain if the thing continues—that the beast will sooner or later do some injury to persons crossing this ground, and crossing it in one sense with his permission—not that he has given direct permission, but that he has declined to interfere and so acquiesced in their crossing it. If he has acquiesced in their doing so, he is bound to take the ordinary precautions to prevent persons going into a dangerous place where he knows that they are going, and going by his acquiescence without notice or warning or any form of security to prevent the injury from happening which did happen. Under those circumstances I am of opinion the judgment appealed from ought to be reversed.

LORD ATKINSON.—I concur. On the interpretation which I think is most rightly and properly put upon the findings of the learned county court judge, it is clear that the plaintiff was lawfully in the place where the injury happened to him. That being so, it is clear, I think, upon authority that the respondent owed a duty to him to take care of this dangerous animal which the respondent put there, which injured the plaintiff by the very vices of which the respondent was well aware.

LORD SHAW.—I should think it strange if a learned county court judge should not be permitted to explain deliberately in writing what he has said in giving judgment, so as to avoid any possible misconception or misconstruction of the language which he has employed. I am glad to know from your Lordships that there is no rule of procedure which forbids that by the law of England. In the present case, accordingly, looking at the findings of the learned judge, I observe that they are threefold: First, that the place where this unfortunate attack took place was habitually used by passengers on foot, and this to the knowledge of the respondent; secondly, that the horse was, and was known by the respondent to be, a dangerous animal with savage propensities; and thirdly, that the horse, with these known vices, was put by the respondent in that place so habitually traversed. In those circumstances I have no doubt that liability attaches to a respondent so acting. I specially desire to reserve any opinion as to the further doctrine applicable to the case of a mere trespasser as such, and further to add that I must not be held as in any respect assenting to the pronouncements by DARLING, J., and VAUGHAN WILLIAMS, L.J., on that larger topic.

Appeal allowed.

Solicitors: *Blyth, Dutton, Hartley & Blyth for Chapman & Baxter, Whitehaven; Harrison & Powell for Brown, Auld & Brown, Whitehaven.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord Atkinson, and Lord Collins), November 23, 24, 30, 1908, March 1, 1909]

[Reported [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319]

Child—Negligence—Dangerous machine—Left by owner in habitual resort of children—Knowledge by owner of frequent presence of children.

The respondent company maintained a siding and an engine turntable on a piece of ground, which was their property, adjoining their line and adjacent to a public road, which crossed the line by a bridge. Access to the plot of ground from the road was afforded by a gate belonging to the company which they kept locked, the road as it approached the bridge being separated from the plot of ground by a clay bank facing the road and a thorn fence or hedge. There was, and had long been, a worn step in the clay bank facing the road, and a gap between 3 ft. and 6 ft. wide in the thorn fence through which children and others could, and did, pass, and there was also a clearly defined track leading from the gap to the turntable. There was a notice board purporting to forbid trespass some 50 ft. from the gap, and both gap and turntable were visible from the road. The appellant, a child aged four years, entered the plot of ground through the gap together with two other children, the elder of whom was nine and a half years old. The two elder boys placed the appellant on the turntable, which they caused to revolve in order to give him a ride, and during the play the appellant's leg was crushed between the turntable and a wall, and eventually had to be amputated. In an action on behalf of the appellant against the respondent company for negligence the jury, in answer to questions left to them by LORD O'BRIEN, C.J., found that the fence was in a defective condition; that it was so through the company's negligence; that the boy was allured through the hedge and to the turntable by that negligence, and that the negligence was the effective cause of the accident. They awarded the appellant £550 damages, and judgment was entered for the appellant for that amount.

Held: the respondent company had allowed a machine, which, unless it were made fast, was dangerous to children, to whom it was attractive, to remain in a movable condition in a place which, to the company's knowledge and with their tacit consent, was an habitual resort of children; they had thus been guilty of a breach of the duty they owed to the appellant not to permit the turntable to be in a movable, and, so, dangerous, condition; and, therefore, there was evidence on which the jury could properly come to the conclusion to which they did.

Notes. The Occupier's Liability Act, 1957, which, by s. 2 (2) prescribes a "common duty of care" which the occupier of premises owes to all his visitors, provides by s. 2 (3) (a) that "an occupier must be prepared for children to be less careful than adults": 39 HALSBURY'S STATUTES (2nd Edn.) 884.

Considered: *Lowery v. Walker*, ante p. 12; *Schofield v. Bolton Corpn.* (1910), 26 T.L.R. 230; *Clinton v. Lyons*, [1911-13] All E.R.Rep. 577. Distinguished: *Jenkins v. Great Western Railway*, [1911-13] All E.R.Rep. 216. Explained: *Latham v. Johnson*, [1911-13] All E.R.Rep. 117. Considered: *Crane v. South Suburban Gas Co.*, [1914-15] All E.R.Rep. 93. Explained: *Hardy v. Central London Rail. Co.*, [1920] All E.R.Rep. 205. Considered: *Glasgow Corpn. v. Taylor*, [1921] All E.R.Rep. 1. Explained: *Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] All E.R.Rep. 1. Considered: *Donovan v. Union Cartage Co.*,

- A *Ltd.*, [1932] All E.R.Rep. 273; *Haynes v. Harwood & Son*, [1934] 2 K.B. 240; *Liddle v. North Riding of Yorkshire County Council*, [1934] All E.R.Rep. 222; *Ellis v. Fulham Corpn.*, [1937] 3 All E.R. 454. Considered: *Phipps v. Rochester Corpn.*, [1955] 1 All E.R. 129. Referred to: *Barker v. Herbert*, [1911-13] All E.R.Rep. 519; *Richards v. Lothian*, [1911-13] All E.R.Rep. 71; *Wheeler v. Morris*, [1914-15] All E.R.Rep. 1196; *Mersey Docks and Harbour Board v. Procter*, [1923] All E.R.Rep. 134; *Cunard v. Antifyre, Ltd.*, [1932] All E.R.Rep. 558; *Culkin v. McFie & Sons, Ltd.*, [1939] 3 All E.R. 613; *Adams v. Naylor*, [1944] 2 All E.R. 21; *Bint v. Lewisham Borough Council* (1945), 174 L.T. 128; *Williams v. Cardiff Corpn.*, [1950] 1 All E.R. 250; *Edwards v. Railway Executive*, [1952] 2 All E.R. 430; *Gough v. National Coal Board*, [1953] 2 All E.R. 1283; *Hawkins v. Coulsdon and Purley U.D.C.*, [1954] 1 All E.R. 97; *Perry v. Thomas Wrigley, Ltd.*, [1955] 3 All E.R. 243n.; *Perry v. Kendricks Transport, Ltd.*, [1956] 1 All E.R. 154; *Dyer v. Ilfracombe U.D.C.*, [1956] 1 All E.R. 581.

As to the standard of care required in the case of children, see 28 HALSBURY'S LAWS (3rd Edn.) 16-19; and for cases see 36 DIGEST (Repl.) 114 et seq.

Cases referred to:

- D (1) *Lynch v. Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, 150.
 (2) *McDowall v. Great Western Rail. Co.*, [1903] 2 K.B. 331; 72 L.J.K.B. 652; 88 L.T. 825; 19 T.L.R. 552; 47 Sol. Jo. 603, C.A.; 36 Digest (Repl.) 40, 200.
 E (3) *Railroad Co. v. Stout* (1873), 17 Wall. (U.S.) 657.

Also referred to in argument:

- Illidge v. Goodwin* (1831), 5 C. & P. 190, N.P.; 36 Digest (Repl.) 43, 224.
Clark v. Chambers (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest (Repl.) 31, 135.
 F *Engelhart v. Farrant & Co.*, [1897] 1 Q.B. 240; 66 L.J.Q.B. 122; 75 L.T. 617; 45 W.R. 179; 13 T.L.R. 81, C.A.; 36 Digest (Repl.) 33, 153.
Sullivan v. Creed, [1904] 2 I.R. 317; 36 Digest (Repl.) 84, *505.
Williams v. Great Western Rail. Co. (1874), L.R. 9 Exch. 157; 43 L.J.Ex. 105; 31 L.T. 124; 22 W.R. 531; 36 Digest (Repl.) 114, 566.
Harrold v. Watney, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, 577.
 G *Jewson v. Gatti* (1886), 2 T.L.R. 441, C.A.; 36 Digest (Repl.) 116, 582.
Hughes v. Macfie, Abbott v. Macfie (1863), 2 H. & C. 744; 3 New Rep. 394; 33 L.J.Ex. 177; 9 L.T. 513; 10 Jur.N.S. 682; 12 W.R. 315; 159 E.R. 308; 36 Digest (Repl.) 123, 627.
Mangan v. Atterton (1866), L.R. 1 Exch. 239; 4 H. & C. 388; 35 L.J.Ex. 161; sub nom. *Atterton v. Mangan*, 14 L.T. 411; 30 J.P. 360; 14 W.R. 771; 36 Digest (Repl.) 123, 621.
 II *Dublin, Wicklow and Wexford Rail. Co. v. Slattery* (1878), 3 App. Cas. 1155; 39 L.T. 365; 43 J.P. 68; 27 W.R. 191, H.L.; 36 Digest (Repl.) 127, 642.
Williams v. Eady (1893), 10 T.L.R. 41, C.A.; 36 Digest (Repl.) 81, 436.
Crocker v. Banks (1888), 4 T.L.R. 324, C.A.; 34 Digest 195, 1595.
 I *Ricketts v. East and West India Docks, etc. Rail. Co.* (1852), 12 C.B. 160; 7 Ry. & Can. Cas. 295; 21 L.J.C.P. 201; 19 L.T.O.S. 109; 16 Jur. 1072; 138 E.R. 863; 38 Digest (Repl.) 330, 250.
Singleton v. Eastern Counties Rail. Co. (1859), 7 C.B.N.S. 287; 114 E.R. 827; sub nom. *Singleton v. South-Eastern Rail. Co.*, 34 L.T.O.S. 67; 36 Digest (Repl.) 114, 565.
Manchester, Sheffield and Lincolnshire Rail. Co. v. Wallis (1854), 14 C.B. 213; 7 Ry. & Can. Cas. 709; 3 Saund. & M. 13; 23 L.J.C.P. 85; 18 J.P. 138; 18 Jur. 268; 2 W.R. 194; 139 E.R. 88; sub nom. *Wallis v. Manchester*,

Sheffield and Lincolnshire Rail. Co., 2 C.L.R. 573; 22 L.T.O.S. 286; A 38 Digest (Repl.) 330, 251.

Gorris v. Scott (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 22 W.R. 575; 2 Asp.M.L.C. 282; 2 Digest (Repl.) 365, 459.

Bird v. Holbrook (1828), 4 Bing. 628; 2 Man. & Ry.M.C. 198; 1 Moo. & P. 607; 6 L.J.O.S.C.P. 146; 130 E. R. 911; 43 Digest 436, 630.

Hounsell v. Smyth (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 6 B Jur.N.S. 897; 8 W.R. 277; 141 E.R. 1003; 36 Digest (Repl.) 65, 356.

Mann v. Ward (1892), 8 T.L.R. 699, C.A.; 36 Digest (Repl.) 43, 229.

Cummings v. Darngavil Coal Co., Ltd. (1903), 10 S.L.T. 660; 5 F. 513; 7 Digest (Repl.) 294, *172.

Devlin v. Jeffray's Trustees (1902), 40 Sc.L.R. 92; 5 F. 130; 7 Digest (Repl.) 293, *170.

Prentices v. Assets Co., Ltd. (1890), 17 R. (Ct. of Sess.) 484; 7 Digest (Repl.) 293, *167.

Keffe v. Milwaukee and St. Paul Rail. Co. (1875), 18 American Rep. 393.

Appeal from a decision of the Court of Appeal in Ireland (WALKER, L.C., FITZ-GIBBON and HOLMES, L.JJ.) reversing a judgment of the King's Bench Division (PALLES, C.B. and JOHNSON, J., KENNY, J., dissenting), which had refused to set aside a verdict of a special jury and a judgment in favour of the appellant, the plaintiff, in an action tried before LORD O'BRIEN, C.J.

The Solicitor-General for Ireland (Redmond Barry, K.C., and Dudley White (both of the Irish Bar) and M. Stebbing for the appellant.

S. Ronan, K.C., Fetherstonhaugh, K.C., and Piers Butler (all of the Irish Bar) for the respondent company.

Their Lordships took time for consideration.

Mar. 1, 1909. The following opinions were read.

LORD MACNAGHTEN.—The only question before your Lordships is this: Was there evidence of negligence on the part of the company fit to be submitted to the jury? If there was, the verdict must stand, although your Lordships might have come to a different conclusion on the same materials. I cannot help thinking that the issue has been somewhat obscured by the extravagant importance attached to the gap in the hedge, both in the arguments of counsel and in the judgments of some of the learned judges who have had the case under consideration. That there was a gap there, that it was a good broad gap some 3 ft. wide, is, I think, proved beyond question. But of all the circumstances attending the case it seems to me that this gap taken by itself is the least important. I have some difficulty in believing that a gap in a roadside fence is a strange and unusual spectacle in any part of Ireland. But however that may be, I quite agree that the insufficiency of the fence, though the company were bound by Act of Parliament to maintain it, cannot be regarded as the effective cause of the accident.

The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred? This, I think, was substantially the question which LORD O'BRIEN, C.J., presented to the jury. It seems to me in accordance with the view of the Court of Queen's Bench in *Lynch v. Nurdin* (1) and the opinion expressed by ROMER and STIRLING, L.JJ., in *McDowall v. Great Western Rail. Co.* (2). WALKER, L.C., puts *Lynch v. Nurdin* (1) aside. He holds that it bears no analogy to the present case, because the thing that did the mischief there was a "cart in the public street—a nuisance." But no question of nuisance was considered in

A *Lynch v. Nurdin* (1). That point was not suggested. The ground of the decision is a very simple proposition. LORD DENMAN, C.J., said (1 Q.B. at p. 35):

"I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about,

B I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first."

If that proposition be sound, surely the character of the place, though, of course, an element proper to be considered, is not a matter of vital importance. It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their

C playground.

I think the jury were entitled and bound to take into consideration all the circumstances of the case—the mode in which the turntable was constructed—its close proximity to the wall by which the plaintiff's leg was crushed—the way in which it was left, unfenced, unlocked, and unfastened—the history of this bit of ground and its position, shut off as it was by an embankment from the view of the company's servants at the station and lying half derelict. After the construction of the embankment it served no purpose in connection with the company's undertaking, except that at one time a corner of it was used as a receptacle for some timber belonging to the company and afterwards as a site for this turntable. In other respects, and apart from these uses, it seems to have been devoted or abandoned to the sustenance of the railway inspector's goat and the diversion of the youth of Navan. It is proved that in spite of a notice board idly forbidding trespass it was a place of habitual resort for children, and that children were frequently playing with the timber and afterwards with the turntable. At the date of the trial, twelve months after the accident, a beaten path leading from the gap bore witness to the numbers that flocked to the spot and to the special attraction that drew children to it.

F It is remarkable that not a single word of cross-examination as to either of these points was addressed to the principal witnesses for the plaintiff. Nor was any explanation or evidence offered on the part of the company. The company knew, or must be deemed to have known, all the circumstances of the case and what was going on. Yet no precaution was taken to prevent an accident of a sort that might well have been foreseen and very easily prevented. They did not close

G up the gap until after the accident. Then it was the first thing thought of. But it was too late. They did not summon any of the children who played there, or bring them before the magistrates, as a warning to trespassers and a proof that they were really in earnest in desiring to stop an objectionable practice which had gone on so long and so openly. They did not have their turntable locked automatically in the way in which it is usual to lock such machines. The table, it

H seems, was not even fastened. There was a bolt, but, if the father of the plaintiff is to be believed, the bolt was rusty and unworkable. The jury were not bound to believe a ganger in the service of the company in preference to the father. The ganger, after some incautious admissions which the jury probably accepted as true, turned round and showed himself, as the Chief Justice says, to be hostile to the

I plaintiff. He prevaricated to such an extent that the jury were justified in disregarding everything said by him with the view of shielding his employers or saving himself from blame, whether it came out of his own head or was suggested by counsel. The evidence is discussed fully, and I think fairly, by JOHNSON, J. I agree in the conclusion at which he arrived. It seems to me that the Chief Justice would have been wrong if he had withdrawn the case from the jury. I think that the jury were entitled, in view of all the circumstances, on the evidence before them, uncontradicted as it was, to find that the company were guilty of negligence.

I am, therefore, of opinion that the finding of the jury should be upheld and the judgment under appeal reversed with pauper costs here and costs below, and I move your Lordships accordingly. I will only add that I do not think that this verdict will be followed by the disastrous consequences to railway companies and landowners which the Lord Chancellor of Ireland seems to apprehend. Persons may not think it worth their while to take ordinary care of their own property and may not be compellable to do so; but it does not seem unreasonable to hold that if they allow their property to be open to all comers, infants as well as children of a maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and are unable, in consequence of their tender age, to take care of themselves.

LORD ATKINSON.—I am of the same opinion. I do not think that the failure of the railway company to discharge the duty of fencing off this piece of ground from the public road was the *causa causans* of the accident to the plaintiff, but I think that for the omission to make the turntable fast the defendants were responsible. If the plaintiff entered upon this piece of land, and played on this turntable with the leave and licence of the defendants, then these latter owed to the child a duty not to permit the machine to be in the movable, and dangerous because movable, condition in which they permitted it, in fact, to be. The boy and his playmates, no doubt, intervened, and made the turntable revolve; but the omission of the defendant company to discharge the duty, which on the above-mentioned assumption I think that they owed to the plaintiff—namely, to cause the machine to be made immovable by boys and children, and, therefore, a safe thing for them to play with—was not only the *causa sine qua non*, but also the *causa causans* of the accident. It was, of course, for the jury to determine whether leave and licence had, in fact, been given. There was, I think, as I have already stated, evidence proper for their consideration on that question. In my opinion, therefore, the defendants were not entitled to the direction for which they asked at the trial, and as that is the only question raised for your lordships' decision, I think that the appeal should be allowed, with the costs usual in such cases.

LORD COLLINS.—This case has given rise to much difference as to the view taken by the Lord Chief Justice, who tried the case, the Lord Chief Baron and JOHNSON, J., being in favour of the plaintiff, and three judges of the Court of Appeal and KENNY, J., in the Divisional Court in favour of the defendants. I am of opinion that there was evidence of actionable negligence, fit the consideration of a jury. The Supreme Court of America has affirmed the liability of the railway company in a case as nearly as possible identical in its facts with that under appeal: *Railroad Co. v. Stout* (3), and the principle of allurement in the case of children has been recognised in our own Court of Appeal. With unfeigned respect for the Court of Appeal in Ireland, I think that in this case they have hardly given sufficient weight to the special considerations applicable in the case of young children as distinguished from adults.

LORD LOREBURN, L.C.—I am content to act upon the opinion of LORD MACNAGHTEN, having regard to the peculiar circumstances—namely, that this place, on which the defendants had a machine, dangerous unless protected, was to the defendants' knowledge an habitual resort of children, accessible from the high road near thereto, as well as attractive to the youthful mind, and that the defendants took no steps either to prevent the children's presence, or to prevent their playing on the machine, or to lock the machine so as to avoid accidents, though such locking was usual. I must add that I think that this case is near the line. The evidence is very weak, though I cannot say that there was none. It is the com-

A combination of the circumstances to which I have referred which alone enables me to acquiesce in the order proposed by LORD MACNAGHTEN.

Appeal allowed.

Solicitors: *Herbert Z. Deane*, for *W. D. Sullivan*, Navan; *Martin & Co.*, for *John Kilkelly*, Dublin.

B [Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

C

THE HAGEN

[COURT OF APPEAL (Lord Alverstone, C.J., Farwell and Kennedy, L.JJ.), March 4, 5, 1908]

D

[Reported [1908] P. 189; 77 L.J.P. 124; 98 L.T. 891;
24 T.L.R. 411; 11 Asp.M.L.C. 66]

Practice—Service out of jurisdiction—Discretion of court—Need of “very careful exercise”—Comparative advantage of parties—Resolution of doubt in favour of foreigner—Fullest disclosure to be made—Lis alibi pendens—R.S.C. Ord. 11, r. 1 (g).

E

The power conferred on the court by R.S.C., Ord. 11, r. 1 (g), to allow service out of the jurisdiction of notice of a writ of summons gives rise to a very serious question and must be very carefully exercised. All the facts must be considered, and, if the discretion is to be exercised in favour of the applicant for leave to effect service out of the jurisdiction, it must be consistent with the comparative advantage of the parties and the doing of justice to them all.

F

Per FARWELL, L.J. (i) If, on the construction of any of the paragraphs of R.S.C., Ord. 11, r. 1, there is any doubt, that doubt ought to be resolved in favour of the foreigner. (ii) The application for leave being made ex parte, the fullest disclosure is necessary, and a failure to make a full disclosure would justify the court in discharging the order even though the party might afterwards be in a position to make another application.

G

On Sept. 27, 1907, a British steamship, the B., proceeding down the Elbe collided with another British vessel, the H., coming up the river. A German steamship was following the H. up the river, and the owners of the B. alleged that the collision was caused by the improper navigation of the German ship. On Sept. 30 the Hamburg agent of the B. exchanged letters of guarantee in lieu of bail with the owners of the German steamship. On Oct. 2 the owners of the B. instituted proceedings in this country in personam against the owners of the H., and obtained ex parte by summons leave to serve notice of the writ out of the jurisdiction on the owners of the German steamship. On the same day proceedings in Hamburg were instituted by the owners of the German ship against the H. On Nov. 26 the German owners appeared in the English proceedings under protest, and on Dec. 6 they instituted proceedings in Hamburg against the guarantors of the B. On a motion by the German owners to set aside the order giving the owners of the B. leave to serve on them notice of the writ against the H.,

H

I

Held: as proceedings had been taken in the German courts without any real delay against the guarantors of the B. and of the H., so that all the three parties were brought before the German court where their rights could be determined as well as they could be in England, the balance of convenience was clearly to leave the parties to take part in those proceedings, and the order

giving leave to serve notice of the writ in the English proceedings would be set aside. **A**

Notes. Referred to: *Oppenheimer v. Louis Rosenthal & Co., A.G.*, [1937] 1 All E.R. 23; *Kroch v. Rossell et Compagnie Société des Personnes à Responsabilité Limitée*, *Kroch v. Société en Comandité par Actions Le Petit Parisien*, [1937] 1 All E.R. 725; *Ocean Steamship Co., Ltd. v. Queensland State Wheat Board*, [1941] 1 All E.R. 158; *George Monro, Ltd. v. The American Cuanamid and Chemical Corpn.*, [1944] 1 All E.R. 386; *Tyne Improvement Comrs. v. Armement Aversois Société Anonyme, The Brabo*, [1949] 1 All E.R. 294; *International Corpn., Ltd. v. Besser Manufacturing Co.*, [1950] 1 All E.R. 355; *Vilkovice Horni a Hutni Tezirstvo v. Korner*, [1951] 2 All E.R. 334; *The Metamorphosis*, [1953] 1 All E.R. 723. **B**

As to service out of the jurisdiction, see 30 HALSBURY'S LAWS (3rd Edn.) 323-328; and for cases see DIGEST (Practice) 336 et seq. **C**

Cases referred to:

- (1) *The Mannheim*, [1897] P. 13; 66 L.J.P. 6; 75 L.T. 424; 13 T.L.R. 56; 8 Asp.M.L.C. 210; 11 Digest (Repl.) 552, 1590.
- (2) *The Duc d'Aumale*, [1903] P. 18; 72 L.J.P. 11; 87 L.T. 674; 51 W.R. 332; 19 T.L.R. 87; 9 Asp.M.L.C. 359, C.A.; Digest (Practice) 308, 350. **D**
- (3) *The Christiansborg* (1885), 10 P.D. 141; 54 L.J.P. 84; 53 L.T. 612; 1 T.L.R. 634; 5 Asp.M.L.C. 491, C.A.; 11 Digest (Repl.) 551, 1587.
- (4) *Société Générale de Paris v. Dreyfus Bros.* (1885), 29 Ch.D. 239; 54 L.J.Ch. 893; 53 L.T. 463; 33 W.R. 823; 1 T.L.R. 380; reversed (1887), 37 Ch.D. 215; 57 L.J.Ch. 276; 58 L.T. 573; 36 W.R. 609; 4 T.L.R. 177, C.A.; Digest (Practice) 339, 574. **E**
- (5) *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch.D. 225; 52 L.J.Ch. 714; 48 L.T. 7; 31 W.R. 851; 5 Asp.M.L.C. 29, C.A.; 11 Digest (Repl.) 545, 1530.

Also referred to in argument:

- Massey v. Heynes* (1888), 21 Q.B.D. 330; 57 L.J.Q.B. 521; 59 L.T. 470; 36 W.R. 834, C.A.; Digest (Practice) 308, 349. **F**
- Logan v. Bank of Scotland*, [1904] 2 K.B. 495; 73 L.J.K.B. 794; 91 L.T. 252; 53 W.R. 39; 20 T.L.R. 640; 48 Sol. Jo. 603, C.A.; Digest (Practice) 318, 426.
- The Elton*, [1891] P. 265; 60 L.J.P. 69; 65 L.T. 232; 39 W.R. 703; 7 T.L.R. 434; 7 Asp.M.L.C. 66; Digest (Practice) 359, 718.
- Croft v. King*, [1893] 1 Q.B. 419; 62 L.J.Q.B. 242; 68 L.T. 296; 41 W.R. 394; 37 Sol. Jo. 252; 5 R. 222, D.C.; Digest (Practice) 355, 694. **G**

Appeal by the defendants, the owners of the German steamship, the *Hagen*, from a decision of BARGRAVE DEANE, J., refusing to set aside an ex parte order made by PARKER, J., giving leave to serve notice of a writ out of the jurisdiction.

The plaintiffs were the Great Central Railway Co., the owners of the *City of Bradford*, the defendants were the owners of the steamship *Hartley* and Deutsche-Australische Dampfschiff-Gesellschaft, the owners of the steamship *Hagen*, who carried on business at Hamburg. On Sept. 27, 1907, the steamship *City of Bradford* bound down the river Elbe collided with the steamship *Hartley* bound up the river. The steamship *Hagen* was following the *Hartley* up the river, and the *Hartley* after colliding with the *City of Bradford* came into collision with the *Hagen*. Both collisions were alleged by the owners of the *City of Bradford* to have been caused by the negligence of the *Hagen*. On Sept. 30 the agent of the Great Central Railway at Hamburg and the owners of the *Hagen* exchanged letters of guarantee in lieu of bail to meet any damage which the respective vessels might have sustained. On Sept. 30 the owners of the *Hartley* issued a writ in rem against the *City of Bradford* the owners of which entered an appearance. On Oct. 2 the owners of the *City of Bradford* issued a writ in personam against the owners of the *Hartley*. The owners of the *Hartley* entered an appearance in the action, **H**

A and PARKER, J., sitting as Vacation Judge, gave leave to serve notice of the writ on the owners of the *Hagen*. On the same day proceedings were instituted in Hamburg by the owners of the *Hagen* against the *Hartley*. On Nov. 16 the owners of the *City of Bradford*, pursuant to the leave granted by PARKER, J., served the owners of the *Hagen* in Germany with notice of the writ in the action in personam, and on Nov. 26 the owners of the *Hagen* appeared under protest. On Dec. 6 the owners of the *Hagen* instituted proceedings against the guarantors of the *City of Bradford*. On Jan. 27, 1908, the owners of the *Hagen* moved the court to set aside the order made by PARKER, J., on the application of the Great Central Railway Co. giving leave to serve notice of the writ in the action in personam out of the jurisdiction. BARGRAVE DEANE, J., dismissed the motion, and the owners of the *Hagen* appealed to the Court of Appeal.

C Laing, K.C., and A. Pritchard for the owners of the *Hagen*.
John Simon, K.C., and H. M. Robertson for the owners of the *City of Bradford*.

LORD ALVERSTONE, C.J.—This case is one, to my mind, of very great difficulty, and but for the fact that I think it is very important to dispose of it at once, I should like to take time to consider my judgment.

D The difficulty which has pressed upon my mind throughout is that we are really asked to interfere with the discretion of the learned judge. The order under which the question arises is R.S.C., Ord. 11, r. 1, which provides:

“Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.”

E It is not disputed in this case that the *City of Bradford* has a right to bring an action against the *Hartley*, and in that sense it is a proper action, and that, assuming there were two vessels involved in the cause which led to the collision, the owners of the *Hagen* are necessary or proper parties. If I could have felt that BARGRAVE DEANE, J., had exercised his discretion upon all the facts before him I should have greater reluctance to interfere with his decision, but I do not think he has appreciated the difficulties of the matter or dealt with the case upon all the facts. Certainly I do say that had these facts been before me I should not have allowed this service to go. With regard to PARKER, J., I do not think anybody pretends that he exercised his discretion upon the materials which we now have before us.

G The question we have to consider is what order we ought to make, having regard to all the facts before us. I am anxious not to be unduly influenced by the fact that we are dealing with a case in which it is sought to bring persons, who have not come here, and whose property is not here, before the jurisdiction of these courts. As far as that jurisdiction goes we are bound in this court by the view—
H and I shall loyally act upon the view—that the court has jurisdiction; but it seems to me there are materials in this case which ought to make the court hesitate before making an order which will have the effect of forcing the owners of the *Hagen* to appear as second defendants in this court in a collision case, the actual collision being between the *City of Bradford* and the *Hartley*, though it may be that was only the consequence of the *Hagen*'s negligent navigation.

I The collision happened somewhere on Sept. 27, 1907. On Oct. 2 the *Hartley* issued a writ in rem against the *City of Bradford*. So far as the necessity of protecting herself against the *Hartley* is concerned, it is plain that the *City of Bradford*, having got bail in that action, required no further proceeding; but it was seen that counterclaiming in that action or availing themselves of those proceedings would not enable her owners to get the *Hagen* here. Therefore, they issued proceedings in personam on Oct. 2 against the Burnett Steamship Co. (owners of the *Hartley*) and made application for leave to serve notice of the writ upon the owners of the *Hagen*. I confess it does strike one that although that was a perfectly

legitimate step to take, the real object, and indeed the only object, of the proceedings in personam was to bring the German company here. It is perfectly legitimate, but I think it is not a circumstance to be left out of consideration when you are dealing with the question whether the court in the exercise of its discretion should give leave for that step to be taken. In addition to that, if the matter had been before me in the first instance, I think I should have attached much more importance than *BARGRAVE DEANE, J.*, appears to have done to what happened immediately after the collision. Mr. Lewis, in his affidavit, says:

"The defendant company, the *Deutsch-Australische Dampfschiffs Gesellschaft* carries on business at Hamburg, in the German Empire, but is a necessary or proper party in this action, inasmuch as the plaintiffs allege that the said collision was caused or contributed to by neglect or default in the navigation of the *Hartley* and the *Hagen*."

On Dec. 11 Mr. Roberts, the solicitor for the owners of the *Hagen*, made an affidavit, and it discloses documents which are the first matters, I think, that have seriously to be considered. On Sept. 30 the representative of the *City of Bradford* asked the representative of the *Hagen*

"to inform me by return in what manner you will give security for the steamship *Hagen*, either to me or my owners for their claims, as otherwise, acting on instructions from my owners, I will be compelled to arrest the ship."

That is a distinct intimation of the plaintiffs' intention to arrest the *Hagen* at Hamburg unless security is forthcoming. The reply was as follows:

"We received your favour of to-day, and beg to inform you that the collision . . . was not brought about by incorrect manœuvring on the part of our steamship *Hagen*. . . . We are nevertheless prepared to give the security demanded, if you on your part will give a similar undertaking on behalf of the *City of Bradford* as regards the steamship *Hagen*."

On Oct. 1 Mr. Rover, for the *City of Bradford*, replies,

"I beg to inform you that I, without prejudice, however, to the question of blame, undertake personal bail for the captain and the owners of the steamer *City of Bradford*."

We have also got, on Oct. 2, the formal document relating to the preliminary proceedings taken in the court at Hamburg. It is said by the junior counsel for the owners of the *City of Bradford* that it only amounts to an undertaking to give bail should necessity arise. I agree with that observation, and if we were dealing with the same question as arose in *The Mannheim* (1), that would be a very material fact, but, in my judgment, that does not exclude the necessity for considering the matter from the point of view from which we are now considering it.

Upon the affidavit of Mr. Lewis being filed the defendants entered an appearance under protest and this motion was brought. Mr. Roberts' affidavit is very material. He sets out the proceedings instituted in the Lower Court of Hamburg on behalf of the *Deutsche-Australische Dampfschiff-Gesellschaft* against the owners of the *Hartley*, and he says he is informed and believes that the evidence of the master and crew of the *Hartley* has been given in those proceedings. He also refers to the action in rem, instituted in the Admiralty Division by the *Hartley* against the *City of Bradford*, says he is informed that the *City of Bradford* and the *Hagen* were not in collision with each other, and continues:

"As between the owners of the *Hartley* and the *City of Bradford*, and so far as the interests of the owners of the *City of Bradford* were concerned, I submit there was no necessity for a second action to be brought by the owners of the *City of Bradford*, as the owners of that vessel could have counterclaimed in the ordinary way for the damages sustained in the collision between those vessels. I further submit there was nothing to prevent the owners of the *City of Bradford* in that action raising the defence, if so advised, that the col-

A lision between the *City of Bradford* and the *Hartley* was due wholly or partly to the navigation of the *Hagen*, and further that the undertakings given in Hamburg by the agents of the owners of the *City of Bradford* and the owners of the *Hagen* respectively not having been withdrawn, the owners of the *City of Bradford* would be in no way damnified, but on the contrary they would be at an advantage by being able to proceed against the *Hagen* in Hamburg. . . .

B To the best of my information and belief the application to join [the owners of the *Hagen*] as a party was irregular and improper on many grounds. It was not bona fide; it was oppressive and vexatious and an abuse of the practice of the court; it was not solely made in the interest of the owners of the *City of Bradford*; the application was based on an improper affidavit which did not state all the material facts to the court, and was a breach of good faith and of

C the understanding on which the undertakings were given."

I confess I have a little suspicion that there is some ground for that suggestion. Mr. Lewis answered that on Jan. 6, but practically all he says is that two out of the three ships which were concerned in the collision are English ships belonging to English companies, carrying on business in England and having English solicitors; that on the ground of convenience it is highly desirable that the questions arising

D in this litigation should be settled in England; and that the owners of the *Hagen* are a necessary and proper party to the action brought by the plaintiffs against the *Hartley*. What I think is of great importance is that there is no answer to the other part of the affidavit. I think it is unfortunate that a fuller answer was not given when there was a direct challenge by Mr. Roberts.

E In the circumstances, ought the learned judge to have made the order giving leave to serve the notice of the writ on the defendants in Germany? It is not denied that there is jurisdiction. *The Duc d'Aumale* (2) establishes that beyond question. The only question, therefore, is as to the exercise of the jurisdiction. In *The Christiansborg* (3), the existence of a document of guarantee somewhat similar to those in the present case was held to be sufficient to make the Court of

F Appeal stay an action against a ship in this country, upon the ground that the guarantee amounted to a bargain that the ship should be released and become a free ship. In that case an action had been commenced abroad, and it is true, as counsel for the owners of the *City of Bradford* pointed out, that that case is not a direct authority for what the court may do if the application is one to stay an action properly brought against a German ship in this country. In the same way, I think *The Mannheim* (1) is not an authority to the extent that the leading counsel

G for the owners of the *City of Bradford* pressed it in his favour. *The Mannheim* (1) was a case in which a foreign ship was arrested when she came to this country, and the action was properly commenced in this country. SIR GORELL BARNES refused to stay the action, holding that a guarantee given abroad was, in the circumstances, no bar to an action being brought here. As I have pointed out, it seems to me that the considerations which operated in that case have not got

H anything like the same force when you are dealing with a mere question of discretion. I, therefore, come to the conclusion that in the circumstances it was not right to force the owners of the *Hagen*, who, within a reasonable time, had acted upon the undertaking given, and had taken proceedings in Hamburg, practically to abandon these proceedings and come and try the case here. If I had felt that

I BARGRAVE DEANE, J., had taken all the facts into consideration and had come to a conclusion upon them, I should hesitate to interfere with his decision, but looking at the judgment I can find nothing to show that he did. I come to the conclusion that he has not exercised his discretion, and I think it is a jurisdiction that ought to be very carefully exercised. Where you have got competent parties taking steps to enforce their rights in a foreign civilised country—proceedings taken practically in accordance with understandings—I think we ought not to allow this, to a certain extent, colourable and unnecessary, writ to be issued, not for the purpose of enforcing the rights of the *City of Bradford* against the *Hartley*, but in order to enable

the owners of the *Hagen* to be brought before the court. It is not disputed that, if the *Hagen* were the only ship alleged to be to blame, the plaintiffs could not bring these defendants here, and I think the court, having regard to the place of the collision and the other circumstances of this case, ought to be slow to force them to come here. With great reluctance I come to the conclusion that I should not have made the order, and I think BARGRAVE DEANE, J., did not exercise his discretion upon the facts. He decided the matter solely upon the ground that there had been some little delay in commencing proceedings in Hamburg. I think this appeal must be allowed. A B

FARWELL, L.J.—I agree. I naturally have some hesitation in differing from BARGRAVE DEANE, J., but, in my view, with all respect to him, he has not rightly appreciated the bearing, if any, that *The Christiansborg* (3) and *The Mannheim* (1) have upon the case. During these present sittings VAUGHAN WILLIAMS, L.J., and myself have on more than one occasion had to consider this Ord. 11, and we have had a great many authorities, very well discussed and very fully considered by the court, and the conclusion to which the authorities led us I may put under three heads. C

First of all, the lord justice adopted, and I agreed with him, the statement of PEARSON, J., in *Société Générale de Paris v. Dreyfus Bros.* (4) (29 Ch.D. at p. 242), which has been followed, over and over again, that, D

“it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked, and whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.” E

The second point which I think we considered established by the cases was that, if on the construction of any of the paragraphs of Ord. 11, r. 1, there was any doubt, that doubt ought to be resolved in favour of the foreigner; and the third is that, inasmuch as the application was made ex parte, the fullest disclosure was necessary, as in all ex parte applications, and a failure to make a full disclosure would justify the court in discharging the order, even although the party might afterwards be in a position to make another application. I may dismiss the second and third of those heads, because, in my judgment, they do not apply here. F

The question in the present case is whether the learned judge was right in exercising his discretion as he did. The initial difficulty, to my mind, is that he really relied, as I follow it, on two cases, which, in my judgment, have no application—viz., *The Mannheim* (1) and *The Christiansborg* (3). It is one thing to say that a defendant who comes here to stop a duly commenced action must show some equity against the plaintiff disentitling him to pursue remedies which *prima facie* he is entitled to pursue. It is quite another thing to say that the court, in exercising its discretion whether it will allow an action which cannot be commenced at all without its permission to be commenced, should give that permission. G

The grounds upon which the jurisdiction, which I may call the *lis alibi pendens*, on which *The Christiansborg* (3) and *The Mannheim* (1) depend, are well set out by the Court of Appeal in *Peruvian Guano Co. v. Bockwoldt* (5), and it is clear, as LORD LINDLEY puts it (23 Ch.D. at p. 232), H I

“A motion is made to compel the plaintiff to elect. It is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter. He must go a step further, and say that there is vexation in point of fact—that is to say, that there is no necessity for harassing the defendants by double litigation.”

It is obvious that that does not apply to cases where the plaintiff in England is the defendant in a foreign court, because there is no question of his harassing by

A double litigation, and, therefore, no personal equity against him, but the consideration whether there is a suit pending elsewhere is a proper one for the judge who is debating whether he shall exercise his discretion in allowing service out of the jurisdiction under Ord. 11. I think that here, if PARKER, J., had had brought to his attention those undertakings in lieu of bail bond, and the statement of BAGGALLAY, L.J., in *The Christiansborg* (3) that there is no distinction in principle between a ship being released on bail in the ordinary form and being released by virtue of an agreement come to between the two owners or their representatives, he would then have had to consider that there was that which is equivalent to the commencement of an action in a foreign court. Having that before him, and considering the recent date of the occurrence, I have very little doubt that he would have said: "The proper tribunal *prima facie* is the German tribunal. The collision took place there; it will depend upon German law; and there is no reason at present for harassing the foreigner by bringing him here." It is quite another thing if the foreigner had not commenced any proceedings at all, or if, after the lapse of a considerable time, he had commenced proceedings, but inasmuch as the proceedings were initiated by this agreement in lieu of bail bond which was actually followed up by whatever is the German equivalent to a writ, on Dec. 6, it appears to me the discretion in this case ought not to be exercised by allowing service out of the jurisdiction. In the case before GORELL BARNES, J., *The Mannheim* (1), it is to be observed that two years had elapsed between the giving of the bail bond and the actual commencement of the proceedings, and it is obvious that you cannot expect the Englishman who has a right of action which he may enforce if the court will permit him by issuing a writ in this country, to wait over an indefinite period till what is the more proper tribunal is invoked by either party. In the present case I think there is not any question of any lapse of time which is material, and I agree with the Lord Chief Justice that this order ought to be discharged.

KENNEDY, L.J.—I am of the same opinion. It appears to me a case of some difficulty, especially upon the ground that it may be said that it is a case in which the jurisdiction of this court is invoked to interfere with the statutory discretion of the judge below, but in my opinion, PARKER, J., had not before him originally the material facts, and it appears to me, with great respect, that the matter has been dealt with by BARGRAVE DEANE, J., without full regard to the circumstances of the case which we have had developed in argument before us. There is no doubt that there was jurisdiction under Ord. 11, r. 1 (g), to bring in this foreign defendant. It was a case in which, had all the parties been originally here and served here, there is no doubt that the *Hagen* might be treated as a proper party; and, as there had been due service of the writ upon the persons who represent the *Hartley*, upon their being served there was jurisdiction, although the collision arose within foreign territory and the person sought to be added was a foreigner, to make an order. But, assuming that there is jurisdiction to make an order, the court has to decide whether, under the initial words of Ord. 11, it is a case in which the jurisdiction, though legitimate, ought as a matter of discretion to be exercised in favour of the *City of Bradford*.

To decide that question the court must consider all the facts. There would be no jurisdiction unless the party sought to be served could be described as a proper party to be added by way of being second defendants, but we have still got to see that all the circumstances make for the exercise of the discretion in favour of the application. For instance, we have to consider what may be called the comparative advantage and the doing of justice to all parties; and among the circumstances there is one which was not before PARKER, J., and seems to me to be material. It is that the plaintiffs had exchanged with the defendants now sought to be added on Sept. 30, before the application to PARKER, J., an undertaking to give security in lieu of bail for the purpose of rendering arrest unnecessary. If that was a bona

fide proceeding, really intended between business men as the initial stage of litigation, there was practically a commencement of an action. It is right to guard the expression by saying "practically," because for some purposes it may not be treated as equivalent to actual arrest. As the Lord Chief Justice and FARWELL, L.J., have pointed out, we have not got to decide here as to the right of a person to stop proceedings which require no discretion for their initial stage, but here there has to be a discretion exercised, of which the court cannot divest itself, and that means the consideration of all the material facts. We know now that on Dec. 6, 1907, proceedings were taken in the German courts without any great delay, first, against the guarantors of the *City of Bradford*, and, secondly, on the same day, against the guarantors of the *Hartley*. So all the three parties were in ordinary course brought before the German court, the evidence of witnesses taken, and the case tried. In those circumstances it seems to me it is impossible to say—particularly in the case of a collision—that it is not a circumstance to be considered that the collision was in the river Elbe, and that one of the parties is a foreigner. Leave being required, it seems to me clear that had all the facts come before me as a judge of first instance as they have come before us to-day I should certainly never have made this order. Looking at all the facts, it seems to me clear that the balance of convenience is so clearly one way that the discretion of the court should only be exercised by the discharge of the order.

It is said that the rights of the parties cannot be adjusted so well in Germany as here. I am not at all sure that the rights will not be as well determined there as here, and it is by no means necessarily inflicting injustice upon the owners of the *City of Bradford* that the *Hagen* is not joined, because upon the materials before us, which are rather meagre, it seems to me they may fight out their battle with the *Hartley* here without any more inconvenience than a triangular battle always involves. The appeal must be allowed with costs.

Solicitors: *Pritchard & Sons; D. H. Davies.*

[Reported by L. F. C. DARBY, Esq., Barrister-at-Law.]

E. HULTON & CO. v. JONES

[COURT OF APPEAL (Lord Alverstone, C.J., Fletcher Moulton and Farwell, L.JJ.), April 27, 28, May 24, 1909]

[Reported [1909] 2 K.B. 444; 78 L.J.K.B. 937; 101 L.T. 330; 25 T.L.R. 597]

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Atkinson, Lord Gorell and Lord Shaw), December 3, 6, 1909]

[Reported [1910] A.C. 20; 79 L.J.K.B. 198; 101 L.T. 881; 26 T.L.R. 128]

Libel—Unintentional defamation—Defendant not aware of plaintiff's existence—Language reasonably applied to plaintiff by persons knowing him—Liability of defendant—Definition of "libel"—Defence—Bona fide belief in truth of statement in fact untrue.

If defamatory language is used, which people who know the plaintiff may reasonably suppose applies to him, it is no defence to an action for libel to say that the defendant did not intend to injure or defame the plaintiff and was not in fact aware of the existence of any such person, but used the name of the plaintiff intending it to represent a purely fictitious character.

Per LORD LOREBURN, L.C.: A libel is a tortious act consisting in using language which other persons knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame the plaintiff. He has none the less imputed something disgraceful, and has none the less injured the plaintiff. A man may publish a libel in good faith believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. In those circumstances he has no defence to the action.

Per LORD ALVERSTONE, C.J.: If an untrue and defamatory statement in writing is published without lawful excuse, and in the opinion of the jury upon the evidence it refers to the plaintiff the cause of action is made out.

Libel—Damages—Publication in newspaper.

Per FARWELL, L.J.: It is difficult to estimate the consequences of libel in a newspaper. As BEST, C.J., said in *De Crespigny v. Wellesley* (1) (1829), 5 Bing. 392 at p. 402, it may "circulate the calumny through every region of the globe." Those who read it may never read the subsequent explanation or the report of the trial, and some of those who read both may forget the result and be left with a general recollection that the plaintiff was a man of whom a discreditable story was reported in the paper. Libellous statements are published by newspapers because they find it pays... and the newspaper proprietors cannot complain if juries remember this in assessing damages.

Notes. By s. 4 (1) of the Defamation Act, 1952 [32 HALSBURY'S STATUTES (2nd Edn.) 401] a person who has published words alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends, and, if the offer is accepted by the party aggrieved and is duly performed, no proceedings for libel or slander shall be taken or continued against the person making the offer. If the offer is not accepted, it constitutes, with evidence of innocent publication, a defence to an action in respect of the publication.

Explained: *Adam v. Ward*, [1916-17] All E.R.Rep. 157. Applied: *Cassidy v. Daily Mirror Newspapers*, [1929] All E.R.Rep. 117. Considered: *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581; *Bruce v. Odhams*

Press, Ltd., [1936] 1 All E.R. 287; *Newstead v. London Express Newspaper, Ltd.*, [1939] 4 All E.R. 319; *Knupffer v. London Express Newspaper, Ltd.*, [1942] 2 All E.R. 555. Referred to: *Spiers and Pond v. John Bull* (1916), 85 L.J.K.B. 992; *Pratt v. British Medical Association* (1918), 120 L.T. 41; *Shaw v. London Express Newspaper, Ltd.* (1925), 41 T.L.R. 475; *Thomson v. McNulty* (1927), 71 Sol. Jo. 744; *Franklin v. Daily Mirror Newspapers, Ltd.*, [1933] All E.R.Rep. 826; *Hough v. London Express Newspaper, Ltd.*, [1940] 3 All E.R. 31.

As to an offer of amends for unintentional defamation, see 24 HALSBURY'S LAWS (3rd Edn.) 83-85.

Cases referred to:

- (1) *De Crespigny v. Wellesley* (1829), 5 Bing. 392; 2 Moo. & P. 695; 7 L.J.O.S. C.P. 100; 130 E.R. 1112; 32 Digest 87, 1172.
- (2) *Harrison v. Smith* (1869), 20 L.T. 713, N.P.; 32 Digest 17, 76.
- (3) *Abrath v. North-Eastern Rail. Co.* (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 659; 33 Digest 500, 418.
- (4) *Bourke v. Warren* (1826), 2 C. & P. 307, N.P.; 32 Digest 17, 75.
- (5) *Le Fanu v. Malcomson* (1848), 1 H.L.Cas. 637; 13 L.T.O.S. 61; 9 E.R. 910, H.L.; 32 Digest 12, 34.
- (6) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, 121.
- (7) *Lowfield v. Bancroft* (1732), 2 Stra. 934; 93 E.R. 951; sub nom. *Lofeild v. Bankcroft*, 2 Barn.K.B. 124; 32 Digest 15, 54.
- (8) *Johnson v. Aylmer* (1606), Cro. Jac. 126; 79 E.R. 109; 32 Digest 15, 51.
- (9) *R. v. Horne* (1778), 2 Cowp. 672; 20 State Tr. 651; 98 E.R. 1300; sub nom. *Horne v. R.*, 4 Bro. Parl. Cas. 368, H.L.; 32 Digest 197, 2458.
- (10) *R. v. Alderton* (1756), Say. 280; 96 E.R. 880; 32 Digest 64, 913.
- (11) *R. v. Marsden* (1815), 4 M. & S. 164; 105 E.R. 796; 32 Digest 197, 2459.
- (12) *Derry v. Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, 185.
- (13) *R. v. Lord Abingdon* (1794), 1 Esp. 226, N.P.; 32 Digest 109, 1414.
- (14) *Shepherd v. Whitaker* (1875), L.R. 10 C.P. 502; 32 L.T. 402; 32 Digest 21, 120.
- (15) *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 36 Digest (Repl.) 166, 890.
- (16) *Gibson v. Evans* (1889), 23 Q.B.D. 384; 58 L.J.Q.B. 612; 61 L.T. 388; 54 J.P. 104; 5 T.L.R. 589, D.C.; 18 Digest (Repl.) 184, 1598.

Also referred to in argument:

- Emmens v. Pottle* (1885), 16 Q.B.D. 354; 55 L.J.Q.B. 51; 53 L.T. 808; 50 J.P. 228; 34 W.R. 116; 2 T.L.R. 115, C.A.; 32 Digest 81, 1120.
- Bromage v. Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry.K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 32 Digest 154, 1857.
- Du Bost v. Beresford* (1810), 2 Camp. 511, N.P.; 32 Digest 11, 14.
- Latimer v. Western Morning News Co.* (1871), 25 L.T. 44; 32 Digest 74, 1037.
- Keighley, Maxsted & Co. v. Durant*, [1901] A.C. 240; 70 L.J.K.B. 662; 84 L.T. 777; 17 T.L.R. 527; 45 Sol. Jo. 536, H.L.; 1 Digest (Repl.) 457, 1074.
- Booth v. Arnold*, [1895] 1 Q.B. 571; 64 L.J.Q.B. 443; 72 L.T. 310; 59 J.P. 215; 43 W.R. 360; 11 T.L.R. 246; 39 Sol. Jo. 314; 14 R. 326, C.A.; 32 Digest 44, 464.

Appeal by the defendants in the action from a decision of the Court of Appeal (LORD ALVERSTONE, C.J., and FARWELL, L.J., FLETCHER MOULTON, L.J., dissenting), affirming a decision of CHANNELL, J., in favour of the respondent, the plaintiff, at the trial before him with a special jury at Manchester.

The action was brought by the respondent for a libel which appeared in the "Sunday Chronicle," a newspaper of which the appellants were proprietors. It

A was contained in an article headed "Motor-Mad Dieppe, Brilliant Scene at French Seaside (From Our Paris Correspondent), Midnight Scenes, Music and Whisky." The alleged libel was in the following terms:

"Upon the terrace marches the world, attracted by the motor races—a world immensely pleased with itself, and minded to draw a wealth of inspiration—and, incidentally, of golden cocktails—from any scheme to speed the passing hour. "Whist! There is Artemus Jones with a woman who is not his wife, who must be—you know—the other thing!" whispers a fair neighbour of mine, excitedly, into her bosom friend's ear. "Really; is it not surprising how certain of our fellow-countrymen behave when they come abroad? Who would suppose by his goings-on that he was a churchwarden at Peckham?" No one, indeed, would assume that Jones, in the atmosphere of London, could take on so austere a job as the duties of a churchwarden. Here, in the atmosphere of Dieppe, on the French side of the Channel, he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

The respondent was a journalist who for some years had been a sub-editor on the staff of, and a habitual contributor to, the "Sunday Chronicle" and another newspaper belonging to the appellants, and his articles were signed "Artemus Jones" or "T. Artemus Jones," or "T. A. J." He was called to the Bar in 1901 and joined the North Wales Circuit, and after he left Manchester he had contributed articles from London to the appellant's newspapers. He was not a churchwarden, he did not live at Peckham, he was not a married man, and he complained of nothing except the use of the name "Artemus Jones." The Paris correspondent of the newspaper stated in evidence that he did not know and had never heard of the respondent, and that the name was, as far as he knew, entirely fictitious, and was only intended to represent a type. He said also that he had never seen any member of the appellants' staff. There was evidence that the respondent was well known in the district in which the newspaper circulated, and that persons who knew him had read the article in question and believed that it referred to him. The jury gave evidence for the respondent with £1,750 damages. It was submitted on behalf of the defendants that a man could not libel a person whom he had no intention of libelling, and of whose existence he was ignorant, and so the alleged libel was not published "of and concerning" the plaintiff, which was an essential averment. CHANNELL, J., decided that question in favour of the plaintiff, and the defendants appealed to the Court of Appeal.

*Rufus Isaacs, K.C., and Norman Craig for the defendants.
Montagu Lush, K.C., and Gordon Hewart for the plaintiff.*

Cur. adv. vult.

May 24, 1909. The following judgments were read.

H LORD ALVERSTONE, C.J.—This was an appeal in an action for the libel tried before my brother CHANNELL, J., and a special jury at the Manchester Assizes. The action was brought by the plaintiff, a member of the Bar, in respect of a libel published in the "Sunday Chronicle," on July 12, 1908, which appeared in an article in the defendants' paper purporting to describe what the Paris correspondent of the paper had witnessed at Dieppe, and the particular passage on which the question I really turns was in these words:

"'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!' whispers a fair neighbour of mine excitedly into her bosom friend's ear. Really is it not surprising how certain of our fellow-countrymen behave when they come abroad?"

It was alleged by the plaintiff that this passage was a libel upon him.

The material facts which were proved in evidence at the trial were as follows. The plaintiff, whose real name is Thomas Jones, is thirty-seven years old, and since

1901 has been a member of the Bar, practising on the North Wales Circuit. His baptismal name was Thomas Jones, but ever since he was at school he has been known by the name of Artemus Jones or Thomas Artemus Jones. He was confirmed in the latter name in 1886, and it appears to have been given him by his father in order to distinguish him from other persons of the name of Jones. The defendants alleged that the name was used as a fictitious name adopted by the writer of the article without any knowledge of the existence of the plaintiff or of any person named Artemus Jones; and both the writer and the editor, who were called as witnesses by the defendants, stated that they had no knowledge whatever of the plaintiff, and had no intention to refer to him, and that so far as they were concerned the name was entirely an imaginary name. The counsel for the plaintiff accepted the explanation given by the writer, Mr. Dawbarn, and the editor, Mr. Woodbridge, and expressly stated that he did not, after their evidence, allege that they or either of them were in fact actuated by malice or intended to refer to the plaintiff in their article. Some question was raised both at the trial and on the appeal before us as to the possibility of there being other individuals in the employment of the defendant company who were actuated by express malice towards the plaintiff, but for the purpose of my judgment I assume that no evidence was given of malice in fact on the part of any agent or servant of the defendants. The plaintiff called five witnesses who stated that upon reading the article they thought that it referred to the plaintiff, and the plaintiff was prepared to call further witnesses to give evidence to the same effect, but, at the suggestion of the learned judge, he abstained from calling them.

It was contended by the defendants that, inasmuch as it must be taken that there was no intention to refer to the plaintiff, and that the only words which could connect the article with him were the name Artemus Jones, the action could not be maintained, inasmuch as the plaintiff failed to prove that the defendants falsely and maliciously published the libel of and concerning the plaintiff. But this contention, in my opinion, involves a fallacy. If an untrue and defamatory statement in writing is published without lawful excuse, and in the opinion of the jury upon the evidence it refers to the plaintiff, the cause of action is made out: see notes to *BULLEN AND LEAKE, PRECEDENTS OF PLEADING* (3rd Edn.), p. 304. No one doubts that the averment that the libel was written of and concerning the plaintiff is a material averment. The authorities cited by my brother, *FLETCHER MOULTON, L.J.*, establish that, but, in my opinion, no authorities are necessary; it has been so held for generations; but here the averment was made, and the question is whether the averment was proved; and that, as well as the innuendo founded thereon, was for the jury upon the evidence.

At the conclusion of the plaintiff's case, the leading counsel for the defendants submitted that, as the name Artemus Jones was a fictitious name coined by the writer of the article, and not intended to refer to any particular individual at all, it was not a libel on anybody, and a fortiori not on the plaintiff himself. In support of this contention *Harrison v. Smith* (2) was at that stage of the proceedings cited to the learned judge. He ruled that, if a person chooses to publish a thing of this description, the question is not whether the man really intended it, but whether it would be understood by readers to apply to a particular person, adding that, if sensible readers would see at once that it was only an imaginary thing, if anyone reading it would see that it did not refer to a gentleman who happened to bear the name of Artemus Jones, it would not be a libel, but, if he would think the contrary, that it did not refer to an imaginary person but to a real individual, the action might be maintained. It is, in my opinion, clearly established by authorities, to some of which I will refer, that the question, if it be disputed whether the article is a libel upon the plaintiff, is a question of fact for the jury; and, in my judgment, this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is libellous or defamatory, but whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff. This proposition is so well established that but for the grave

A and strenuous argument addressed to us on behalf of the defendants I should not have thought it necessary to refer at any length to the authorities which support the proposition. It was, however, contended that there was a distinction between the identity of the person supposed to be referred to in the article and the defamatory language used about that person. I know of no case in which this distinction has been drawn, but it seems to me both upon authority and principle that both

B on the question whether the alleged libel refers to the plaintiff and as to the meaning of the language used the question is for the jury upon the evidence before them. It seems to me that a very brief consideration will show that on principle this must be so. Take the case of a libel which uses a name; that name may or may not be conclusive as to the person to whom the libel is intended to refer. Just in the same way, if the libel speaks of a person by description without mentioning the name, in order to establish a right of action the plaintiff must prove to the satisfaction of a jury that ordinary readers of the paper who knew him would have understood that it referred to him. There is abundant authority to show that it is not necessary for everyone to know to whom the article refers. This would in many cases be an impossibility; but if in the opinion of the jury a substantial number of persons who knew the plaintiff reading the article would believe that it refers to him, in my opinion an action, assuming the language to be defamatory,

D can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If on the evidence the jury are of opinion that ordinary sensible readers knowing the plaintiff would be of opinion that the article referred to him, the plaintiff's case is

E made out.

Upon the question whether or not the readers of the paper reading the article in the present case would think that it referred to the plaintiff it is, in my judgment, necessary to state certain other facts which were proved in evidence and not disputed by the defendants. The plaintiff had for six or seven years been a contributor to the paper. He had on several occasions published articles in the

F paper signed "T. A. J." There was evidence upon which the jury might well come to the conclusion that his name and personality as Artemus Jones were well known to many readers of the "Sunday Chronicle." He had been since 1901 a barrister on the North Wales Circuit, and had met with very considerable success. He was known on that circuit, and by the reports of his cases in the local papers, as Mr. Artemus Jones, and there was evidence, as I have already said, that readers of the

G paper on reading the article thought that it did refer to him. It was alleged by the defendants that the article on the face of it related to a fictitious person, and that no reasonable person could think that the article referred to anyone. This was, in my opinion, for the jury, but there certainly was evidence from the article itself that the writer was purporting to describe that which he had himself seen, and people whom he had himself observed. The writer admitted that he had intended

H to describe under a fictitious name people whom he had seen. But, as I have already said, I think this is quite immaterial, and ought not to be used against the defendants. No doubt, any person who knew the plaintiff intimately and read the whole of the article carefully would come to the conclusion that it did not refer to him, because he did not live at Peckham and was not a churchwarden. But this, again, was for the jury, and it might well be that the article would be

I read by persons who knew the plaintiff by the name of Artemus Jones and by repute and from his public life and position, and did not know in what part of London he resided or whether he was or was not a churchwarden. Mr. Hulton, a witness called for the defendants, who knew the plaintiff, said that at first he was surprised at the name appearing as it had, but that on reading the article he came to the conclusion that it could not refer to the plaintiff.

Dealing now with the authorities, it is, I think, beyond dispute that the intention or the motive of the words which are employed is immaterial, and that if in fact the article does refer or would be deemed by reasonable people to refer to the

plaintiff, the action can be maintained, and proof of express malice is wholly unnecessary: see the judgment of LORD BRAMWELL in *Abrath v. North-Eastern Railway Co.* (3), in which the following passage occurs (11 App. Cas. at pp. 253, 254):

"That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper, or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation in order to see whether it should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill-will or motive."

What is passing in the mind of the writer is wholly immaterial, or what was his intention, if he has in fact published a libel upon the plaintiff: see the cases collected in chapter V. of ODGERS ON LIBEL AND SLANDER, and the judgment in *Bourke v. Warren* (4), where ABBOTT, C.J., in summing up to the jury, said (2 C. & P. at pp. 809, 810):

"The question for your consideration, is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant? It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant."

The judgment of the House of Lords in *Le Fanu v. Malcomson* (5) involved the same proposition, and, in my opinion, the statement of the law by LORD BLACKBURN in *Capital and Counties Bank v. Henty* (6) is conclusive of the point (7 App. Cas. at p. 772):

"In construing the words to see whether they are a libel, the court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he may have written in levity only."

It follows from these decisions that, if a corporation publish a libel, it is for the jury to say on the evidence whether it be a libel upon the plaintiff. It was contended that the language of LUSH, J., in *Harrison v. Smith* (2) is inconsistent with this view. In my opinion, that cannot be successfully maintained. I understand LUSH, J., to have ruled that, although the defendant thought that the name used was a fictitious name, still if the article would be understood to refer to the plaintiff the defendant was liable.

We were further asked to direct a new trial on the ground that the damages were excessive. There is, in my judgment, no ground for interfering with the finding of the jury in this respect.

FLETCHER MOULTON, L.J.—The ruling of the learned judge in this case is of such wide application, and strikes so directly at what I believe to be the foundations of the English law of libel, that, before dealing with the facts which, to my mind, make it an ordinary case of no special difficulty, I propose to examine gener-

A ally the law relating to libel so far as it deals with the necessity of the plaintiff's proving that the defendant intended the defamatory matter to apply to him.

The action of libel is a very ancient action for a tort at common law. The essentials of such a cause of action appear from the well-known form of the declaration, a form which itself must have been in use for centuries. It ran thus :

B "That the defendant falsely and maliciously wrote and published of and concerning the plaintiff the words following, that is to say, he [meaning the plaintiff] is, etc."

To support such a declaration the plaintiff must prove that the words alleged were written and published of him by the defendant. Having satisfied this onus, he succeeds in the action if the words bear naturally a defamatory meaning or must

C be understood in a defamatory sense by reason of circumstances attending the writing and publication; for the law under such circumstances presumes malice and damage, unless the occasion was a privileged one or the defamatory matter true. That it was necessary, in order to succeed in such an action, that the plaintiff should show that the words were written and published of him by the defendant, follows to my mind from the language of the declaration itself, and

D until the present case I never heard of any doubt being thrown upon the proposition, for the language of LORD BRAMWELL cited by the Lord Chief Justice refers to a different point—the implication of malice. It is, of course, an issue of fact to be found by the jury on all the evidence in the case. The libel itself will form an important part of that evidence, but any other relevant evidence may be adduced alike by plaintiff and defendant. At the present moment I do not propose to

E discuss the nature of this evidence. The important question is the issue which the jury has to decide by its aid, which is, Aye or No, did the defendant write and publish the words of the plaintiff? I have said that, to my mind, the very form of the declaration shows conclusively that the plaintiff must succeed on this issue to support the action. But it is not necessary to rely on any such inference. From

F very early times it was recognised that it was essential for the plaintiff to allege and prove that the defendant wrote or spoke the defamatory matter "of and concerning" him. The absence of the averment (well-nigh in these very words) was consistently held by the courts to be fatal, not as a mere irregularity of pleading such as could be dealt with by special demurrer, but as a matter of substance which was of the essence of the case and could not be cured by verdict.

G This was fully recognised as far back as the reign of James I, and probably much earlier, and was regularly acted on. *Lowfield v. Bancroft* (7) and the case in 1 ROLLE'S ABRIDGEMENT at p. 85, are cases in which courts of error set aside judgment in actions of libel because in the count it was not alleged that the defendant wrote or spoke the words "of and concerning" the plaintiff. A striking instance of the view that the courts held of the necessity of this averment is given

H by *Johnson v. Aylmer* (8) in the time of James I. The action was brought by one Jeremy Johnson against Sir John Aylmer for slander. The declaration did not aver that the words had been spoken by the defendant "of and concerning the plaintiff," but it set out the libel in the following way (Cro. Jac. at p. 126) :

"Mr. Price, you do my Lord Burleigh wrong, that you do not apprehend Jeremy Johnson [innuendo the plaintiff] 'for a felon.' . . ."

I The jury found a verdict for the plaintiff for £50. The defendant moved in arrest of judgment on the ground that the words were not alleged to be spoken of the plaintiff, and that this was a fatal defect not cured by inserting the innuendo in reciting the libel. The court so decided, and accordingly set aside the judgment, thus asserting in the strongest way that, no matter what the libel might contain or might be alleged to mean, the action would not lie unless it was averred and proved that the words were spoken "of and concerning the plaintiff." The reason why the courts insisted so positively on the presence of this averment appears

plainly from the judgment of LORD MANSFIELD in *R. v. Horne* (9). He there says (2 Cowp. at p. 679):

"The gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written."

He cites in support of this *R. v. Alderton* (10), in the time of George II. This was a case precisely similar to *Johnson v. Aylmer* (8), except that it was an indictment instead of an action, a difference which the cases show to have no bearing on the point with which I am now dealing. It was a libel on the justices of Suffolk. The information omitted to allege that the words were written "of and concerning the justices," but in reciting the libel it inserted the innuendo "meaning . . . the justices of Suffolk." The jury found a verdict of guilty, but on a motion for arrest of judgment the court of error set the judgment aside, holding that the omission of the averment that the words were written "of and concerning the justices" was fatal and was not cured by the insertion of the innuendo in the libel itself. In *R. v. Horne* (9), to which I have referred, a writ of error to the House of Lords was brought and the judges were called in to advise. DE GREY, C.J., delivered the unanimous opinion of the judges, and in it he cites, and follows, the decision in *R. v. Alderton* (10), and the House of Lords accepted the view of the judges. It is difficult to conceive any higher sanction to the proposition that it is essential that it should be averred and proved that the words were written or spoken "of and concerning the plaintiff."

Inasmuch as the procedure of error and motions in arrest of judgment has now passed away, it is worth while to spend a moment in examining the precise legal effect of these decisions. In all these cases the verdict of the jury was "Guilty," and in moving in arrest of judgment the defendant had to admit that the verdict conclusively established that everything alleged in the count had been duly proved. These cases show, therefore, that the action of defamation does not lie at all unless the plaintiff has proved that the defendant wrote or spoke the words "of and concerning the plaintiff." It is this which gives the exceptional significance to such a case as *R. v. Alderton* (10). The relators there strove to say that they had made up for the omission by inserting in the libel the innuendo that the words meant the relators. But the courts held that no innuendo could cure the fatal defect of not having obtained the verdict of the jury that the defendant wrote the words of and concerning the relators. In no way could the legal procedure of that day more formally put on record that unless a defendant has written or spoken the defamatory words "of and concerning the plaintiff" he cannot be guilty of defamation, no matter what those words be or what they may be alleged to mean. In the absence of a finding of the jury to that effect, the court declined altogether to consider the words complained of.

But it must not be thought that the importance of this averment was only recognised in times long past. It has always, so far as I can find, been equally insisted upon. In *R. v. Marsden* (11) the court made absolute a rule in arrest of judgment after verdict, because in the declaration it was not averred that the words were printed and published "of and concerning the plaintiff," although it could not be doubted that the pleader had intended the indictment to bear that meaning. In his judgment LORD ELLENBOROUGH, C.J., says (4 M. & S. at p. 168):

"In this instance I dare say the omission has been through a mistake, and if I could find any words of equivalent import I should be unwilling to arrest the judgment. But the words 'of and concerning' are very material words, the importance of which has been pronounced by a court of the highest resort. There may, perhaps, be words of equivalent import, but I should not advise them."

Other decisions of courts of error could be cited to the same effect. And the necessity of the averment in substance is shown by all the cases which turn upon the existence and effect of the colloquium in actions of slander, which is familiar to those who take an interest in the history of English pleading, but to which I need not further refer.

A Thus far I have been dealing with the necessity of the averment that the defendant wrote and published the words "of and concerning the plaintiff." Its meaning is so clear and unmistakable that I cannot conceive any other interpretation being put upon it than the natural meaning which the words bear. Certainly no other meaning is suggested in any reported case. No one has suggested that it means anything but what it says. Accordingly, there are few cases which deal specifically with the meaning of the averment. But occasionally the question turns up indirectly and the utterances of the courts are entirely in accordance with the plain meaning of the language of the averment. *Le Fanu v. Malcomson* (5) in the House of Lords illustrates this. The plaintiff in that case was owner of a factory in Ireland, and the defendant had published a letter about Irish factories, in which he had said: "The cruelties of the slave trade or the Bastille are not equal to those practised in some of the Irish factories." The declaration alleged that these words were composed and published "of and concerning" the plaintiff, and that the "factories" meant the plaintiff's factories. At the trial the jury returned a general verdict for the plaintiff with £500 damages. The defendants brought a writ of error to set aside the judgment substantially on the ground that the libel contained no allegation against the plaintiff, because it only spoke of the factories as a class, and did not name or refer to the plaintiff's factory specifically. LORD COTTENHAM, in upholding the judgment, says (1 H.L.Cas. at pp. 663, 664):

E "The declaration after introducing those words has the innuendo, 'meaning the factory of the plaintiff,' and the jurors have, by finding a verdict for the plaintiff, found that the words were used in allusion to the factory of the plaintiffs. In that state the question arose below, and arises here, whether the judgment, founded upon that verdict, can be maintained on such a declaration; that is to say, where terms are used which must have reference to someone (for the terms 'some of the Irish factories' must evidently mean to apply to some Irish factories); and the innuendo is that the words do apply to the plaintiff's factory; and the jurors have found that that innuendo is true, and that the plaintiffs, who are the proprietors and owners of a factory in Ireland, were the persons meant. . . . If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party from being protected against such libels."

G To my mind, no language could more clearly express the view that the issue which the jury had to decide was, to whom the libel was intended to refer, and that by their verdict for the plaintiff they had found that it was, in fact, intended to refer to the plaintiff. The opinion of LORD CAMPBELL, the other member of the court, is to the same effect. He says (*ibid.* at p. 668):

H "It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is, in fact, done as would be done if his name and christian name were ten times repeated."

I This clearly shows that he considered that the question to whom the slander is intended to refer, or, as he expresses it, "the person who is aimed at," is the question of fact to be determined by the jury on the evidence laid before them.

It is, therefore, to my mind, settled law that the defendant is not guilty of libel unless he wrote and published the defamatory words "of and concerning the plaintiff"—in other words, unless he intended them to refer to the plaintiff. The ruling of the learned judge in the present case is directly contrary to this. He says: "It does not matter what he intended," and has directed the jury that they may find the defendant guilty of libelling the plaintiff although he did not know of his existence and had never written a word "of and concerning him" in his life. He has substituted for the plain issue which the common law has alone known, throughout three centuries at least, an issue which is in substance expressed thus: "Is there a class of persons who might reasonably suppose the words to be written of and concerning the plaintiff?" That this can be the meaning of the old common law averment is, to my mind, impossible. It must be remembered that we are dealing with the old common law of libel and nothing more. The tort for which an action of libel can be brought must be the same now as it always has been, and to support the ruling of the learned judge we must say that this extraordinary issue has always been the meaning of the plain and necessary averment that the defendant "wrote and published the words of and concerning the plaintiff." The old system of pleading at common law has been rightly done away with, because the price paid for its punctilious accuracy was too heavy. But it had great merits, and, in my opinion, increased laxity of thought has followed the increased laxity of statement in our present pleadings. One great merit of the old common law pleading was that it left no doubt as to the essentials of such causes of action as it recognised, and insisted on their being duly and correctly stated. To say that when the common law required it to be alleged and proved that the defendant wrote and published the words of and concerning the plaintiff it meant only that it must be shown that some people might think so is, to my mind, to give up all pretence of interpreting language and arbitrarily to create new torts which the law never did, and does not now, recognise as such.

This attempt to get away from the plain meaning of the recognised issues in the common law action of defamation and thus to impute to a man a tort of which he is entirely innocent in intention is not the first instance of an attempt to introduce a doctrine of constructive torts into common law. There was a period when there was a formidable attempt to alter the plain issue of fraud in the common law action of deceit by introducing the doctrine that a man must be held responsible in such an action for the knowledge he possesses or ought to possess and for the language he uses, and that if he makes a statement not in accordance with such knowledge he must be taken to be guilty of fraud in the eye of the law, even though it be due to forgetfulness, mistake, imperfection of expression, or any other intellectual cause. The unanimous judgment of the House of Lords in *Derry v. Peek* (12) put an end to this, and established that nothing had changed the nature of the old common law action of deceit, and that to be guilty of fraud you must have a fraudulent mind, and that fraudulent intention was an essential of the issue. Similarly in the case of the action of defamation. It is an action for speaking evil of your fellow, and, as the cases I have cited show, to be guilty of it you must in the first place have spoken the words of him—i.e., have intended your words to refer to him. It is not an action based on some supposed negligence whereby you have said something which may mistakenly be taken by some persons to refer to a person or persons who may be unknown to you and of whom you were not speaking. I remember very well the arguments by which, in *Derry v. Peek* (12), it was unsuccessfully sought to extend the common law action of fraud. They were precisely those to which we were treated in the present case by counsel for the plaintiff. It was said that the presence or absence of fraudulent intent did not make any difference in the damage caused, and that a man must be held responsible for his words and actions whatever be his intentions. The answer of the House of Lords to this argument was that the plaintiffs were pursuing their common law remedy of an action of deceit, and fraudulent intent had always been essential to that cause of action and must be so still. A like answer must, in my

A opinion, be given here—it has always been essential to the common law action of defamation that the defendants should have written or spoken the words of and concerning the plaintiff, and it must be so still.

I have not dealt with other features of the common law as to actions of defamation, because they do not directly bear on the present question. But they are not without significance. I cannot believe that the law would have implied malice on the part of the defendant from the mere publication of the words if it contemplated that he might be innocent of any intention that they should refer to the plaintiff or even of any knowledge of the plaintiff's existence. The law as to the innuendo also illustrates very forcibly the importance which the law ascribes to the intention of the defendant. If the words were spoken of and concerning the plaintiff, the defendant was responsible for them taken in their natural meaning. But, if the plaintiff asserted that they bore any other meaning than that which they would naturally bear, he must allege that the defendant meant them in that sense, and must prove it by evidence admissible against the defendant, usually, no doubt, from the libel itself and the circumstances of its publication. But nothing that could not be brought home to the knowledge of the defendant would be admissible to support the issue because it depended on intention—it was an attempt to make a man liable for something other than the natural meaning of his words, and that could only be done, as the form of the count indicates, by showing that he intended the words to have that meaning.

The limitation of the action of defamation to cases where the defendant has spoken or written the words "of and concerning the plaintiff" is not an example of the weakness of common law remedies but of their wisdom. It constitutes the protection of the innocent individual from being held guilty of defaming others of whom he has never intended to speak, and also from being himself defamed. On the one hand, to hold a person responsible for every application that his words may bear in the minds of persons who either possess knowledge that he does not possess, or are ignorant of that which he knows would be to put on him a burden too heavy to be borne. But, on the other hand, it constitutes the protection of the individual from being defamed, because it nullifies all attempts to libel by language which, as a matter of construction, cannot refer to the plaintiff, but which persons, reading between the lines, would understand to refer to him by reason of the surrounding circumstances. This is one of the most common forms of libel. No name is mentioned, or some name other than that of the person really meant is substituted. The surrounding circumstances are intentionally misdescribed. The reader, in order to discover the person referred to, must reject or alter part of that which is written. But all these devices are in vain to shelter a libeller, because the issue is not whether the language is, as a matter of construction, applicable to the plaintiff, but whether the writer intended it to refer to the plaintiff, and if he did so he is responsible if anyone can discover his intention, however much in words he may have striven to conceal it. This great and beneficial amplitude of the remedy is, however, only possible because the law makes the intention to refer to the plaintiff the critical issue. If a man is to be liable for the interpretation put by any person on his words, he must be entitled to require that it should be an interpretation of his words as they stand. He cannot be held responsible for what people may think to be his meaning after rejecting such portion of his words as do not agree with their interpretation. If a man who, judged by the language actually used by him, has not referred to the plaintiff and may have such portion of that language as they may think fit rejected as being a mere blind by each set of readers, and the rest alone used for the purposes of identification, and is to be held liable according to the result of this process, then we have actually attained in our system of legal procedure to the absurdity expressed in the well-known farce, where the magistrate solemnly warns the prisoners, "Any statement you may make will be taken down, altered, and used against you." [But see now Magistrates' Courts Rules, 1952 (S.I. 1952, No. 2190), r. 5 (8).]

I will now pass on to examine the facts of this case which are simple and not in dispute. [His LORDSHIP stated the facts and continued:] The plaintiff at the trial called his father, a doctor at Denbigh, and some other persons from North Wales who knew him personally, to say that they thought the article referred to him. None of them suggested any reason for so thinking except the name. They knew one person of that name and one only, and so they thought that it meant the plaintiff. It was not suggested that they thought that any other portion of the description was applicable to the plaintiff, and most of the witnesses knew that it was not applicable. But the learned judge put a stop to calling further evidence by the following remarkable ruling:

"The question for the jury is whether people who happened to know Mr. Artemus Jones and who happened to read the article would as reasonable men think it meant him."

He thus takes the interpretation, not of the world at large, but of the comparatively small class who knew of the plaintiff. The learned judge repeats this ruling several times in slightly different terms, so that there is no doubt either of his meaning or of the interpretation which the jury must have put on his words. He was referred to *Harrison v. Smith* (2), in which LUSH, J., directing the jury in a case of libel, said (20 L.T. at p. 715):

"First you have to say whether this libel points to the plaintiff—that is to say, whether the plaintiff is the person at whom the writer intended to point."

The learned judge then said:

"I shall rule that, if a person chooses to publish a thing of this description, the question is really, not whether the man intended it—it does not matter what he intended—but whether it would be understood by readers to apply to a particular person. . . . If you did not intend it, and it was a mere misfortune of yours to fix upon some individual name when you did not refer to that individual, and the writing unfortunately by accident libelled him, a jury probably would not give the same amount of damages as they would if they thought you knew him perfectly well because he had been in your service and you intended to hit at him. If they thought that, they would give you very different damages from what they would in the other case. At the same time an action lies if you have libelled a gentleman when you did not intend it."

In the summing-up this ruling is repeated in various forms, but in all cases it amounts to a direction that the intention of the defendant is immaterial, and that, if persons who knew of the existence of the plaintiff would think it was meant for him—the reason throughout being merely the identity of name—the verdict must be for the plaintiff. I will only quote one passage:

"If you think that by what is somehow or other rather a misfortune than anything else they have happened to publish something which has seriously damaged the plaintiff, then it seems to me that in the way in which this case has been put to you you are bound to find for the plaintiff."

There is no necessity for me to deal with these rulings at length. Their purport is plain, and they are in direct contradiction of what I hold to be the fundamental principles of the English law of libel. The learned judge directs that it is immaterial whether the defendant intended the words to refer to the plaintiff or not, and that, if persons who know of the existence of the plaintiff might reasonably think they referred to him, the plaintiff is entitled to succeed. He holds that you may accidentally libel a man of whose very existence you do not know. In my opinion, an unintentional libel in this sense is as impossible in English law as an honest fraud, and the gist of the action is, as LORD MANSFIELD said, the person of and concerning whom the words are spoken or written. As LORD KENYON said in his direction to the jury in *R. v. Lord Abingdon* (13) (1 Esp. at p. 228): "In order to constitute a libel, the mind must be in fault."

A If I am right in my view, the direction of the learned judge to the jury was so materially erroneous that the verdict cannot stand. But, in my opinion, this court ought not to grant a new trial, but enter judgment for the defendants, on the ground that there was no case to go to the jury. This would be obviously the right course if the action was against the writer of the article, but as it is against the company it may require an examination of the position of a company with regard to an action of libel, and I, therefore, postpone it for a moment in order that I may first deal with some further questions arising out of the ruling of the learned judge. In the first place I wish to point out that the only connection of the words with the plaintiff here is the identity of the name Artemus Jones. The learned judge has directed the jury that, if the persons who knew the plaintiff might suppose the plaintiff to be meant, they are to find for the plaintiff. It is obvious that this would make the defendant equally liable to any other person of the name of Artemus Jones, for it is admitted that there is nothing else in the description which points to the plaintiff, and, in fact, that the remainder of the description is inapplicable to him. If this be the law, then a person who makes a statement about Mr. A. B. which is perfectly true, but which if not true would be libellous, can be made liable to every other person of the name of A. B. except the one of and concerning whom the words were written. It is clear on the judge's ruling that it would be no defence to say that the writer intended another Mr. A. B. and that it was true of him, because the learned judge says expressly that the defendant's intention is immaterial. The consequence is that persons seeing the libel who did not know of the existence of the Mr. A. B. to whom the statement referred, but who knew of the existence of some other persons of that name, would be able to come and give the same evidence as was held by the learned judge to be sufficient to support the plaintiff's case in the present instance. The same consequences might be true in many cases where the words were not defamatory of the person of whom they were spoken. An erroneous application may render innocent words defamatory. That Mr. A. B. devotes himself in private life to spreading the doctrines of the Protestant Church might constitute a serious charge of hypocrisy if erroneously applied to an eminent Roman Catholic of the same name; and even the harmless domestic announcement that Mrs. A. B. had just had a baby might make a man liable to a grave charge of having accused a person of want of chastity if readers are at liberty from the similarity of name to apply it to a lady who was at the time a widow. It would indeed be a calamity if our English law of defamation burdened ordinary speech or writing with such a chaos of responsibilities.

G But the suggestion that such responsibilities may arise from the use of a name gives occasion for even deeper and more fundamental considerations. A man has no monopoly in his name. If there had been one or more persons bearing the name of Artemus Jones in existence at the time when the plaintiff thought proper to add Artemus to his name, they could not have prevented him doing so. Nor did his assumption of that name in any way interfere with the right of any other person to take that name if it should please him so to do. The law will prevent persons using assumed names for the purposes of fraud, but that is all. And in a precisely similar way the possession or assumption of a particular name by one or more persons does not interfere with the right of any writer to use the name for one of his characters. The innocent use of a particular name by a writer for such a purpose is as legitimate an act as the innocent assumption of it as his own name by a person dissatisfied with that given him in baptism. And the fact that a writer does so use a name does not warrant his words being taken to refer to any particular person called by that name, any more than the plaintiff's signing his name as Artemus Jones would make him guilty of forgery of the name of a person who had always borne that name. In the present case it is admitted that the writer of the article and the editor were in the same position with regard to knowledge of the existence of any person of the name of Artemus Jones as was the plaintiff when he assumed the name, and the fact that it was used in the article no more warranted

the conclusion that the writer referred to the plaintiff than would the use of the name by the plaintiff warrant the conclusion that he was passing himself off as some other person of the same name if there chanced to be one. Indeed this would be too obvious to be contested if the name were an ordinary one. But a different law cannot apply to the innocent use by a writer of an ordinary and of an extraordinary name unless we are to be guilty of the supreme absurdity of saying that the more pains a writer takes to avoid causing annoyance to any person by the accidental use of his name, the more damning is the evidence against him in an action of defamation if by chance he has pitched upon the same name as has, unknown to him, been adopted on like grounds by some individual.

But the most serious aspect of the new doctrine is when we apply it to cases where the description is not by name. After all, a name is only one means of identification, and, considering the millions of names that must exist in England and the improbability of any man's name being borne by him alone, is not a very strong one. There is no difference in the eye of the law with regard to an indication of identity by name or indication by other modes of description. Now suppose that no name is mentioned, but that the description is purely circumstantial. Let us take the case of a preacher or speaker who in denouncing some practice may introduce into his discourse some hypothetical case in order to render his meaning clear. Some detail innocently introduced by him or even the choice of that particular theme may lead his hearers to imagine that he is referring to some particular person in the neighbourhood of whose existence and circumstances he is wholly ignorant and to whom personally he is not in any way referring. The learned judge clearly indicates that in that case he would be liable for defamation, and in fact says that he has already so ruled in another case tried before him. Nor do I see how a person could guard himself against such a liability or what defence he could raise. It is clear law that no omission of the name, or statement that it is a hypothetical case, or declaration that he does not intend to refer to anybody in particular, can or ought to protect a person so speaking whose intention is to libel. It could not, therefore, protect an innocent man under this ruling that intent is immaterial.

The major portion of the argument before us on behalf of the plaintiff consisted in urging that the ruling of the learned judge is only a case of applying the principle that a man must be held responsible for the ordinary meaning of the words he utters. A little consideration will show this to be a fallacy. The principle which is referred to (which is not applicable when the cause of action depends on intent) must mean that he is bound by that which is the true construction of his words. But, in the first place, it is not pretended that as a matter of construction his words described the plaintiff. It is only either by rejecting the bulk of the description as a blind, or leaving it out of consideration altogether, that the description was made by the witnesses to apply to the plaintiff. And this is the more important seeing that the part which they rejected is the really material part of the description. The actual name of the fictitious individual has no bearing on the point of the paragraph—that which is material is that the man who is guilty of light conduct abroad is a churchwarden at home. And this is the part which is rejected or disregarded by the people whose construction of the words published by the defendants is held to render the defendants liable. In the second place the identification of the name appearing in the article with any particular personage is not strictly speaking a matter of construction at all. Like all such questions it may and very often must be decided by extrinsic evidence. Everyone knows the maxim: "Parcel or no parcel is a question for the jury." Even in contract, if A sells to B Blackacre, B cannot compel A to convey to him any close which goes by that name. If the name can refer to more than one close, B must show either by the rest of the description or by extrinsic evidence that the close he claims is the one to which the contract refers, and to do so it is not sufficient for him to show merely that it is the one to which he thought the contract referred. Similarly in the present case the name in the article might refer to the plaintiff, or to some

A other person of the same name, or it might be a fictitious name used by the writer to denote the person to whom he was speaking. All these three are equally possible and equally legitimate, and to determine which of the three is to be taken one must have recourse either to the rest of the description or to extrinsic evidence as to which was the meaning in which it was actually used by the writer or the defendants. If recourse be had to either of these sources in the present case, the
B unchallengeable result is that the words did not refer to the plaintiff. It is thus that, according to ordinary principles of law, the question whether the words referred to the plaintiff must be decided, and not by the mere surmise of the reader.

The ruling, therefore, of the learned judge is not in accordance with the principle of a person being held responsible for the words he uses. The doctrine of the old
C common law in the case of actions of defamation is far more nearly an application of those principles. But I do not wish it to be thought that, in my opinion, the doctrine of the old common law that the plaintiff must prove that the defendant wrote or spoke the words of and concerning the plaintiff is merely an example of the principle of holding a man responsible for his words. It went much deeper, because it regarded the liability as dependent on intent, and thereby, on the one
D hand, enlarged the responsibility of the individual by holding him responsible where intent was present, although on the words themselves there was no necessary reference to the plaintiff, and, on the other hand, where the intent was absent, protected him though the words themselves were such as might have referred to the plaintiff.

One point remains. It was suggested by counsel for the plaintiff that this action
E would lie against the defendants who published the newspaper, even though it would not lie against the writer of the article. I fail to understand the grounds on which this is suggested. Be the defendants who they may, it is equally necessary for the plaintiff to prove that they intended the words to refer to him. The company are responsible for the action of their editor. His intention for this purpose is theirs. But the editor is in this case as blameless as the writer, for he was
F equally ignorant of the existence of the plaintiff, or of any person of that name. Counsel for the plaintiff attempted to suggest that the defendants were responsible because the compositor or the employees who read the proofs for printer's errors might have known of his existence. Whether they did or did not appears to me to have no bearing on the question whether the defendants published the article of and concerning the plaintiff. You cannot draw an inference as to the intention of
G the defendant company from the state of mind of any such subordinate servants who have no part in deciding on behalf of the defendants what shall and what shall not appear in the paper. I am, therefore, of opinion that there was no evidence to go to the jury in support of the plaintiff's case, and that judgment ought to be entered for the defendants. A new trial is also asked for by the notice of appeal on the ground that the damages are excessive. Immediately after the article
H appeared complaint was made to the defendants, and accordingly in their next issue they inserted a disclaimer in terms which to my mind exactly meet the case and leave no possible doubt that the plaintiff was not referred to in the article. Seeing that it is admitted that the defendants were innocent of any defamatory intent, and that it cannot be pretended that any actual damage has been suffered by the plaintiff, the verdict of £1,750 is, even on the ruling of the learned judge,
I so absolutely perverse that on that ground alone the defendants are, in my opinion, entitled to a new trial.

FARWELL, L.J.—The defendants contend that the verdict and judgment in this case cannot stand because it was proved that neither the writer of the libellous article nor any person in the defendants' employment, under whose notice it came before it was published, knew or had even heard of the existence of the plaintiff, and that it, therefore, necessarily follows that the defendants cannot have intended the libellous words to apply to the plaintiff.

The question for us is whether this contention is right. The old declaration in an action for libel still accurately states the issues that have to be proved, viz., that the defendants falsely and maliciously printed and published of the plaintiff in the A. paper the words following (setting them out), meaning thereby that the plaintiff, etc. It is hardly necessary to say that actual malice is not necessary; malice in law is sufficient, and that is shown by the falsity and defamatory nature of the words as soon as it has been proved that they were written of the plaintiff. But the plaintiff has to prove (i) the publication, and (ii) that it is of the plaintiff; and then he has to prove the libellous nature of the words—i.e., the innuendo. It is contended that the libel cannot be published of the plaintiff if it be proved that his existence was unknown to the defendant. A plaintiff need not, of course, be named in the libel; it is sufficient if he be sufficiently described, and for this purpose recourse may be had to the innuendo. As LORD CAMPBELL says in *Le Fanu v. Malcomson* (5) (1 H.L.Cas. at pp. 668, 669):

"It comes round to the old rule, that you cannot by an innuendo extend the natural meaning of the words which are spoken or written, but by the innuendo you may point out the particular individual to whom the words apply."

The first step is to prove that the words published, whether by name, nickname, or description, are such as reasonably to lead persons acquainted with the plaintiff to believe that he is the person to whom the libel refers; the next step is to prove that that is the true intent and meaning of the words used. That is what I understand to be meant by LORD COTTENHAM in *Le Fanu v. Malcomson* (5) where he said (1 H.L.Cas. at p. 664):

"If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords."

LORD CAMPBELL in the same case said (*ibid.* at p. 668):

"Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and christian name were ten times repeated."

It is, however, argued that when LORD COTTENHAM says, "the writer of the libel intended to mean these individuals," he was referring to the intention in the writer's mind as distinct from the intention expressed in the words that he had used as explained by the relevant surrounding circumstances.

In my opinion, this is not so, and I may remark that it was not the contention of the appellant's counsel in that case; he opened his case by asserting (*ibid.* at p. 646) that it was necessary to show "that the libel on the record should point to the plaintiffs," etc. The rule is well settled that the true intention of the writer of any document, whether it be contract, will, or libel, is that which is apparent from the natural and ordinary interpretation of the written words; and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who knew the plaintiff and the circumstances. LORD BLACKBURN's speech in *Capital and Counties Bank v. Henty* (6) has already been read. It has been held that a mistake in the statement is no defence. Thus, in *Shepherd v. Whitaker* (14), the defendant's newspaper by mistake inserted the name of a trading firm under the heading of: "First meetings under the Bankruptcy Act," instead of under "Dissolutions of Partnerships." The mistake

A was simply an error in setting up the type, but the defendants were held liable. The same result might follow if the mistake had been in the name of the firm—e.g., if they had intended to insert Smith & Co. and had in fact inserted Shephard & Co., and this too whether the existence of that firm was or was not known to them. Before Lord Denman's Act in 1843, and Lord Brougham's Act in 1851, a defendant was not a competent witness, and the defendant could never have been called to state his intention; and, in my opinion, he cannot now be heard to say that he did not intend the true meaning of his own words as interpreted by relevant surrounding circumstances on the issue of publication of the plaintiff, although such evidence would be admissible in mitigation of damages as negating express malice. It always was, and is still, open to him to prove the surrounding circumstances so as to show that, although the words appear to refer to the plaintiff, that is not their true intent and meaning. As LORD BLACKBURN says in *River Wear Commissioners v. Adamson* (15) (2 App. Cas. at p. 763):

D "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."

E In the present case the jury have found that the libellous article described an actual scene at Dieppe, and that "Artemus Jones" mentioned therein described an actual person and not a mere type. If the defendants had proved in the present case not only that the writer of the article did not know of the plaintiff's existence, but also that there was an Artemus Jones other than the plaintiff, who was present at Dieppe in the company alleged, then the circumstances with reference to which the words "Artemus Jones" were used would show that the plaintiff was not the person intended; but the writer of the libel has chosen to state as a fact that F Artemus Jones was present in order (as he says) to avoid the banality of using "A. B.," or a blank. He has, therefore, for his own purposes chosen to assert a fact of a person bearing the very unusual name of Artemus Jones recklessly, and caring not whether there was such a person or not or what the consequences might be to him. An action for defamation differs from other actions in tort, such, for instance, as trespass, in that it is of the essence of defamation that the plaintiff G should be aimed at or intended by the defendant. The man who throws a squib into a crowd, not intending to hit anyone, is liable for the consequences of his act whatever his intentions may have been, because the two elements necessary to constitute such a tort—viz., a wrongful act by the defendant and actual damage to the plaintiff—are both present. But it is not enough for a plaintiff in libel to show that the defendant has made a libellous statement and that the plaintiff's friends and acquaintances understood it to be written of him; he must also show that the defendant printed and published it of him, for if the defendant can prove that it was written truly of another person the plaintiff would fail.

I To this extent I agree with FLETCHER MOULTON, L.J., but we differ as to the meaning of the word "intended." In my opinion, the defendant intends the natural meaning of his own words in describing the plaintiff as much as in the innuendo. The inquiry is not: What did the defendant mean in his own breast? but: What do the words mean having regard to the surrounding circumstances? For example, fraud is proved in an action of deceit not only when a false representation is made knowingly, but also when it is made recklessly, careless whether it be true or false, and although there was no intention to cheat or injure the person to whom the statement was made (*Derry v. Peek* (12)), and yet the fraudulent intent is of the essence of the action. So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individual, but also when he has made a statement con-

cerning a man by a description by which the plaintiff is recognised by his associates, if the description is made recklessly, careless whether it holds up the plaintiff to contempt and ridicule or not. In such a case it is no answer for the defendant to say that he did not intend the plaintiff because he had never heard of him; he intended to describe some living person; he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at and has suffered damage thereby. The element of intention, which is as essential to an action of defamation as to an action of deceit, can be proved in the same way in both actions. The issue of fact is whether the plaintiff is the person intended by the libeller, but sufficient evidence to prove it may be given although the defendants had no intention of injuring the plaintiff and had never heard of his existence. The squib-thrower is liable for the injury done by his squib to the plaintiff whether he aimed at or intended to hit him or not; the libeller is not liable to the plaintiff unless it is proved that the libel was aimed at or intended to hit him, the manner of proof being such as I have already stated. If the libel was true of another person and honestly aimed at or intended for him and not the plaintiff, the latter has no cause of action although all his friends and acquaintances may fit the cap on him. If this were not so, no newspaper could ever venture to publish a true statement of A. lest some other person answering the description should suffer thereby. It is said that this would enable several plaintiffs to bring several and distinct actions in respect of one libel, and I think that this is so; but I am unable to see the objection. If the libel consisted in defamation of a number of individuals described generally, e.g., as the owners of some of the Irish factories, as in *Le Fanu v. Malcomson* (5), every member of the class who could satisfy the jury that he was a person aimed at and defamed could recover; and I can see no reason why two or more persons of the name of Artemus Jones, who produced evidence from their acquaintances and others in different parts of the kingdom similar to that produced by the plaintiff in this case, the other circumstances being similar, should not recover. It is quite possible that a defendant might know two persons of the same name, and might use words equally applicable to both and describe each so that he appeared to his own circle of friends and acquaintances to be the person attacked, and might really intend to strike at both; it would certainly be somewhat shocking if such a man could successfully defend an action by one, Artemus Jones, by swearing (and truly swearing) that he meant the other, and then defeat the second action by swearing (and truly swearing) that he meant the first. If a man chooses to make statements of fact about persons whom he names, as in this case, I see no reason why he should not be liable to everyone whom he injures who can convince a jury that he is reasonably intended by the words used.

I am, therefore, of opinion that the defendant cannot complain of CHANNELL, J.'s summing up. I do not think that he intended to rule anything more than that the alleged actual, as distinguished from the expressed, intention of the defendant was under the circumstances of this particular case immaterial. I do not understand him to have withdrawn from the jury the question whether the plaintiff was the person of whom the libel was published, which was, in my opinion, a question for them to decide, but to have ruled that the fact that anyone of the plaintiff's name was unknown to the writer or anyone in the defendant's office through whose hands the libels passed was not a conclusive defence requiring him to stop the case—and in this he was, in my opinion, right. The ignorance was of course a material fact, both in considering the question of the true intent of the defendants, and also in considering the damages, but I think that these were before the jury. It was said that there was some misdirection on the point of negligence, but I do not think this is so; negligence is immaterial on the question of libel or no libel, but may be material on the question of damages. The recklessness to which I have referred, founding myself on *Derry v. Peek* (12) is entirely different from mere negligence. Then it is said that the amount of damages is excessive: it is no doubt large, but the evidence shows how serious the consequences have been and

A may yet be to the plaintiff. It is difficult to estimate the consequences of libel in a newspaper. As BEST, C.J., said in *De Crespigny v. Wellesley* (1), it may "circulate the calumny through every region of the globe." Those who read it may never read the subsequent explanation or the report of the trial; and some of those who read both may forget the result and be left with a general recollection that the plaintiff was a man of whom a discreditable story was reported in the paper.

B Libellous statements are published by newspapers because they find that it pays; many of their readers prefer to read and believe the worst of everybody, and the newspaper proprietors cannot complain if juries remember this in assessing damages. The amount of damages is peculiarly their province, and I see no ground for interference. In my opinion, the appeal should be dismissed.

C The defendants appealed to the House of Lords.

Norman Craig, K.C. (Rufus Isaacs, K.C., with him), for the appellants.

Gordon Hewart (Lush, K.C., with him) for the respondent.

LORD LOREBURN, L.C.—I think that this appeal must be dismissed. A question in regard to the law of libel has been raised which does not seem to me to be entitled to the support of your Lordships. Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame the plaintiff. He has none the less imputed something disgraceful, and has none the less injured the plaintiff.

E A man may publish a libel in good faith believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action.

It was suggested that there was a misdirection by the learned judge in the present case. I see none. He laid down the law in his summing-up as follows:

F "The real point upon which your verdict must turn is: Ought or ought not sensible and reasonable people reading this article to think that it was a mere imaginary person such as I have said—Tom Jones, Mr. Pecksniff as a humbug, Mr. Stiggins, or any name of that sort which one reads of in literature used as a type? If you think that any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that

G people would suppose it to mean some real person—those who did not know the plaintiff, of course, would not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff—then the action is maintainable, subject to such damages as you think under all the circumstances are fair and right to give to the plaintiff."

H I see no objection in law to that passage. The damages are certainly heavy, but I think that your Lordships ought to remember two things. The first is that the jury were entitled to think, in the absence of proof satisfactory to them—and they were the judges of it—that some ingredient of recklessness entered into the publication and the writing of this article, especially as the respondent had been employed on this very newspaper, and his name was well known in the paper and also in the district in which the paper circulated. In the second place, the jury were

I entitled to say: "This kind of article is a kind of article to be condemned."

There is no tribunal more fitted or more competent to decide in regard to publications—especially publications in the newspaper press—whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the licence is not fairly used, and that the tone and the style of the article and the libel in question is one that is reprehensible and ought to be checked, it is for the jury to say so; and for my part, although I think that the damages are certainly high in this case, I am not prepared to advise your Lordships to

interfere, especially as the Court of Appeal have not thought it right to interfere, with the verdict which is now seeking confirmation.

LORD ATKINSON.—I concur with the opinion which has been delivered by the Lord Chancellor, and I also concur substantially with the judgment delivered by FARWELL, L.J., in the Court of Appeal. I think that he has put the case upon its true ground, and I should be quite willing to adopt in the main the conclusions at which he has arrived.

LORD GORRELL.—I also concur with the judgment which has been pronounced by the Lord Chancellor. I also wish to express my concurrence with the observations which LORD ATKINSON has made upon the judgment of FARWELL, L.J.

LORD SHAW.—I concur in the observations which have been made by the Lord Chancellor, but for my own part I should desire in terms to adopt certain language which I will now read from the judgment of LORD ALVERSTONE, C.J. (ante at p. 32):

"The question, if it be disputed whether the article is a libel upon the plaintiff, is a question of fact for the jury, and, in my judgment, this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is libellous or defamatory, but whether the person referred to in the libel would be understood by persons who knew him to be the plaintiff."

With regard to this whole matter I should put my propositions in a threefold form, and, as I am not acquainted by training with a system of jurisprudence in which criminal libel has any share, I desire my observations to be confined to the question of civil responsibility. In the publication of matter of a libellous character—that is, matter which would be libellous if applying to an actual person—the responsibility is as follows. In the first place, there is responsibility for the words used being taken to signify that which readers would reasonably understand by them; in the second place, there is responsibility also for the names used being taken to signify those whom the readers would reasonably understand by those names; and, in the third place, the same principle is applicable to persons unnamed, but sufficiently indicated by designation or description. I demur to the observation so frequently made in the argument that these principles are novel. Sufficient expression is given to the same principles by ABBOTT, C.J., in *Bourke v. Warren* (4), in which that learned judge said (2 C. & P. at pp. 309, 310):

"The question for your consideration is, whether you think that the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant? It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant."

I think that it is out of the question to suggest that that means "meant in the mind of the writer" or of the publisher: it must mean "meant by the words employed." LORD COLERIDGE, C.J., dealt similarly with the point in *Gibson v. Evans* (16), where, in the course of the argument, he remarked (23 Q.B.D. at p. 386):

"It does not signify what the writer meant. The question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff."

Solicitors: *Lewis & Lewis; Nicol, Son & Jones, for Pickstone & Jones, Radcliffe.*

[Reported by J. H. WILLIAMS and C. E. MALDEN, Esqs., Barristers-at-Law.]

A

CHETTI v. CHETTI

[PROBATE, DIVORCE and ADMIRALTY DIVISION (Sir Gorell Barnes, P.), November 13, 14, December 7, 1908]

B

[Reported [1909] P. 67; 78 L.J.P. 23; 99 L.T. 885; 25 T.L.R. 146; 53 Sol. Jo. 168]

Conflict of Laws—Marriage—Validity—Solemnisation in England—Husband domiciled abroad—Personal disability from entering marriage imposed on husband by law of his domicile.

C

A man, domiciled abroad, who marries an English woman domiciled in England, does not carry with him a disability of a personal character imposed on him by the law of his own country which would prevent him from entering into a marriage with her in this country, if the marriage is one which would be recognised by English law as valid if solemnised between persons domiciled here.

D

A Hindu, domiciled in India, while in England went through the ceremony of marriage with a woman domiciled in England. He afterwards left his wife and refused to cohabit with her or to make proper provision for her, and on a petition being presented by the wife for a decree of judicial separation on the ground of desertion, he alleged that, according to Hindu law, which was the law of his domicile and his personal law, he could not marry any person outside his own caste or who was not a Hindu by religion.

E

Held: the husband could not be allowed to set up any disqualification imposed by the law of his domicile against the validity of a marriage which had been duly celebrated in England according to English law.

Notes. Considered: *R. v. Hammersmith Superintendent Registrar, Ex parte Mir-Anwaruddin*, [1916-17] All E.R.Rep. 464; *Inverclyde v. Inverclyde*, [1931] P. 29. Referred to: *Mitford v. Mitford and Von Kuhlman*, [1923] All E.R.Rep. 214; *Papadopoulos v. Papadopoulos*, [1929] All E.R.Rep. 310; *Sim v. Sim*, [1944] 2 All E.R. 344.

As to the effect of foreign law on the validity of marriage, see 7 HALSBURY'S LAWS (3rd Edn.) 88-102; and for cases see 11 DIGEST (Repl.) 455 et seq.

G

Cases referred to:

- (1) *Abraham v. Abraham* (1863), 9 Moo. Ind. App. 195, P.C.
- (2) *Sottomayor v. De Barros* (1877), 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 26 W.R. 455, C.A.; 11 Digest (Repl.) 460, 945; further proceedings (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 27 W.R. 917; 11 Digest (Repl.) 461, 946.
- (3) *Brook v. Brook* (1861), 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703, H.L.; 11 Digest (Repl.) 457, 915.
- (4) *Mette v. Mette* (1859), 1 Sw. & Tr. 416; 28 L.J.P. & M. 117; 33 L.T.O.S. 139; 164 E.R. 792; sub nom. *In the Goods of Mette*, 7 W.R. 543; 11 Digest (Repl.) 456, 914.
- (5) *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 6 Jur.N.S. 561; 164 E.R. 917; 11 Digest (Repl.) 478, 1065.
- (6) *Ogden v. Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 24 T.L.R. 94, C.A.; 11 Digest (Repl.) 357, 260.
- (7) *Armytage v. Armytage*, [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 14 T.L.R. 480; 11 Digest (Repl.) 475, 1052.

H

I

Petition of Louie Venugopal Chetti (née Taylor), of Wellesley Road, Harrow, for a judicial separation from her husband, Venugopal Chetti, an Indian civil servant, on the ground of his desertion.

The wife, in her petition, stated that she was lawfully married to the husband on Sept. 1, 1890, at the registrar's office, Paddington; that she had cohabited with



him at various places, and that one child had been born the issue of the marriage, **A**
 a girl, Florence Mohini Chetti. It was further alleged in the petition that both
 the parties were British subjects; and that the husband had deserted the wife for
 two years and upwards without reasonable cause. The husband, in his answer,
 denied that he had been lawfully married to the wife on the ground that he was
 at the time of the alleged marriage, and had since remained, a Hindu domiciled **B**
 in India. According to Hindu law, which was the law of his domicile and his
 personal law, he could not lawfully contract a marriage with a person who was
 not a Hindu, and, according to that law, plurality of wives was permissible. He
 further denied that he had been guilty of desertion, and he prayed the court to
 dismiss the petition, and to decree that the ceremony of marriage between himself
 and the wife was null and void. The wife, in her reply, said that the answer of **C**
 the defendant disclosed no defence in law.

Hume Williams, K.C., and Willock for the wife.

Barnard, K.C., De Gruyther, K.C., and Bayford for the husband.

Cur. adv. vult.

Dec. 7, 1908. **SIR GORELL BARNES, P.**, read the following judgment: **D**
 This case is one of very considerable importance and interest, not only to persons
 who are living in this country, but also to those who live in India, and it is just
 possible that it may affect other cases. The wife alleges in her petition that a
 marriage took place on Sept. 1, 1890, between herself and the husband at the
 registrar's office, Paddington, London, and, further, that cohabitation took place **E**
 and a child was born, the issue of the marriage. The wife now seeks a judicial
 separation on the ground of the husband's desertion of her for two years and
 upwards without reasonable cause. In his answer the husband denies the deser-
 tion, and also denies that a lawful marriage has taken place; and further says
 that, as he was at all material times and is a Hindu domiciled in India, such a
 marriage is unlawful, and that by his personal law a plurality of wives is permissible.
 The husband is not domiciled in this country, and his permanent address is in **F**
 Madras.

There are two questions here for me to decide. One is a question of fact—
 namely, whether there has been desertion on the part of the husband which would
 entitle the wife to a decree of judicial separation; and the other a question of law,
 whether the marriage which took place was a valid marriage in this country.
 According to the affidavit filed by the husband, he is the district and sessions judge **G**
 at Chingleput, in the province of Madras. It appears that his income has gradually
 increased until it is now about £1,800 a year in English money. He was and is
 undoubtedly a Hindu resident in India, and belongs to a caste, and by his religion
 his marriage could not take place until after a ceremony of initiation had been
 performed. In the year 1887 he came over to England to study for the Indian **H**
 Civil Service. He borrowed money from his father for the purpose of his education,
 and studied for some years in London and at Cambridge. During that time he
 made the acquaintance of the petitioner, the daughter of Mr. Thomas Taylor, a
 visiting director of prisons. They became engaged. Eventually a ceremony of
 marriage was performed before the registrar, and a child was subsequently born. **I**
 The husband in his evidence stated that at the time of his marriage the wife
 knew that he was a Hindu, and he further stated that he has never given up either
 his religion or his domicile. An important part of the evidence given by the
 husband was that when he went through the ceremony of marriage he thought that
 he could be lawfully married to the wife and that he had not been married before.
 Soon after the marriage had taken place he left England for India. At that time
 he was in debt, and he alleges that the wife assented to the arrangement that she
 should remain in England until his debts were paid. He expected to be able to
 clear off his debts in about three years. In his evidence he stated that when he left
 the wife in England, he intended to send for her to India later. Further, he

A said that according to his religion and the rules of his caste he could marry more than one wife, and that the petitioner was quite aware of the fact. The petitioner practically admits that the arrangement between her and the husband was that she should remain in England until his debts were paid, and that she knew that he was a Hindu; but she has stated that the husband assured her that there would be no other wife than herself, and that she would not have married him if that had not been the case. In the evidence given by the wife's sister, it is alleged that, in the course of a conversation concerning the fact that he was a Hindu, the husband stated that it would not do for him to marry anyone else after his marriage with the petitioner, as he was a government official. There was a very long correspondence between the parties, the early part of which is of a most affectionate nature, and there is not the slightest question that the husband regarded the petitioner as his wife at that time. The correspondence in some passages has a strong bearing on the question of his intention, which is really quite clear. [The learned President then dealt with the correspondence, and proceeded:] On looking at this correspondence, I have not the slightest doubt that, up to the end of 1893, the husband treated the relationship existing between himself and the wife as a legal marriage, and that he intended and was anxious that the wife should go out to him in India, the only reason given for his not sending for her being the fact that he was still in debt.

Upon the facts proved and upon the correspondence I find that both parties went through the ceremony of marriage with the intention that it should be a binding ceremony of marriage—namely, a union between one man and one woman to the exclusion of all others. I am also quite satisfied that the husband adhered to that position. It is difficult to see how a man in his position and of his actions up to that time can reconcile that position and those actions with the attitude which he is now taking up. Counsel for the husband has said that there are a number of marriages by Hindus in this country which the Hindus consider illegal in their own country. I can only express a hope that such is not really the case. If, indeed, it is so, it will be a most extraordinary and a most serious matter if it is allowed to continue. The husband himself, however, in my opinion, does not take that view, and I have already stated that I find as a fact that he fully intended his marriage to be a perfectly valid one at the time when the ceremony was performed. The wife says that in 1894 she received a letter from the husband in which he stated that he was going to marry again, and would make some provision for her. She further says that she thought from that letter that he had really determined to marry again and believed that he had done so until about six years later she received information from a Mr. Yusuf that such was not a fact. It appears that the husband came to England again in 1905, and that he met the wife's sister accidentally in Westbourne Grove. In the course of conversation the sister asked him if he was going to see the wife, and he said he would do so soon. As a matter of fact, however, he never went to see her at all. Proposals were made for a reconciliation, and the wife wrote to him, but nothing came of it, as he replied that he had not made up his mind whether he would take out the wife to India or not. I have already gone through the correspondence, and I have said that there were social difficulties of a very serious character which were in the way. It appears that the husband's debts had been paid off by 1897 or 1898, and a careful review of the correspondence shows that there had been no arrangement come to between the parties as to a separation. Then there is the evidence of the husband himself, and he says that he had a conversation with Mr. Yusuf, and had told him that he was going to England, and that he did not wish his wife to know anything about his visit. It has been proved that the husband was in England on leave from April, 1904, until October, 1905, and during the whole of that period he never went to see the wife. Correspondence, however, did take place, and it dealt mainly with the question of the allowance or provision which the wife should receive from the husband. The husband eventually

wrote that the terms which were proposed by the wife were absolutely beyond A
his means, and then the present suit was commenced.

It is, perhaps, desirable for me to state that there is no suggestion made against
the wife of any kind whatever. In my view the correspondence shows that there
has been, in fact, desertion; but there is a suggestion that the wife would not
proceed if the husband had been willing to make a proper provision for her. The
husband had paid to the wife an allowance varying from £10 to £16 a month, B
but there is nothing to show that she has waived the desertion. In 1894, or a
little later, the husband did, in fact, put an end to the relationship then subsisting
between them, such as is common enough where a husband and wife, though
actually living apart, are not actually separated from each other. The husband
never asked the wife to go out to him in India, and he never visited her when he
came over again to this country. From 1894 he altered his attitude towards her, C
so that he was no longer willing to do more than make some provision for her.
I find, therefore, as a fact that he did desert her, and that he deserted her in such
a manner that she is entitled to a decree of judicial separation.

Having now dealt with those questions which are more particularly questions
of fact, I will proceed with the law applicable to this case. The position of the
husband is that of a Hindu domiciled in India and belonging to the Vaisya caste. D
It is not necessary that I should attempt to trace the origin and development of the
caste system or the usages and customs thereof; such an attempt would be beyond
the powers of one not familiar with India and the customs there. The subject
may be studied in a number of works, among which reference may be made to Mr.
MAYNE's treatise of HINDU LAW AND USAGE (6th Edn.) and in the LECTURES ON E
THE HINDU LAW OF MARRIAGE AND STRIDHAN by GOOROODAS BANERJEE, Tagore Law
Professor (1879). It is sufficient for the purposes of this judgment to state that the
caste system prevails amongst the Hindus, that there are three "regenerate" or
"twice-born" castes, and also the Sudra caste, and that there appear to be other
inferior castes, also that the evidence given in the present case is to the effect that,
according to Hindu law and usage, a Hindu cannot marry a woman who does not F
belong to the same caste as himself, and that it is competent for a Hindu member
of a caste to marry a plurality of wives. I note also that Mr. MAYNE, in his
treatise, after stating (s. 88) that "the prohibition against marriages between per-
sons of different castes is comparatively modern," says (in s. 89):

"Marriages between persons of different classes are long since obsolete; no
doubt from the same process of ideas which has split up the whole native
community into countless castes, which neither eat, drink, nor marry with
each other. . . . It is impossible now to say when mixed marriages first became
extinct."

In s. 92 he says:

"It is now quite settled in the courts of British India that a Hindu is absolutely
without restriction as to the number of his wives, and may marry again without
his wife's consent or any justification except his own wish."

The recognition accorded to the Hindu laws and usages in British India may, so far
as the researches which I have been able to make enable me to state, be gathered
from certain statutes, charters, and regulations, an account of which up to 1850
is to be found in MORLEY'S ANALYTICAL DIGEST (Introduction, p. 69). A summary
of these is also given by SIR COURTENEY ILBERT, K.C.S.I., in his work on THE
GOVERNMENT OF INDIA, p. 387 et seq. (Edn. 1898), and to some of these counsel
have, since the hearing, sent me a reference.

The question of the law to be applied to natives appears to have first assumed
a practical form when Warren Hastings became governor-general of Bengal, and
in the year 1772, early in the stirring times of his governorship, laid down his

A celebrated plan for the administration of justice in the interior of Bengal. With respect to civil rights, that plan, by its 23rd rule, directed that

"in all suits regarding marriage, inheritance, and caste, and other religious usages and institutions, the laws of the Koran with respect to Mohammedan and those of the Shaster with respect to Gentus (Hindus) shall be invariably adhered to."

B This was followed up by the Regulating Act of 1773, and the regulations thereunder, and the English Act of 1781 (21 Geo. 3, c. 70), of which see especially ss. 17 and 18, and other statutes. For Madras provision was made at different times by the statutes 37 Geo. 3, c. 142, relating to the Recorder's Court (see especially ss. 12 and 13), which were superseded by the Supreme Courts, and now by the High Courts; 39 & 40 Geo. 3, c. 79; 4 Geo. 4, c. 71; 24 & 25 Vict., c. 104, and the regulations and charters thereunder (see s. 3 and cll. 19 and 20 of the charter of 1865); and the Madras Civil Courts Act, 1873 (Act III, of 1873), which deals with the civil courts of the Madras Presidency subordinate to the High Court, s. 16 of which is as follows:

D "Where in any suit or proceeding it is necessary for any court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution—(a) the Mohammedan law in cases where the parties are Mohammedans, and the Hindu law in cases where the parties are Hindus, or (b) any custom (if such there be) having the force of law and governing the parties or properly concerned, shall form the rule of decision, unless such law or custom has by legislative enactment been altered or abolished;

E (c) in cases where no specific rule exists the court shall act according to justice, equity, and good conscience."

The Caste Disabilities Removal Act, 1850 (Act XXI, 1850) may also be referred to. It declares that

F "so much of any law or usage now in force within the territories subject to the government of the East India Co. as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion or being deprived of caste, shall cease to be enforced as law in the courts of the East India Co. and in the courts established by Royal Charter within the said territories."

G The result is that within the domain of family law Hindus retain their laws of marriage and certain other matters not material to refer to; but I am not concerned in the present case with any question as to marriage relationship entered into in India, or to what extent Hindu marriages in India would be recognised outside that country. I have merely to deal with the effect, if any, of this husband's condition on a marriage which he, a British subject, chose voluntarily to enter into in England

H with the wife who was domiciled here. Changes would seem to be occurring tending to relax some of the strict rules of caste, for it appears from the evidence of a relative of the husband under commission that the going of a Hindu to England might formerly have been prohibited (I understand this to mean by the usages and customs of his caste), but that there is no such restriction or prohibition now. Further, the following passage occurs:

I "In former days it was prohibited to go on board ship; even if a man went on board ship in former days a regular 'prayaschitta' would have to be performed. It has become usual now to go on board ships. There is no prohibition now. I do not know when the change took place. I have heard that it used to be necessary to perform 'prayaschitta' after going on board ship, but I have not known of it of my own knowledge, and I know of no instance of 'prayaschitta' being performed because a person went a voyage in a ship; I have only heard of the rule. I did not look into the Shastras. There is no such rule now. I do

no know if that rule was changed or by whom. There has been no caste meeting to discuss the question of crossing the sea. I am forty-four years of age. More than fifteen years ago (about twenty years ago) there were three of my relations who crossed the sea; they were three sons of Mr. P. Ramasamy Chetti. I do not know of any other persons at all who went more than twenty years ago."

Still I understand that while the husband remains a member of his caste he cannot in India, according to the Hindu law and the usage of his caste, marry a woman out of his caste. But I cannot find anything in the laws to which I have made reference, nor in the evidence in this case, to show that he is prevented from renouncing or being deprived of his caste or becoming of another faith. This, I think, it may be gathered from the evidence, may be done or happen: see also the terms of the Act last mentioned. I notice further that in Mr. MAYNE's work he states (6th Edn., s. 57):

"Where a Hindu has been converted to Mohammedism he accepts a new mode of life which is governed by a law recognised and enforced in India,"

and that in *Abraham v. Abraham* (1), in dealing with the status of a Hindu who has become converted to Christianity, LORD KINGSDOWN, in giving judgment, said (9 Moo. Ind. App. at pp. 237, 238):

"He becomes, as their Lordships apprehend, at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindu law recognises and creates. Their Lordships, therefore, are of opinion that upon the conversion of a Hindu to Christianity the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion."

There are, no doubt, many faiths in India, and there would appear to be no prohibition against a Hindu joining any other faith or abandoning his position as a member of a Hindu caste. I may here notice that this case was argued upon the assumption that the husband still remained a member of his caste. There is no doubt that he has not, according to the evidence, married again, but there is really no proof in the course of the evidence of what would have occurred if the marriage in question in this case had been generally known, and what effect it would have had upon his position as a member of his caste. I gather from the evidence that he did not divulge the fact that he had gone through the ceremony of marriage in England after his return to India, although he states that his parents came to know of it some years afterwards, in 1895, but it does not appear that anybody else knew or was informed, and there is a significant answer given by the relative to whose evidence I have already referred, who stated that the husband did not tell him that he had gone through a form of marriage in England. The question was asked: "Suppose you had known when he returned to India that he had cohabited with an Englishwoman whilst in England, would that have made any difference in your treatment of him?" (Answer) "We would not so much have noticed it if he had only cohabited with or kept an Englishwoman." It is very unsatisfactory that the evidence should have been left without any distinct statement of the husband's position if it had been known on his return that he had in fact entered into the matrimonial alliance which the wife asserts. Then, again, the evidence to which reference has been made shows, what is probably a matter of common knowledge, that it is only in comparatively recent years that Hindus have left their country, voyaged to England, and had the opportunities of dealing

A and entering into relationship with persons outside India, and the recognition afforded to Hindu law and usage in India can hardly have had in contemplation cases in which a Hindu's actions requiring consideration took place outside India, nor is there anything in the legislation aforesaid which shows that rules of life and conduct, which would be applicable to him in India, are to be held by the Indian courts to be applicable to him in dealings in another country with an inhabitant thereof. **B** I may here notice that the Indian Christian Marriage Act, 1872 (Act XV, of 1872), which provides for the solemnisation of marriages in India between persons one or both of whom is or are a Christian or Christians subject to the formalities and conditions prescribed by the Act, but which by s. 88 enacts that the Act is not to be deemed to validate any marriage which the personal law applicable to either party forbids him or her to enter into, only applies to marriages contracted in India. **C** It results from what I have been stating, that what is set up by the husband is not a general disability because of being domiciled in India, that is to say, not a disability grounded on the fact that he is a domiciled Indian and is governed by a general law which deals with all the inhabitants of India, as in the cases where foreign laws have had rules as to consanguinity differing from those prevailing in this country, of which *Sottomayor v. De Barros* (2) is an illustration, but what is **D** relied upon by the husband is in the nature of a religious disability which in principle differs little, if at all, from that of the priest referred to by LORD HANNEN in his judgment in that case. There is not in truth a disability by the laws of his domicile which cannot be got rid of at the will of the husband, and there seems to be no status of which notice can be taken in this country creating an incapacity to enter into a marriage contract in this country. I may refer, while dealing with **E** this part of the case, to the old statement with regard to religious disabilities found in Co. Litt. 132 (b): "Of foreign professions [that is religious] the common law taketh no knowledge."

Then is it clearly proved by the evidence that this marriage would not have its validity recognised at all in India, and would, therefore, be declared invalid, if held valid in this country? After the most careful study of the whole of the evidence of the witnesses who spoke as to the law, which evidence is not very exhaustive, **F** I am not able to find as a fact that this is clearly proved. Sir Venbakam Bhashyam Ayyangar, Knight, C.I.E. who was the Acting Advocate-General of Madras and formerly a judge of the Madras High Court, gives evidence as follows:

G "Q. According to the law administered in British courts in India, can a Hindu who belongs to one of the four castes mentioned in the previous question lawfully marry a woman who does not belong to his own caste?—A. According to the ancient Hindu law a Brahmin could marry a woman of the Kshatriya or Vaisya caste and possibly of the Sudra caste also; and a Kshatriya could marry a woman of the Vaisya caste or of the Sudra caste, and a Vaisya could marry a woman of the Sudra caste, but that has been obsolete for a long time, and **H** according to the Hindu law and usage now in force a Hindu cannot marry a woman outside of his own caste. Q. According to the Hindu law as administered by the British courts in India, can a Hindu who belongs to one of the aforesaid four castes lawfully contract a marriage in India with a Christian woman?—A. Certainly not. Q. Would a ceremony of marriage gone through in England or anywhere outside India between a Hindu male of one of the aforesaid castes and a Christian woman be held to be a valid marriage by the **I** courts of British India?—A. If the question that arises in a court in British India be whether that ceremony would constitute a valid marriage under the Indian common law or statutory law, the court would hold that it did not constitute a valid marriage. But if a question should arise in a British Indian court as a question of foreign law of the place when the ceremony purporting to be a ceremony of marriage was gone through—a question which would have to be proved in the Indian court as a question of fact—the Indian court would hold the intended marriage either as valid or invalid, according to the foreign

law as proved. But the court will not recognise such a union as constituting a valid marriage for its enforcing any marital rights as between the Hindu male and the Christian woman who have gone through the ceremony of marriage in a foreign country, though, according to the law of such foreign country, the union would constitute a valid marriage. Q. Do I understand you to say that if for any purpose a court in British India has to consider the question whether such a ceremony of marriage constitutes a valid marriage, according to the law of the place where it was solemnised, the question will be decided according to that law to be proved as a question of fact?—A. Yes, as I have already stated in my answer.”

Further he states :

“According to the Hindu jurisprudence, there is no such thing as *lex situs* or *lex loci*, and all law is personal, which follows the person wherever he goes, until he may choose to adopt and follow some other personal law.”

It is true that elsewhere in his evidence there are certain passages which may qualify what is stated in these answers, but I am unable to satisfy myself either from that evidence, or from the evidence given by Mr. Jardine, K.C., who was called as a witness at the trial, that the marriage is clearly proved to be one which would be treated as invalid in India, if held to be valid here. I have taken the following questions and answers from the shorthand notes of the evidence of Mr. Jardine :

“Q. Do you agree, if an English court held such a marriage to be valid in England, that an Indian court would consider it valid also?—A. That is so in my view—if the English court said it was valid so far as England is concerned, the Indian court would accept for what effect it might have that the marriage was a valid marriage, and I think no person, under those circumstances, would attempt to enforce marital rights. Q. The question was: Would such a marriage be held to be valid in India if the English court held it to be a valid marriage, and that was proved as a matter of fact. Would the Indian court come to the same conclusion?—A. I hardly think it would run to that quite. I think the Indian court would consider it a valid marriage, and would give the effect, as far as it could, to the English decision, and find the marriage valid, but without enforcing marital rights.”

Although this is not the whole of the evidence of Mr. Jardine, I remain of the same view after studying all the evidence which he gave. A question such as that raised in this case has never, as I gather, been raised in the courts of India, and any evidence given appears to me to be a matter of opinion, even if it amounts to a statement that the marriage would be treated as invalid in India if held valid here. Upon the evidence, therefore, I am unable to find, as a fact, that the law of India is in favour of the husband on this point, nor can I find any sufficient reason given or principle stated from which it should follow that the courts of India would apply Hindu law and usage to a case such as this, where the husband has acted, not in India, but in England, in defiance of such law and usage.

But even supposing it to be the law of India that this marriage, though binding in this country, would not be regarded as binding in India, it remains to be considered what is the correct view of the law of England with regard to the validity of the marriage. The argument which the counsel for the wife addressed to me may, perhaps, be taken as summed up by Mr. BISHOP in s. 360 of his work on the *LAW OF MARRIAGE AND DIVORCE* (6th Edn.), vol. 1, thus :

“These processes of reasoning, it is submitted, conduct us again, by other steps, to the conclusion first drawn—namely, that each government ought to accept of all marriages celebrated within the territorial limits of other governments, whether such as itself approves or not, and whether between its own citizens transiently there, or between others, as good and lawful. There is no ground

A but this on which conflicts can be avoided. Otherwise we have the unseemly spectacle of the same persons differently mated in marriage in different countries—a spectacle abhorrent to the natural feelings of pure minds, and corrupting to all."

B The author is, no doubt, in this passage, referring to marriages recognised by Christendom, and he does not there deal with exceptions such as polygamous or incestuous marriages, etc., which he discusses further on in his work. Counsel for the husband, on the other hand, supported his argument by reference to s. 21 of PROFESSOR WESTLAKE'S treatise on PRIVATE INTERNATIONAL LAW, which is as follows:

C "It is indispensable to the validity of a marriage that the personal law of each party be satisfied as far as regards his capacity to contract it, whether absolute, in respect of age, or relative, in respect of the prohibited degrees of consanguinity or affinity."

D The learned author refers to certain cases in his note to that section, but they do not appear to me to support his proposition to an extent sufficient to cover the present case. The principal cases mentioned by him are *Brook v. Brook* (8), *Mette v. Mette* (4), and *Sottomayor v. De Barros* (2). The two former were cases of marriages contracted out of England, and in one of which both parties, and in the other one party, were held to have owed obedience to the Marriage Act, 1835 [rep. Marriage Act, 1949], and to have been unable to contract marriage in contravention thereof, though such marriage might have been valid in the country of celebration. The real ground of the decisions in those cases may perhaps be stated from the speech of LORD CAMPBELL in *Brook v. Brook* (8) where he says (9 H.L.Cas. at p. 214):

E "My opinion in this case does not rest on the notion of any personal incapacity to contract such a marriage being impressed by Lord Lyndhurst's Act [the Marriage Act, 1835] on all Englishmen, and carried about by them all over the world, but on the ground of the marriage being prohibited in England, as 'contrary to God's Law.'"

F These two cases were not looked at from the point of view of the courts of the country of celebration—the marriages might have been valid in their own country. Moreover, there is likely to be some confusion if this is not borne in mind, that where the judgements speak of essentials and forms those who decided these cases were looking at them from an English standpoint; but it may be observed that what may be regarded as form in this country might, in a foreign country, be regarded as an essential; for instance, in *Simonin v. Mallac* (5), and *Ogden v. Ogden* (6), the French courts held the marriages in those cases invalid from defect in what in this country is regarded as a matter of form, and in this country the marriages in both these cases were held valid. The difficult position in which the wife was placed in each of those cases was the result of a conflict of law on a matter of form. The third case above referred to—viz., *Sottomayor v. De Barros* (2), was a case in which, on the facts presented to the Court of Appeal, both parties were domiciled abroad, and could not intermarry, according to the law of their domicile, unless they obtained a Papal dispensation, but when that case came on for further ascertainment of the facts, it was found that the wife was domiciled abroad and the husband was domiciled in this country, and the marriage was supported by that eminent judge, LORD HANNEN. I think it is obvious from a perusal of his judgment in 5 P.D. 94, that the decision of the Court of Appeal, though binding upon him, was not in accordance with his views; and it may be noticed that that decision was discussed in *Ogden v. Ogden* (6), and is considered by MR. BISHOP contrary to the old ideas of the supremacy of English law on English soil.

I It may possibly be said that different considerations apply where both parties to a marriage are domiciled in a country where the laws forbid their marriage,

though it would be valid if they were domiciled in the country of the celebration, from those which should be applied where one party is domiciled in the country which forbids the marriage and the other in the country of celebration which allows it, and that whatever may be thought of the theoretical proposition upon which the Court of Appeal acted they guarded themselves from being considered as indicating that it was applicable to the latter case, for they expressly stated (3 P.D. at pp. 6, 7):

"Our opinion on this appeal is confined to the case where the contracting parties are, at time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied upon as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England on the ground of any personal incapacity not recognised by the law of this country."

The learned author, MR. WESTLAKE, whose treatise is above mentioned himself gives qualifying statements in ss. 16 and 22 of that work, for in s. 22 he states that an incapacity to marry of a penal nature or resulting from religious vows or orders will not be admitted in England on the ground of the personal law in consequence of the doctrine stated in s. 16, and in s. 16 he expresses himself thus:

"An incapacity existing by a foreign law of a penal or religious nature or so opposed to British principles, as, for example, is slavery, would be disregarded in England."

Further, it may be observed that in s. 23 he treats consent of parents or guardians as a matter of form only when by his personal law a party may, in some form or other, marry without such consent, though such a distinction was not really the ground of the decision in *Simonin v. Mallac* (5), which was dealt with on the broad ground that, by decree of the French court, the marriage was void, and the question considered was whether the marriage was to be judged of in England by the law of France or by the law of England; while in s. 25 he expresses himself to the effect that when, by his personal law, the party cannot marry in any form without a certain consent, the want of such consent will invalidate a marriage by him, notwithstanding he satisfies the *lex loci actus*. I confess that these views, and I say it with all respect to the learned author, seem to me to overlook that which I have already pointed out—viz., that it is one thing for the courts of this country to deal with matters of form when they are applying the law here to marriages effected abroad, and another thing when they are applying the English law to marriages which are effected in this country in a manner which is regarded by the courts of a foreign country as inadequate to constitute a proper marriage; for if in a foreign country a marriage is declared void for want of consent which we hold a matter of form only, what difference is there in substance between the position in such a case and the case where the consent is more than form? The unfortunate wife is in the same position in either case, and logically there seems to be only the choice between following our own law in each case or the foreign law. I am not aware of any case in which that choice has been in favour of foreign law where an inhabitant of this country has married a foreigner in England, nor am I able to satisfy myself that any principle which has ever met with recognition in the English courts would justify the choice being determined in that way in such a case. In some countries I believe the rules upon which justification is founded and exercised depend upon nationality rather than domicile, and in those countries the legislation purports to govern their subjects in certain respects even when in another country. For an instance of this see the provisions of the 3rd section of art. 1 of the French Civil Code, which ordains that the French laws relating to the conditions and privileges of persons are to govern Frenchmen,

A although residing in a foreign country. It is perhaps easier to understand why in such countries a personal law should be considered as following the individual, wherever he may be, than in the case where his position is merely regarded from the point of view of his domicile. But whether nationality or domicile be considered, why should another country in which the individual's act towards an inhabitant thereof takes place according to its laws, and has to be adjudicated upon, hold itself bound in its decisions to apply the law of the country foreign to it, and to hold that the individual has carried with him a personal law of incapacity not recognised by the law where the act takes place?

So far, however, as the present case is concerned, it is not necessary for me to refer in this judgment to the whole of the cases which were very fully considered in *Ogden v. Ogden* (6), or to the various textbook writers on the continent, in **C** America, and in England, upon the subject. For the decision of LORD HANNEN in *Sottomayor v. De Barros* (2) is, to my mind, decisive of the case in this court. In his judgment in that case he followed the broad reasons given in the judgment in *Simonin v. Mallac* (5). He quotes very fully from that judgment, and proceeds as follows (5 P.D. at p. 104):

D "Numerous examples may be suggested of the injustice which might be caused to our own subjects if a marriage was declared invalid, on the ground that it was forbidden by the law of the domicile of one of the parties. It is still the law in some of the United States that a marriage between a white person and a 'person of colour' is void. In some States the amount of colour which will incapacitate is undetermined. In North Carolina all are prohibited who are descended from negro ancestors to the fourth generation inclusive, though **E** one ancestor of each generation may have been a white person (PEARSON ON MARRIAGE, s. 308). Suppose a woman domiciled in North Carolina, with such an amount of colour in her blood as would arise from her great-grandmother being a negress, should marry in this country, should we be bound to hold that such a marriage was void? Or suppose a priest or a monk domiciled in a **F** country where the marriage of such a person is prohibited were to come to this country and marry an Englishwoman, could the court be called on at the instance of the husband to declare that the marriage was null, and to give a legal sanction to his repudiation of his wife? MR. DICEY, in his excellent treatise on DOMICIL, at p. 223, answers these questions in the negative, and places these two cases under this head:

G 'A marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which, though enforced by the law of his or her domicile, is of a kind to which our courts refuse recognition.'

But on what principle are our courts to refuse recognition if not on the basis of our laws? If this guide alone be not taken it will be free to every judge to indulge his own feelings as to what prohibitions by foreign countries on the capacity to contract a marriage are reasonable. What have we to do, or, to be more accurate, what have English tribunals to do with what may be thought in other countries on such a subject? Reasons may exist elsewhere why coloured people and whites should not intermarry, or why first cousins should not. But what distinction can we properly draw between these cases, and why are they not both to be regarded in the same light here, namely, that as **I** they are alike permitted by our laws, we cannot recognise their prohibition by the laws of other countries as a reason why we should hold that such marriages cannot be contracted here."

The marriage in that case was upheld by LORD HANNEN, and the petition for nullity in the suit was dismissed.

The only substantial distinction which may be noticed with regard to the position in that case and the present is, that in that case the husband was domiciled in England, whereas in the present case the husband is domiciled abroad. It has

been suggested by a learned writer, Mr. F'OOTER (PRIVATE INTERNATIONAL JURISPRUDENCE (2nd Edn.), p. 107), that that distinction makes a very substantial difference; but I cannot myself find in LORD HANNEN's judgment that he would have come to a different conclusion if the domicile of the husband had been foreign, and the domicile of the wife English, for the reasons which he gives do not depend on any such distinction, and I think the principles which he lays down are binding upon me, and that I cannot, even if I had any different view, come to a conclusion in this case that the suggested distinction ought to produce a different result. *Ogden v. Ogden* (6) to which reference has been made, only dealt with the question of want of consent required by French law to a marriage in England, where such consent was not required, but the reasoning in that case tends to support the view which I am taking in the present case, and to show that a man marrying an English girl domiciled in this country does not carry with him a disability of a personal character imposed by the law of his own country which would prevent him from entering into a marriage with her in this country, the marriage being one which would be recognised by the law of England as valid if solemnised between persons domiciled here. India, for the purposes of the jurisdiction of the courts of this country, is a foreign country, though the case being dealt with is the case of a British subject from British India marrying an English girl with due form in England, and now setting up in objection to the marriage that he has a personal disqualification when in India. Ought he to be allowed to do so? Ought a foreigner domiciled abroad who comes to this country and here marries in due form, according to English law, another person domiciled in England, to be allowed to assert that he carries about with him while here the burden of an incapacity, imposed by the laws of the foreign domicile, to do that which he has done voluntarily and in due form according to the laws of England, and to repudiate his marriage on the ground that he is incapable of doing what he has done; and ought our courts to support such an assertion and repudiation with the consequent effects on the position of the wife and the legitimacy of her child? To my mind the answer should be "No." This, of course, applies with equal, if not greater, force to a British subject domiciled abroad.

If, then, the marriage is valid in this country, the question arises whether the wife can sue for judicial separation, and the benefits which she might derive from a decree to that effect. Her rights in this respect do not depend upon any question of domicile. This has been decided in *Armstrong v. Armstrong* (7). Both parties to the present suit were within the jurisdiction at the time of its commencement, and, in my opinion, the wife is entitled to a decree of judicial separation, and I pronounce a decree accordingly, with costs, and the custody of the child.

Solicitors: *Fisher & Stephens; Wilson & Co.*

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

DOMINION NATURAL GAS CO. v. COLLINS SAME v. PERKINS AND OTHERS

[PRIVY COUNCIL (Lord Macnaghten, Lord Dunedin, Lord Collins and Sir Arthur Wilson), July 8, 9, 30, 1909]

[Reported [1909] A.C. 640; 79 L.J.P.C. 13; 101 L.T. 359;
25 T.L.R. 831; C.R. [1909] A.C. 236].

Negligence—Dangerous article—Peculiar duty to take precaution—Installation in building—Gas in railway repair shop—Safety valve with emission into shop instead of open air.

In the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed on those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that an accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then the defendant will not be liable.

Accordingly, where a gas company installed in a repair shop of a railway company a plant for the supply of gas and negligently fitted a safety valve with an emission into the shop instead of into the open air, and there was an explosion, one of the railway company's servants being killed and another injured,

Held: the gas company was liable to the dependants of the dead man and to the injured man in damages for negligence.

Notes. Considered: *Blacker v. Lake and Elliot* (1912), 106 L.T. 533; *Till v. Oakville* (1914), 31 O.L.R. 405. Applied: *Skubiniuk v. Hartmann* (1914), 28 W.L.R. 518. Considered: *Ruoff v. Long*, [1916] 1 K.B. 148; *Toronto Hydro-Electric v. Toronto Rail. Co.* (1919), 45 O.L.R. 470. Applied: *Pietrzak v. Rochelau*, [1928] 1 W.W.R. 428. Considered: *Bottomley v. Bannister*, [1931] All E.R. Rep. 99; *Donoghue (or McAlister) v. Stevenson*, [1932] All E.R. Rep. 1. Applied: *London Guarantee and Accident Co. v. N.W. Utilities*, [1934] 3 W.W.R. 641; *Doughty v. Duncannon*, [1938] O.R. 684. Considered: *Duncan v. Cammell Laird & Co.*, *Craven v. Cammell Laird & Co.*, *Duncan v. Wailes Dove Bitumastic Ltd.*, *Craven v. Wailes Dove Bitumastic, Ltd.*, [1943] 2 All E.R. 621; *Travers v. Gloucester Corpn.*, [1946] 2 All E.R. 506. Applied: *Ball v. L.C.C.*, [1949] 1 All E.R. 1056; *Philco Radio and Television Corpn. of Great Britain, Ltd. v. Spurling, Ltd.*, [1949] 2 All E.R. 882. Considered: *Beckett v. Newalls Insulation Co., Ltd.*, [1953] 1 All E.R. 250. Applied: *Prosser & Son, Ltd. v. Levy*, [1955] 3 All E.R. 577; *Crits v. Sylvester*, [1956] O.R. 132; *Noddin v. Laskey*, [1956] S.C.R. 578; *Midgley v. Prescesky* (1957), 22 W.W.R. 224. Referred to: *White v. Steadman*, [1913] 3 K.B. 3; *Jefferson v. Derbyshire Farmers*, [1920] All E.R. Rep. 129; *Montreal City v. Watt and Scott*, [1922] 2 A.C. 555; *Kelliher v. Smith*, [1931] S.C.R. 672; *Dozois v. Pure Spring Co.*, [1935] S.C.R. 319; *Grant v. Australian Knitting Mills, Ltd.*, [1935] All E.R. Rep. 209; *North-Western Utilities, Ltd. v. London Guarantee and Accident Co.*, [1935] All E.R. Rep. 196; *Howard v. Furness Houlder Argentine Lines, Ltd. and Brown, Ltd.*, [1936] 2 All E.R. 78; *Snyder v. Moncton Electricity Co.*, [1936] 2 D.L.R. 81; *Burfitt v. Kille*, [1939] 2 All E.R. 372; *Paine v. Colne Valley Electricity Supply Co.*, [1938] 4 All E.R. 803; *McFadyen v. Harvey* [1941] O.R. 90; *McSweeney v. Windsor Gas Co.*, [1942] O.R. 140; *Yachuk v. Oliver Blais Co.*, [1946] S.C.R. 1; *R. v. Laperriere*, [1946] S.C.R. 415; *Budgeon v. Harbour View Hospital*, [1947] 2 D.L.R. 388; *Salamandick v. Canadian Utilities, Ltd.*, [1947] 2 D.L.R. 689; *Jones v. Shafer*, [1948] S.C.R. 166.

As to negligence in relation to dangerous things, see 28 HALSBURY'S LAWS (3rd Edn.) 56-58; and for cases see 36 DIGEST (Repl.) 79 et seq.

Cases referred to:

- (1) *Dixon v. Bell* (1816), 5 M. & S. 198; 1 Stark. 287; 105 E.R. 1023; 36 Digest (Repl.) 80, 431.
- (2) *Thomas v. Winchester* (1852), 6 N.Y.R. 397.
- (3) *Parry v. Smith* (1879), 4 C.P.D. 325; 48 L.J.Q.B. 731; 41 L.T. 93; 43 J.P. 801; 27 W.R. 801; 36 Digest (Repl.) 81, 433.

Also referred to in argument:

Earl v. Lubbock, [1905] 1 K.B. 253; 74 L.J.K.B. 121; 91 L.T. 830; 53 W.R. 145; 21 T.L.R. 71; 49 Sol. Jo. 83, C.A.; 36 Digest (Repl.) 107, 532.

Burrows v. March Gas Co. (1870), L.R. 5 Exch. 67; 39 L.J.Ex. 33; 22 L.T. 24; 18 W.R. 348; affirmed (1872), L.R. 7 Exch. 96; 41 L.J.Ex. 46; 26 L.T. 318; 20 W.R. 493, Ex. Ch.; 36 Digest (Repl.) 34, 156.

Rapson v. Cubitt (1842), 9 M. & W. 710; 11 L.J.Ex. 271; 6 Jur. 606; 152 E.R. 801; 34 Digest 31, 92.

Appeals by the defendants in the actions by special leave from a decision of the Court of Appeal for Ontario (MOSS, C.J., OSLER, MACLAREN, MEREDITH, JJ.), reported 13 O.W.R. 165, affirming a judgment of FALCONBRIDGE, C.J., at the trial.

The actions were brought by the respondent Collins, and by the representatives of one Perkins, deceased, against the appellant company to recover damages for an explosion of gas in the repairing shops of the Toronto, Hamilton, and Buffalo Rail. Co. by which Collins was injured and Perkins was killed, the two men being at the time in the employment of the railway company.

Sir R. Finlay, K.C., and *Lynch Staunton, K.C.* (of the Canadian Bar) for the appellants.

Martin, K.C., and *Farmer, K.C.* (both of the Canadian Bar), for the respondents.

July 30, 1909. **LORD DUNEDIN.**—The defendants, the Dominion Natural Gas Co., recover natural gas from certain gas-bearing strata situated at a considerable depth below the surface of the ground and distribute this gas as a commercial product. In order to obtain a wayleave for their main, they entered into a contract with the Toronto, Hamilton, and Buffalo Rail. Co., of which one of the terms was that they should supply the railway company with gas at reduced rates at certain buildings belonging to the railway company, and should furnish meters and regulators for the gas so supplied. The railway company wished to have a supply, and the gas company installed a supply plant for the purpose at the repair shops of the railway company, in the city of Hamilton. The gas, as it issues from the ground, is at a very high pressure. This pressure is reduced by a transforming device, before the gas is admitted to the mains. But the pressure in the mains is still too high for actual working, and it is, therefore, necessary still further to reduce the pressure before the gas is admitted to the burning jets, the ultimate pressure desirable being that of a few ounces, whereas the pressure in the mains is reckoned in pounds. This is effectuated by means of a very simple and ingenious regulator. It may be described as follows. The gas from the service pipe is admitted into a chamber with an exit at the other side, and this chamber can be closed against the passage of the gas by means of a door working after the fashion of a portcullis. On the exit side the pipe branches; one branch, the direct one, going to the burners, the other, which forms part of the regulator, being taken vertically upwards and then bent back so as to fill a chamber situate vertically immediately above the portcullis. This chamber is divided into two parts horizontally by a diaphragm of indiarubber arranged on a metal frame. The lower surface of the diaphragm connects with a piston rod, which is free to move up and down and is attached at the lower end to the top of the portcullis door. In the side of the piston rod, about the middle, there is a slot into which is inserted the end of a lever supported on a fixed fulcrum. On the other end of the lever is a sliding weight, so that by receding the weight from, or approaching it to, the

A fulcrum, the upward pressure of the end of the lever which is in the slot can be increased or diminished. The apparatus then works as follows. The weight on the lever, which, of course, tends to keep the portcullis door open, is adjusted at the number of ounces pressure required. The portcullis door being open, the gas is admitted at the high pressure. The moment, however, it has passed through the chamber, it goes, not only to the burners, but also up the vertical pipe, and gains admission to the top of the diaphragm. Its pressure being greater than is necessary to overcome the upward pressure effected by the lever and weight, it depresses the diaphragm and the piston rod, and gradually shuts the portcullis, till the opening becomes so small that the pressure of the system is reduced and equalises itself. Inasmuch, however, as at the first moment of admission there may be a strong rush of gas before the regulator action has time to work, and also in order to provide for any sticking of the portcullis, there is an extra precaution employed by means of a safety valve inserted at the angle where the vertical pipe turns backwards towards the diaphragm chamber. The valve is a simple weight valve, the pressure being, of course, calculated at a little greater than the working pressure of the system.

The gas company installed this system in the blacksmith's shop, an inclosed chamber. It seems to be usual, and is obviously conducive to safety, to put a pipe on the emission nozzle of the safety-valve, and take the outlet of the pipe to the open air. The company, however, did not do so, but simply allowed the emission nozzle of the safety-valve to discharge, when it acted, into the air of the chamber. The whole system was installed and worked, so far as is known, well for upwards of a year. It was from time to time inspected by the workmen of the gas company. On Nov. 1, 1906, the plaintiff Collins and the deceased Perkins, whose representatives are the other plaintiffs, being workmen of the railway company, and having charge of the boilers which are heated by the gas, found that the gas was not coming easily to the boilers. They went into the chamber and found that there had been some escape of gas. They then went away, but shortly afterwards returned. This time, on opening the door, or a few seconds after, they were met with a rush of gas, and the gas caught fire from the jets of the boilers. There was an explosion, and Perkins was killed and Collins injured. The plaintiffs sued both the railway company and the gas company for damages. The railway company denied liability on the ground that there was no negligence on their part. They had employed capable persons in the gas company to install the machine, and, if there was any fault in the system, it was the gas company who were to blame. The gas company denied liability on the ground that the system as installed was proper and safe, and that the escape which took place must have been due to improper practices on the part of the railway company's servants for which they were not responsible. The machine itself was examined, and it was found that there was an accumulation of dirt which prevented the portcullis door closing tight. It was also proved that the railway company's servants had inserted a tap valve with a controlling cock in the pipe just before it enters the regulator—i.e., on the high-pressure side; also that some workers of the railway company, annoyed by the noise which it made, had put a punch on top of the safety-valve and hammered it.

In this state of matters, the learned judge at the trial put certain specific questions to the jury, which, with the answers, were as follows:

I "1. Was the injury to the plaintiff Collins and to Perkins caused by any negligence of the defendants, the railway company?—A. Yes. 2. If so, wherein did such negligence consist?—A. By the company allowing their men to tamper with the gas plant. 3. Was the injury to the plaintiff Collins and to Perkins caused by any negligence of the defendants, the gas company?—A. Yes. 4. If so, wherein did such negligence consist?—A. By not running a pipe up through the roof. 5. If you find the accident was caused by the escape of gas, from which valve do you find the gas escaped?—A. Safety valve."

They also, by their answers to other questions (which it is unnecessary to quote), negatived contributory negligence. Upon these answers the trial judge found for the plaintiffs against the gas company, but dismissed the suit as against the railway company. The gas company appealed, and the plaintiffs resisted the appeals, but acquiesced in the decision absolving the railway company. The Appeal Court affirmed the judgment of the trial judge in each case, and the present appeals are against these judgments.

To come now to the position of the gas company. The gas company were not occupiers of the buildings on which the accident happened. Further, there being no relation of contract between the company and the plaintiffs, the plaintiffs cannot appeal to any defect in the machine supplied by the defendants which might constitute breach of contract. There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth to install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet *Dixon v. Bell* (1), *Thomas v. Winchester* (2), and *Parry v. Smith* (3) are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail.

In applying these principles to the facts in hand, the basis of consideration must be sought in the findings of the jury, unless it can be said of these findings that they are incapable of support by the evidence. The jury has affirmed negligence on the part of the gas company in respect that they installed the safety-valve with an emission direct into the shop instead of into the open air. This finding seems to their Lordships not only capable of support upon the evidence, but really reasonable in itself. For the safety-valve by its very existence was meant to work from time to time; and the frequency of its working would seem to depend on causes which might be quite independent of negligence—e.g., sudden pressures of gas, and also accumulations of dirt which would prevent the portecullis closing tight. When the valve did work, gas was necessarily emitted, and it would seem both an easy and a reasonable precaution that that emission should be led to the open air, where it would be harmless, rather than put into the closed chamber where it might become a source of danger. That being so, have the defendants been able to show affirmatively that the true cause of the accident was the conscious act of another volition—i.e., the tampering with the machines by the railway company's workmen? In truth, their Lordships think that on the evidence the true cause of the escape is left in doubt. It is found by the jury, and their Lordships think rightly, that it took place at the safety-valve, and not at the valve put in by the railway company's workmen on the high-pressure side. But the escape at the safety-valve itself could equally have been caused either (i) by the destruction of the valve as a tight-fitting valve owing to the hammering, or, in other words, by the negligence of the railway company's workmen; or (ii) by the fact that the portecullis had got clogged with dirt, which, by preventing it from shutting, would allow of a constant pressure greater than the restraining power of the safety-valve. There is no evidence to show that the accumulation of dirt was due to the action of the railway company's workmen. It was indeed suggested that, in putting in the tap valve, they may have broken a wire gauze screen which was found with a hole in it, and was meant to protect the portecullis chamber from

A dirt. But first, this is only a suggestion unsupported by actual testimony, and, second, it is certain that it is only a question of time, the gauze screen being unable to prevent a certain amount of dirt gaining admission, and the dirty state of the portcullis chamber being either a natural result to protect against which the safety-valve was in one aspect designed, or the result of the negligence of the gas company's servants, whose duty it was from time to time to inspect the apparatus and see that it was in good order. Accordingly their Lordships hold that the defendants, the gas company, have failed to show that the proximate cause of the accident was the act of a subsequent conscious volition, and that, there being initial negligence found against them, the plaintiffs are entitled to recover. Their Lordships will, therefore, humbly advise His Majesty to dismiss these appeals, and to affirm the judgments of the Court of Appeal. The appellants will pay one set of the respondents' costs of the appeals, but the taxing officer will allow such additional items (if any) as are, in his opinion, justified by the circumstances of the case.

Solicitors: *Harrison & Powell; R. A. Daniell.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

BAKER v. COURAGE & CO.

[KING'S BENCH DIVISION (Hamilton, J.), October 19, 1909]

[*Reported* [1910] 1 K.B. 56; 79 L.J.K.B. 313; 101 L.T. 854]

Limitation of Action—Mistake—Claim for repayment of money paid under mistake—Need of demand for repayment.

Where money has been paid under a mistake of fact common to both parties, and the person paying the money brings an action to recover the money which he has so paid, notice by him to the payee of the discovery of the mistake and a demand for repayment are not necessary to complete the cause of action for the return of the money, so as to enable the person suing for the return of the money to say that the cause of action was not complete and the statute did not begin to run against him until the discovery of the mistake had been notified to the other party.

Notes. Considered: *Jones v. Waring and Gillow*, [1925] 2 K.B. 612; *Re Mason*, [1929] 1 Ch. 1; *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding U.D.C.*, [1937] 3 All E.R. 335. Referred to: *Re Robinson, McLaren v. Public Trustee*, [1911-13] All E.R.Rep. 296; *Re Blake, Re Minahan's Petition of Right*, [1931] All E.R.Rep. 372; *Re Diplock's Estate, Diplock v. Wintle* (1947), 177 L.T. 40; *Phillips-Higgins v. Harper*, [1954] 1 All E.R. 116.

As to the limitation of an action for mistake, see 24 HALSBURY'S LAWS (3rd Edn.) 320, 321; and for cases see 32 DIGEST 337. For Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

- (1) *Freeman v. Jeffries* (1869), L.R. 4 Exch. 189; 38 L.J.Ex. 116; 20 L.T. 533; 1 Digest (Repl.) 69, 524.
- (2) *Spackman v. Foster* (1883), 11 Q.B.D. 99; 52 L.J.Q.B. 418; 48 L.T. 670; 47 J.P. 455; 31 W.R. 548, D.C.; 32 Digest 344, 271.

- (3) *Wilkinson v. Verity* (1871), L.R. 6 C.P. 206; 40 L.J.C.P. 141; 19 W.R. 604; sub nom. *Williamson v. Verity*, 24 L.T. 32; 32 Digest 327, 136.
- (4) *Skyring v. Greenwood* (1825), 4 B. & C. 281; 6 Dow. & Ry.K.B. 401; 107 E.R. 1064; 1 Digest (Repl.) 501, 1385.

Also referred to in argument :

- Brooksbank v. Smith* (1836), 2 Y. & C.Ex. 58; Donnelly, 11; 6 L.J.Ex. Eq. 34; 160 E.R. 311; 32 Digest 518, 1758.
- Gibbs v. Guild* (1881), 8 Q.B.D. 296; 51 L.J.Q.B. 228; 46 L.T. 135; on appeal (1882), 9 Q.B.D. 59; 51 L.J.Q.B. 313; 46 L.T. 248; 30 W.R. 591, C.A.; 32 Digest 526, 1819.
- Kelly v. Solari* (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 6 Jur. 107; 152 E.R. 24; 35 Digest 151, 487.

Action tried by HAMILTON, J., without a jury.

The plaintiff claimed to recover from the defendants the sum of £1,000, being the balance of moneys had and received by the defendants to the use of the plaintiff in the terms of a deposit receipt dated Jan. 22, 1908, in the following form :

"Received of Mr. W. F. Baker the sum of £2,000 on deposit at the rate of 4 per cent. per annum, subject to fourteen days' notice of withdrawal. This receipt is not transferable or negotiable. For Courage & Co., Ltd., H. Ernest Courage, Director."

Of this sum £1,000 had been withdrawn in 1908 and January, 1909. In the alternative, the plaintiff claimed the £1,000 as being the balance due upon an account stated, and he also claimed interest on the £1,000 at 4 per cent. from Jan. 22, 1909.

In February, 1896, the plaintiff, who then held a public-house at Tottenham for the residue of a long lease less the last three days subject to a mortgage to the defendant company, acquired the freehold reversion from a Mr. John Green, £1,000 of the purchase money being left by Mr. Green on mortgage of the freehold. In March, 1896, the plaintiff agreed to sell to the defendant company for the sum of £18,000 his freehold and leasehold interests in the premises, together with the stock-in-trade and effects and the licences and policies held in connection therewith at a valuation, one firm of solicitors acting for both parties, and, in order to facilitate the completion of the transaction the defendants on Mar. 19, 1896, paid to the plaintiff on account of the agreed purchase money £1,000 to pay off Mr. Green's mortgage. This loan of £1,000 was not made upon any security, as it was expected that it would be repaid in a few days. The necessary valuations were made by brokers employed by the plaintiff and the defendants respectively, and these brokers concurred in a statement of settlement to the effect that, after bringing into account the money due to the defendants on the mortgage of the leasehold and other payments made by the defendants to or for the plaintiff, the balance due to the plaintiff was £9,000. In making out this statement the brokers omitted to take into account against the plaintiff the £1,000 which had been given to him by the defendants for the purpose of paying off Mr. Green's mortgage. If they had taken this £1,000 into account, it would have reduced the balance due to the plaintiff from £9,000 to £8,000. The parties accepted the brokers' statement of the figures, and the fact that the £1,000 had been omitted remained unnoticed. On Mar. 31, 1896, the purchase was completed, the £1,000 before mentioned was still overlooked, and the defendants paid the plaintiff the sum of £9,000, the balance of the purchase money of £18,000; the plaintiff, who appeared to be an illiterate man, received that sum in good faith. On April 1, the plaintiff agreed with the defendants to deposit with them the £9,000, and he deposited it with them accordingly at interest. The plaintiff deposited further sums from time to time with the defendants and drew out portions of the money lying on deposit, and in January, 1909, there was then a balance of £1,000 remaining on deposit. The plaintiff gave notice to the defendants to draw out that balance. A short time

A before this notice of withdrawal was given, the defendants, who wished to know what the premises had cost them, instructed their solicitor to look into the documents relating to the purchase, and on examination it was discovered that they had by mistake paid the plaintiff £1,000 too much. They then refused to pay the plaintiff the £1,000 which they held on deposit for him, and the plaintiff brought the present action to recover that £1,000. The defendants, in their defence, said that on Mar. 31, 1896 (the date of completion of the purchase), by mistake the plaintiff had received £1,000 from them for which they received no consideration; that the mistake was not discovered until early in 1909, when the plaintiff was informed of the mistake and was asked to refund the £1,000, which he refused to do; and that they were not indebted to the plaintiff in any sum, they having repaid him the sum of £8,000. They claimed to set off that sum of £1,000 which by mistake they had overpaid the plaintiff against the £1,000 due from them to the plaintiff on the deposit, and alternatively they counterclaimed payment of the £1,000, and interest on the same, which had been paid by mistake. The plaintiff in his reply said (inter alia) that at the completion of the purchase there was a final settlement of all outstanding accounts, and that he received from the defendants a sum representing the agreed balance due to him after deducting divers sums claimed from him by the defendants; he denied that there was any mistake on the part of the defendants; and he contended that the defendants' set-off and counterclaim were barred by the Statute of Limitations (21 Jac. 1, c. 16)—the Limitation Act, 1623.

Danckwerts, K.C., and Mallinson for the defendants.

Boxall, K.C., and R. E. Moore for the plaintiff.

E **HAMILTON, J.**, held on the first point argued, that in the circumstances of the case time under the Statute of Limitations began to run at the date of the payment and not at that of the discovery of the mistake. That point does not now call for report in view of the provision in the Limitation Act, 1939, s. 26 (c), that where an action is brought for relief from the consequences of a mistake the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it. **HIS LORDSHIP** continued: Then it was said that, even though the Statute of Limitations would have applied to the recovery of the money independently of the date at which the mistake was found out, there is no cause of action complete until there is a duty to refund, because the cause of action is in the nature of a breach by the person who has received the money of a duty to hand over money which *ex æquo et bono* does not belong to him but belongs to the person who has paid the money; that there can be no breach of the duty when the fact of the existence of the duty has not been brought to the person's attention; and, therefore, before a claim can be made for the return of money paid under a mistake of fact the person claiming the return must complete his cause of action by making demand upon the recipient of the money for its return and by informing him of the mistake. As far as this case is concerned I think that is fallacious. It is clear that if it is right the effect of it would be that a person might honestly, if carelessly, postpone the making of his demand and the notification of the discovery of his mistake for a still further period and yet not have the statute run against him because he had forborne to do the act which he had to do himself to complete the existence of his cause of action. It seems to me, however, that the cause of action in this case was complete, quite independently of any notification of the discovery. The mistake was one which the plaintiff had made as well as the defendants. The plaintiff, knowing that money had been found by somebody to pay his debt and expecting and knowing that the transfer of the money from his hands to the party who had found that sum would take place on the completion of the purchase, believed that it had been done, and he intended it to be done, and he took the £9,000 under the mistaken belief that it had been done.

In these circumstances it does not appear to me that any notification of the

existence of the mistake was necessary to raise in the plaintiff the duty to pay the money back. It was money had and received by the plaintiff to the use of the defendants, because it was money for the payment of which there was no consideration, and which was only handed to him under a mistake. It is quite true that one or two cases were cited on which an argument to the contrary was founded. *Freeman v. Jeffries* (1) was a decision which would bind me if the facts were the same, for in the language of MARTIN and BRAMWELL, BB., the action, which was an action to recover money paid by mistake, was held to be not maintainable without a demand, that is, an intimation from the plaintiff to the defendant that the money which had been paid was paid under such circumstances as rendered a part or the whole of it recoverable back. But in that case at the time the plaintiff gave the defendant a promissory note for the money, neither the plaintiff nor the defendant knew anything at all about the mistake. The mistake was purely one made by two valuers who made a valuation, and, as I read the facts, it was not until the plaintiff came to consult another valuer on the re-sale of the property, that that other valuer looked into the accounts and discovered that the two former valuers employed on the occasion in question had omitted to take into account certain customary or other deductions, with the result that the valuation—as the plaintiff alleged—included items which ought not to have been so included; but no complaint with respect to the valuation was made by him to the defendant until afterwards, and then no intimation was given of the nature of the grievance, and subsequently, after he knew of the valuers' mistake and the defendant did not know of it, he paid to the defendant the amount of the promissory note and afterwards brought an action to recover the money. In those circumstances it was held that the plaintiff could not recover the money, by some members of the court on the ground that the valuers' award was final and that the parties were bound by the mistake of the valuers, who were in the position of arbitrators; and by MARTIN and BRAMWELL, BB., on the ground that the action was not maintainable without a demand. But it is, I think, quite clear that the court were deciding that case without any reference to the possibility of a case in which the party who paid the money and the party who received the money were both under a mistake about it at the time the money was paid. If we read the reasoning of BRAMWELL, B. (L.R. 4 Exch. at pp. 200, 201), it seems to me that his consideration with regard to the arising of the duty on the part of the defendant to repay is founded on the idea that the defendant who had received the money was never under any mistake at all, that he had received what he supposed to be right and what he was told was right, and had been no party to there being any mistake, and, therefore, could be under no duty to repay the money until he knew that there was something to repay. Therefore, it does not appear to me that *Freeman v. Jeffries* (1) advances the argument for the defendants.

Then it was said that there is authority for the proposition that in all cases, even of detainee, where the return is demanded of something which the defendant is not entitled to keep, it is necessary to complete the cause of action by making the demand. When we come to look at the authorities on that point there are two classes of cases. There are cases where there is a conversion or detention, wrongful ab initio. In these cases of conversion the statute clearly runs from the time of the wrongful act, and not from the time of the true owner's knowledge of it. There are, on the other hand, cases in which the possession which is sought to be regained arises upon a deposit or contract of bailment for safe custody or otherwise, where the duty under the contract is to retain the thing until demand is made for its delivery; and there is then no cause of action for detainee until the person has called upon the custodian or bailee to return that which up to that time his contract of bailment obliged him to keep.

There is also the somewhat intermediate case of *Spackman v. Foster* (2), where the possession of certain title deeds by the defendant in respect of which the action of detainee was brought, in the first instance was not proved to be lawful. The defendant who received the title deeds, in the first instance received them from

A someone who purported to be entitled to pledge them; he lent his money upon them in good faith, and from that time he had held them as an equitable mortgagee by deposit of the title deeds. The view there adopted by the court was that until the defendant was told that he was not entitled to the deeds, there was no adverse possession of them as against the plaintiffs; there was nothing but a custody of them under two rights, one the right of a mortgagee who lent the money, and the other the right of the mortgagee who, subject to his being off, is bound to return the deeds to his mortgagor. Therefore, in that case the time when the cause of action completely arose was when the true owners of the deeds determined that which up to that time was neither an adverse nor an unlawful holding of them, by saying: "The deeds are really ours and we want them." I do not think that case has any application to the present one.

C *Wilkinson v. Verity* (8), which was cited, was detinue pure and simple. It was detinue by churchwardens against a clergyman who had sold the communion plate. The case shows that for detinue pure and simple, where the taking was originally improper, no fresh demand is requisite, but the Statute of Limitations runs from the taking or the holding or the dealing with the thing is unlawful. Hence, in that case, although the clergyman had sold the communion plate before demand and refusal, and he still remained under the duty to deliver up the goods to the churchwardens when called on, the statute did not run to protect him from the date of the sale, but ran only from the date of the demand and refusal.

I think that disposes of the legal arguments that were advanced. It appears to me that the Statute of Limitations bars both the set-off and the counterclaim of the defendants; in fact no distinction has been made between the set-off and the counterclaim. If it was necessary to do so, I should certainly consider that, had this been a question of the application of the equitable rules and not a mere interpretation of the Statute of Limitations, there has been such laches on the part of the defendants as would in fact prevent them from any longer claiming to rectify this mistake. It was suggested in the course of the argument that the evidence given by the plaintiff, which I accept as true, that he is entering upon financial transactions on the faith of this £1,000 belonging to him, and he will be left in the lurch if it does not, would of itself afford him an answer to the defendants' case, but I think that that is erroneous. The nearest case I know of having reference to an argument of that kind is *Skyring v. Greenwood* (4), which, when we come to look at it, was really a case of estoppel. In that case the paymasters in a military corps had told their customer—an officer in the corps—that he was entitled to pay at such and such a scale, and credited him in their books accordingly, and they allowed him to draw for that amount, although they themselves were informed and knew that under the amended regulations he was no longer entitled to so full a scale of pay. Years elapsed before they told him that they had been crediting him in error, and when they tried to get the money back it was held that they were not entitled to get it back. But the ground of that decision was that as his agents they were under a duty to communicate to him the effect of the regulations upon the pay which they were receiving on his behalf, and they were consequently estopped by their own conduct from rectifying a mistake which they had the means of knowing to be a mistake, and which they nevertheless assured him was quite correct. I do not, therefore, think that the circumstance that the plaintiff has erroneously thought himself to be entitled to this £1,000 would of itself give an answer to the defence and the counterclaim. There must, therefore, be judgment for the plaintiff for the amount of his claim, with costs, and there will also be judgment for the plaintiff on the defence and counterclaim.

Judgment for plaintiff.

Solicitors: Nye, Moreton & Clowes, for J. K. Nye & Donne, Brighton; Bayley, Adams, Hawker & Noble.

[Reported by W. W. ORR, ESQ., Barrister-at-Law.]

Re COTTRELL. BUCKLAND v. BEDINGFIELD

[CHANCERY DIVISION (Warrington, J.), January 15, 1910]

[Reported [1910] 1 Ch. 402; 79 L.J.Ch. 189; 102 L.T. 157]

Annuity—Insufficiency of estate—Valuation of annuity—Payment of pecuniary legacies in full.

A testatrix, by her will, after giving pecuniary legacies, bequeathed an annuity to her husband for his life, and directed her trustees to set apart and invest such sum as would produce income sufficient for the annuity and to apply the income, or, if necessary, the corpus, of the fund so appropriated in payment of the annuity, which sum, on the dropping of the annuity, was to fall into and form part of her residuary estate. She then devised and bequeathed the residue of her real and personal estate to her trustees on trust for sale and conversion and for payment of her funeral and testamentary expenses, debts and legacies, and to invest such moneys as should remain on trust for her son. Her estate was insufficient to pay the pecuniary legacies and to set aside a sum sufficient to produce the amount of the annuity, but it was sufficient to pay the pecuniary legacies in full and the value of the annuity as at the date of her death.

Held: the proper course for the trustees was to have the annuity valued as at the death of the testatrix according to the government tables, and to pay the amount of such valuation to the annuitant or invest it in the purchase of an annuity, and to pay the pecuniary legacies in full.

Notes. Applied: *Re Dempster, Borthwick v. Lovell*, [1914-15] All E.R. Rep. 998; *Re Richardson, Richardson v. Richardson*, [1914-15] All E.R. Rep. 484. Considered: *Re Cox, Public Trustee v. Eve*, [1938] Ch. 556. Applied: *Re Vardon, Brown v. Vardon*, [1938] 4 All E.R. 306. Considered: *Re De Chassiron, Lloyds Bank, Ltd. v. Sharpe*, [1939] 3 All E.R. 321. Explained: *Re Hill, Westminster Bank, Ltd. v. Wilson*, [1944] 1 All E.R. 502. Referred to: *Re Ellis, Nettleton v. Crimmins*, [1934] All E.R. Rep. 58.

As to abatement of legacies and annuities, see 16 HALSBURY'S LAWS (3rd Edn.) 330 et seq.; and for cases see 23 DIGEST (Repl.) 423 et seq.

Cases referred to:

- (1) *Wright v. Callender* (1852), 2 De G. M. & G. 652; 21 L.J.Ch. 787; 19 L.T.O.S. 308; 16 Jur. 647; 42 E.R. 1027, L.J.J.; 23 Digest (Repl.) 428, 4986.
- (2) *Wroughton v. Colquhoun* (1847), 1 De G. & Sm. 357; 11 Jur. 940; 63 E.R. 1103; 23 Digest (Repl.) 427, 4984.
- (3) *Re Grant, Walker v. Martineau* (1888), 52 L.J.Ch. 552; 48 L.T. 937; 31 W.R. 703; 39 Digest 173, 633.
- (4) *Re Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair*, [1897] 1 Ch. 921; 66 L.J.Ch. 514; 76 L.T. 452; 45 W.R. 596; 23 Digest (Repl.) 427, 4981.

Also referred to in argument:

- Miner v. Baldwin* (1853), 1 Sm. & G. 522; 17 Jur. 823; 65 E.R. 229; 39 Digest 144, 393.
- Gratrix v. Chambers* (1860), 2 Giff. 321; 7 Jur.N.S. 960; 66 E.R. 134; 23 Digest (Repl.) 427, 4980.

Adjourned Summons

Harriet Jane Cottrell, the wife of Charles Walter Cottrell, by her will made in 1907, after appointing two persons executors and trustees, gave each of them £25, and also gave a legacy of £100 to her father, G. R. M. Bedingfield, and one of £50 to her cousin, Annie Mary Brownen, and she continued:

"I bequeath to my dear husband, Charles Walter Cottrell, an annuity of £1 a week during his life, and I direct my trustees to appropriate and set apart

- A and invest such sum of money as will when invested produce by the income thereof an annual sum equal to the amount of the said annuity, and to apply the income or (if necessary) the corpus of the fund so appropriated in payment of the said annuity, which sum shall on the dropping of the said annuity fall into and form part of my residuary trustee estate."
- B The testatrix then devised and bequeathed her real and personal estate not thereby otherwise devised or bequeathed to her trustees on trust for sale and conversion and out of the moneys so arising and her ready money to pay her funeral and testamentary expenses, debts, and legacies, and to invest the trust moneys which should remain after such payments in the manner therein mentioned on trust to apply the income of the investments for the maintenance and education of her son during his minority, and if and when he should attain the age of twenty-one years to pay over to him her residuary trust estate and the accumulations thereof. But if he should die under the age of twenty-one years then the residuary trust estate was to be held in trust for the testatrix's sister Minnie M. Bedingfield absolutely. The testatrix died in February, 1908. Her whole estate after realisation, amounted only to £1,250, which was insufficient to pay the pecuniary legacies in full and enable a sum to be set aside which when invested in trust securities would produce the sum of £52 a year, the amount of the annuity. Charles W. Cottrell was sixty-three years of age, and the son was seventeen years of age.
- D The trustees took out this summons asking, *inter alia*, whether the legacies and annuity ranked *pari passu*, and how the estate was to be apportioned amongst the legacies and annuity.
- E A. Whittaker for the trustees.
Tomlin for the pecuniary legatees.
H. W. Malkin for the annuitant.
Owen Thompson for the residuary legatee.

- F **WARRINGTON, J.**—The question in this case is what is proper to be done in order rightly to satisfy the demands of certain legatees and an annuitant in a case in which the amount of the estate of the testatrix is not sufficient to give effect *literatim* to the directions of her will, but is sufficient if the amount of the annuity is to be treated as a legacy and dealt with accordingly; in which case the estate would be sufficient to pay both the legatees and the annuitant in full. [His Lordship read the material parts of the will and continued:] That is in effect the whole of the will. The amount of the estate of the testatrix is sufficient to pay in full the pecuniary legacies and the value as at the death of the testatrix of the annuity of £52. It is not sufficient to pay the pecuniary legacies in full and to set apart a fund sufficient by the income thereof to pay the annuity in full. If, therefore, the directions of the testatrix are to be carried out in the form in which they are expressed in the will, the pecuniary legacies and the amount set aside to answer the annuity will have to abate. It is true that, if the annuity did not in the result exhaust the abated fund set aside, the pecuniary legatees might in the end get paid in full—they might or they might not. Under these circumstances what is the course which the court ought to pursue? In the ordinary case, where there is a gift of an annuity to an annuitant with a direction to set aside the fund to answer the annuity, it was decided in *Wright v. Callender* (1), and I think that it is the law, that the right of the annuitant is to have the directions of the testator carried into effect, and that if the estate is not sufficient to pay the annuity in full, he is entitled to have the deficiency made up out of capital; but he must take the estate as it stands, and is not entitled to have the value of the annuity paid over to him. That is the law where the question is one simply as between an annuitant and residuary legatees. But where the question is one as between an annuitant and pecuniary legatees, and the estate is insufficient for the payment of the annuity and the pecuniary legacies, then, where there is a direction in the will to set aside

and invest a sufficient sum to answer the annuity, the course adopted by the court has been to value the annuity as at the date of the death of the testator, to treat the amount of the valuation as a legacy, and to make it abate in its due proportion, and then to pay the abated fund to the annuitant. In each of those two cases respectively those are the proper courses to pursue, as appears in *Wright v. Callender* (1).

But the case with which I have to deal is an intermediate case. If, in this case, the course to be pursued is that pursued where the estate is insufficient to pay both an annuitant and pecuniary legatees in full, the pecuniary legatees will be paid in full, and the annuitant will receive the full value of this annuity at once. If, however, I take the amount directed to be set aside to answer the annuity and treat it as a trust legacy and make it abate with the other pecuniary legacies, then three courses are possible: either, first, the annuitant is to receive only the income of the abated fund; or, secondly, he is to receive his annuity in full out of both income and capital; or, thirdly, by some intricate calculation he is to receive out of the income supplemented by capital a yearly sum abated in proportion to the actual abatement of the pecuniary legacies. Whichever of those three courses was adopted, an injustice would be done to the pecuniary legatees whose right is to be paid at the expiration of one year from the death of the testatrix—that is in the present case at once—the amounts of their legacies. If I adopt the course pressed on me by counsel for the residuary legatee, I do not pay the pecuniary legatees the amounts of their legacies in full. The annuitant may get paid in full, the pecuniary legatees may or may not, at some time hereafter when in the future the annuitant has died, be paid in full, and, possibly, when both the annuitant and the pecuniary legatees have been paid in full, there may be something left for the residuary legatee. But that result is wholly speculative. By adopting the other course, I can do justice at once to both the pecuniary and the residuary legatees. The pecuniary legatees are entitled to be paid in full at once, and so also is the annuitant. It is true that here the testatrix has provided a means by which the annuity can be secured, but to follow that course would do injustice to the pecuniary legatees. In my judgment, justice can be done to all three classes of persons interested by adopting the course suggested by counsel for the pecuniary legatees—namely, by valuing the annuity as at the date of the death of the testatrix according to the government tables or on actuarial principles, and treating the amount of the valuation as a pecuniary legacy, and paying the pecuniary legatees in full, and the annuitant the amount of the valuation of his annuity, if he is willing to accept it, or invest it in the purchase of a government annuity of £52, if he is not. There will thus remain a residue to which the residuary legatee will be entitled.

There are no authorities which apply, except *Wright v. Callender* (1) and *Wroughton v. Colquhoun* (2), the latter of which lays down the rule applicable in the case of insolvent estates. I think that the rule first appeared in *Wright v. Callender* (1). The other cases which have been referred to do not help me in this case. In *Re Grant*, *Walker v. Martineau* (3), the question was not as between annuitant and legatee, or as between annuitant and pecuniary legatees and residuary legatee, but as between tenant for life and remainderman. The annuitant was not represented. The decision was on a point entirely different from that in the present case, and therefore does not help me. In *Re Sinclair*, *Allen v. Sinclair* (4), the annuitant was a creditor, and the only point in the case was that the annuity was subject to a provision for forfeiture on alienation. KEKEWICH, J., said that, as it was the case of a creditor, the annuity ought to be valued, and, it being possible that the additional element of forfeiture might affect the value, that element must be taken into account in valuing the annuity, and the amount must be paid to the creditor.

I think that the former course I have indicated is the proper one—namely, to declare that the annuity ought to be valued as at the death of the testatrix according to the government tables, and the amount of such valuation paid to the

A annuitant or invested in the purchase of an annuity as he shall choose, and the legacies paid in full.

Solicitors: *Peacock & Goddard*, for *T. G. Lefroy*, Bournemouth; *Pritchard, Englefield & Co.*

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.]

B

C

IVIMEY v. IVIMEY

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., and Kennedy, L.J.), April 30, 1908]

[Reported [1908] 2 K.B. 260; 77 L.J.K.B. 714; 99 L.T. 75;
52 Sol. Jo. 482]

D

Divorce—Costs—Order—Enforcement—Action in King's Bench Division—Jurisdiction—R.S.C., Ord. 42, r. 24, Ord. 68, r. 1.

R.S.C., Ord. 42, r. 24, does not, by virtue of Ord. 68, r. 1, apply to an order made in a divorce suit, and, therefore, an order for costs in a divorce suit is not enforceable by action in the King's Bench Division, but is only enforceable in the manner prescribed by the Divorce Rules.

E

Notes. Considered: *Morse v. Muir*, [1939] 2 All E.R. 40. Referred to: *Leavis v. Leavis*, [1921] All E.R.Rep. 266; *Leivers v. Barker, Walker & Co.*, [1943] 1 All E.R. 386.

F

As to enforcing orders of the Divorce Division, see 12 HALSBURY'S LAWS (3rd Edn.) 467 et seq.; and for cases see 27 DIGEST (Repl.) 673 et seq.

Cases referred to :

- (1) *Bates v. Bates* (1888), 14 P.D. 17; 58 L.J.P. 85; 60 L.T. 125; 37 W.R. 230; 5 T.L.R. 155, C.A.; 27 Digest (Repl.) 676, 6451.
- (2) *Godfrey v. George*, [1896] 1 Q.B. 48; 65 L.J.Q.B. 249; 44 W.R. 245; sub nom. *Godfrey v. G.*, 73 L.T. 599; 40 Sol. Jo. 117, C.A.; 30 Digest (Repl.) 199, 416.
- (3) *Bailey v. Bailey* (1884), 13 Q.B.D. 855; 53 L.J.Q.B. 583; 27 Digest (Repl.) 682, 6515.
- (4) *Norton v. Gregory* (1895), 73 L.T. 10; 11 T.L.R. 439; 14 R. 735, C.A.; 30 Digest (Repl.) 199, 415.

G

Also referred to in argument :

- Re Binstead, Ex parte Dale*, [1893] 1 Q.B. 199; 62 L.J.Q.B. 207; 68 L.T. 31; 41 W.R. 452; 9 T.L.R. 114; 37 Sol. Jo. 117; 9 Morr. 319; 4 R. 146, C.A.; 30 Digest (Repl.) 150, 46.
- Furber v. Taylor*, [1900] 2 Q.B. 719; 69 L.J.Q.B. 898; 83 L.T. 308; 48 W.R. 689, C.A.; 30 Digest (Repl.) 199, 418.

I

Appeal from an order of COLERIDGE, J., in chambers.

In a suit for divorce brought by a wife, an order dated Feb. 19, 1908, was made by BARNES, P., that the respondent should within seven days from the service of the order pay to the petitioner £62 10s. 9d., the amount of the petitioner's taxed costs, and also that the respondent should lodge in court £60 to cover the petitioner's costs of the hearing, or give security for the same as therein mentioned, and that all further proceedings should be stayed until the order was complied with. The order was not complied with, and on Mar. 6, 1908, the wife commenced an action against the husband in the King's Bench Division by specially endorsed writ for

£62 10s. 9d., the amount of her costs, and applied for leave to sign judgment under R.S.C., Ord. 14. The Master granted the application, but, on appeal, COLERIDGE, J., reversed the order of the Master, and held that the action could not be maintained on the ground that the order for payment of the costs was an order *pendente lite*, and was, consequently, not an order to which Ord. 42, r. 24, applied, and that, even if the action would lie, such an action, having regard to the methods of enforcing the order under the procedure of the Divorce Court, would, under the circumstances of the case, be an abuse of the process of the court. The wife appealed.

Stephen Lynch for the plaintiff wife.

Douglas Hogg for the defendant husband.

Sir HERBERT COZENS-HARDY, M.R.—This is a case of importance. I think there is no ground for doubting that the decision of COLERIDGE, J., was perfectly right.

In proceedings in the Divorce Court, an order was made that the respondent husband should pay a certain sum for the taxed costs of the wife petitioner, and should give security for the petitioner's costs of the hearing, and that all proceedings should be stayed until the order was complied with. The consequence of an order for payment of costs made in the Divorce Court is prescribed by the Divorce Rules. Rule 179 says this:

"This order shall be served on the proctor, solicitor, or attorney of the party liable [or if it is desired to enforce the order by attachment on the party himself], and if the costs be not paid within the seven days a writ of *fieri facias* or writ of sequestration shall be issued as of course in the registry upon an affidavit of service of the order and nonpayment."

By r. 203, such order may also be enforced by writ of *elegit*. That is to say, the person in whose favour the order is made can, in case of default, obtain an order of course in the registry, giving him either a writ of *fieri facias* or a writ of sequestration or a writ of *elegit*. Until the Debtors Act, 1869, he could also have attached the party in default, but this can no longer be done as to the costs already incurred: see *Bates v. Bates* (1). The petitioner, thinking she was not able, to enforce the order in the manner prescribed by the rules, or in accordance with the practice of the Divorce Court, has issued a writ in the King's Bench Division claiming the costs due and payable to her under the order I have referred to. The learned judge has held that no such action will lie.

In my opinion, that is correct. In the first place, this is not a judgment, it is a mere order, and it was the law before the Judicature Acts that, although you could bring an action on a judgment, you could not bring an action on an order of another court; but R.S.C., Ord. 42, r. 24, says that

"every order of the court or a judgment in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect."

The effect of that is that, for most purposes, there is no difference between an order and a formal judgment in any case coming within that rule. I guard myself by saying that there may be a difference between an interlocutory order and a final order, but the mere fact that the court has made an order and not a judgment does not prevent the court from granting such remedy as it could formerly grant on a judgment. But that rule has no application whatever to the present case, because Ord. 68, r. 1, says:

"Subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in [inter alia] proceedings for divorce or other matrimonial causes."

Counsel for the defendant's point is that Ord. 42, r. 24, does not give any jurisdiction to the High Court to enforce by action any order in the Divorce

A Division, whether interlocutory or final, and I think that the authorities which he has cited bear out what appears to me to be the logical result and fair meaning and effect of Ord. 68, r. 1, and Ord. 42, r. 24.

B *Godfrey v. George* (2) was a case where a solicitor had been ordered to pay the costs of an application to strike him off the roll, and an action was brought to enforce that order. The Court of Appeal held that such an action could be maintained on the ground that a proceeding against a solicitor of that nature was not a criminal proceeding within Ord. 68, r. 1, and, consequently, not excepted from the operation of the Rules of the Supreme Court, and was, therefore, a proceeding to which Ord. 42, r. 24, applied. *Bailey v. Bailey* (3) is also, in my opinion, a strong authority to the same effect. It was there held that an order to sign final judgment under Ord. 14 could not be made in an action for arrears of alimony payable under an order of the Divorce Division. GROVE, J., decided that the action would not lie, on the ground that the order was an interlocutory order. The Court of Appeal affirmed his decision, but they put it on a larger and wider ground. BRETT, M.R., pointed out (13 Q.B.D. at p. 859) that the power to give alimony was conferred on a court which was constituted by the Matrimonial Causes Act, 1857, and that the remedy intended to be given for disobedience to the orders of that court was to be found in s. 52 of that statute, which provides for the enforcement of such orders in the same way as orders might be enforced in the Court of Chancery. It is quite true that that section has been repealed by the Statute Law Revision Act, 1892, but that repeal is subject to the usual reservations contained in such Acts, and does not affect the remedies given by r. 179, to which I have already referred. Then BRETT, M.R., says this (*ibid.*):

E "Would an action lie in a court of common law to enforce a decree of the Court of Chancery? Clearly it would not, at least under ordinary circumstances. There was always power to sue upon the judgment of a court of common law; but no promise could be implied at common law to obey a decree of the Court of Chancery; and therefore a remedy by action for disobedience to a decree of the Court of Chancery did not exist at common law, and a decree or order of the Divorce Division can be enforced only in the manner pointed out by s. 52. We go upon higher grounds than those stated in the Queen's Bench Division, but the reasons given by GROVE, J., are also weighty."

BOWEN, L.J., gave judgment to the same effect, saying (*ibid.* at p. 860) that

G "the only remedy for disobedience to an order for non-payment of alimony is that pointed out by 20 & 21 Vict., c. 85, s. 52."

H That being so, and there being no authority to the contrary, I think we must hold that no action can be maintained on an order in the Divorce Division. I only wish to say in conclusion that our decision does not apply to an order made in the Probate Division, because proceedings in the Probate Division are not excepted from the rules by Ord. 68, r. 1. I think that the judgment of COLERIDGE, J., was right and that the appeal should be dismissed.

I **KENNEDY, L.J.**—I agree, and I desire to add a few words only. The learned judge has, in my opinion, rightly reversed the decision of the Master who allowed these proceedings to go on; but I think it right to say expressly that I am not entirely in agreement with the learned judge as to the precise grounds on which he has based his judgment, because, in the first place, he distinguishes *Norton v. Gregory* (4) from the present case on the ground that the order in the present case is an order pendente lite; and, secondly, he said that, if this action could be maintained, it would, under the circumstances of the case, be an abuse of the process of the court. I prefer to put my judgment on the ground so fully stated by the Master of the Rolls, viz., that, having regard to Ord. 68, r. 1, an action to enforce a claim for costs under an order made by a judge in divorce proceedings is not

authorised by Ord. 42, r. 24, but that the process which should be followed in such cases is the process prescribed by the rules of that peculiar jurisdiction.

Appeal dismissed.

Solicitors: *G. R. A. Edmonds; Paterson, Candler & Sykes.*

[Reported by W. C. Briss, Esq., Barrister-at-Law.]

DUNBAR (OTHERWISE WHITE) v. DUNBAR

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Gorell Barnes, P.), January 18, 1909]

[Reported [1909] P. 90; 78 L.J.P. 35; 100 L.T. 380;
25 T.L.R. 230]

Nullity—Permanent maintenance—Discretion of court—Consideration of conduct of parties—Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1.

On an application for an allowance after a decree of nullity, as well as after a decree of dissolution of the marriage, the court will exercise its discretion in ordering or refusing an allowance, and the whole conduct of the parties will be taken into consideration, the application in each case depending on the particular facts.

Notes. The Matrimonial Causes Act, 1907, s. 1, has been replaced by the Matrimonial Causes Act, 1950, s. 19 (2).

Considered: *Duchesne v. Duchesne*, [1950] 2 All E.R. 784.

As to permanent maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 430 et seq.; and for cases see 27 DIGEST (Repl.) 611 et seq. For the Matrimonial Causes Act, 1950, s. 19, see 29 HALSBURY'S STATUTES (2nd Edn.) 407.

Motion to set aside or vary the registrar's report on a petition for allowance after a decree of nullity of marriage.

The parties to the suit for nullity of marriage were married in the early part of 1896, and lived together for a little over two years. They then separated, and the petitioner instituted proceedings for nullity in the middle of 1907. A decree nisi was obtained on April 8, 1908, which was made absolute on Oct. 23, 1908. The petitioner then applied for an allowance, and the registrar in his report stated that the income of the respondent averaged about £380 a year, exclusive of what he derived from the investment of a sum of about £380. There was, in addition, a policy of life insurance in existence, the surrender value of which was £120, as well as certain house property, but this was in dispute. The petitioner had, prior to the date of the proceedings, cohabited with a man in South Africa, and she had become entitled to a pension of £100 a year in consequence of the decree absolute from the India Office, which would be payable to her until she married. In case of marriage, this annuity of £100 would be commuted for a payment of £1,000. The pension and, in the case of its cessation, the commuted sum, was payable to the petitioner by reason of her father's having contributed to a pension fund when he was an official in India. The concluding words of the report were:

"It is submitted that, having regard to all the circumstances, this is not a case in which the court will exercise its discretion in favour of the petitioner; the petition should, therefore, be dismissed with costs."

A By s. 1 of the Matrimonial Causes Act, 1907 :

B “(1) The court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to her fortune (if any), to the ability of her husband, and to the conduct of the parties, it may deem reasonable, and for that purpose may refer the matter to any one of the conveyancing counsel of the court to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the court may, if it thinks fit, suspend the pronouncing of its decree until such deed shall have been duly executed. (2) In any such case the court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding subsection.”

C *Whately* for the petitioner.

Willis for the respondent.

D **SIR GORELL BARNES, P.**—This case is exceedingly clear. It arises under s. 1 of the Matrimonial Causes Act, 1907, and the petitioner is asking the court to make an order on the respondent that he shall provide further maintenance for her. The section in question is exceedingly wide, and it is abundantly clear that it was the intention of the legislature to leave all cases like the present to the discretion of the court, and that discretion can only be exercised by a careful consideration of the peculiar facts of each case. There is no necessity to enter into details of this case, for the matters have been fully discussed. In his report, the registrar says :

E “Having regard to all the circumstances, this is not a case in which the court will exercise its discretion in favour of the petitioner.”

F I am entirely of the same opinion. When all the facts are taken into consideration, and when the conduct of the parties is reviewed, I think that it would be unreasonable to make any order against the respondent, and especially when it is borne in mind that the petitioner is now provided for in another way. There has also been considerable delay in instituting proceedings. The suit for nullity might have been commenced years ago, and such a suit ought to be brought with reasonable promptitude. It is quite true that, if the petitioner had brought her suit before the Act of 1907 came into force, she would have been in a worse position than a petitioner generally finds herself since the passing of the Act. But, having regard to all the circumstances, I think she ought not to have presented this petition for an allowance, for I cannot see that she has, on a review of the whole case, any claim on the respondent. The petition will, therefore, be dismissed with costs.

H Solicitors : *W. Powell; Tilleards.*

[*Reported by J. A. SLATER, Esq., Barrister-at-Law.*]

R. v. PORTER

[COURT OF CRIMINAL APPEAL (Lord Alverstone, C.J., Darling and Phillimore, JJ.),
December 17, 1909]

[Reported [1910] 1 K.B. 369; 79 L.J.K.B. 241; 102 L.T. 255;
74 J.P. 159; 26 T.L.R. 200; 22 Cox, C.C. 295;
3 Cr. App. Rep. 237]

*Criminal Law—Bail—Agreement to indemnify—No intent to obstruct justice—
Illegality of agreement.*

An agreement to indemnify bail is an illegal contract, not merely because it is unenforceable, but because it tends to produce a public mischief. Such an agreement amounts to a criminal conspiracy, although there may be no intent to pervert or obstruct the course of justice.

R. v. Broome (1) (1851), 18 L.T.O.S. 19, disapproved.

Notes. Considered: R. v. Manley, [1932] All E.R.Rep. 565. Followed and applied: R. v. Young (1944), 30 Cr. App. Rep. 57. Referred to: Laidler v. Laidler, [1920] All E.R.Rep. 174; R. v. Newland, [1953] 2 All E.R. 1067.

As to conspiracy, see 10 HALSBURY'S LAWS (3rd Edn.) 360 et seq.; and for cases see 14 DIGEST (Repl.) 121 et seq.

Cases referred to:

- (1) R. v. Broome (1851), 18 L.T.O.S. 19; sub nom. R. v. Broome, *Ex parte Staden*, *Ex parte James*, 15 J.P. 644; 14 Digest (Repl.) 170, 1332.
- (2) Wilson v. Strugnell (1881), 7 Q.B.D. 548; 50 L.J.M.C. 145; 45 L.T. 219; 45 J.P. 831; 14 Cox, C.C. 624; 14 Digest (Repl.) 171, 1357.
- (3) Herman v. Jeuchner (1885), 15 Q.B.D. 561; 54 L.J.Q.B. 340; 53 L.T. 94; 49 J.P. 502; 33 W.R. 606; 1 T.L.R. 445, C.A.; 14 Digest (Repl.) 171, 1361.
- (4) Consolidated Exploration and Finance Co. v. Musgrave, [1900] 1 Ch. 37; 69 L.J.Ch. 11; 81 L.T. 747; 64 J.P. 89; 48 W.R. 298; 16 T.L.R. 13; 14 Digest (Repl.) 171, 1358.
- (5) R. v. Brailsford, [1905] 2 K.B. 730; 75 L.J.K.B. 64; 93 L.T. 401; 69 J.P. 370; 54 W.R. 283; 21 T.L.R. 727; 49 Sol. Jo. 701; 21 Cox, C.C. 16, D.C.; 14 Digest (Repl.) 129, 909.
- (6) R. v. Stockwell (1903), 66 J.P. 376; 14 Digest (Repl.) 171, 1360.

Also referred to in argument:

- Jones v. Orchard* (1855), 16 C.B. 614; 24 L.J.C.P. 229; 25 L.T.O.S. 182; 1 Jur.N.S. 936; 3 W.R. 554; 3 C.L.R. 1275; 139 E.R. 900; 14 Digest (Repl.) 171, 1356.
- Cripps v. Hartnoll* (1863), 4 B. & S. 414; 2 New Rep. 453; 32 L.J.Q.B. 381; 8 L.T. 765; 10 Jur.N.S. 200; 11 W.R. 953; 122 E.R. 514, Ex. Ch.; 26 Digest (Repl.) 41, 268.
- R. v. Wheatly (1761), 2 Burr. 1125; 1 Wm. Bl. 273; 97 E.R. 746; 14 Digest (Repl.) 234, 1989.
- R. v. Higgins (1801), 2 East, 5; 102 E.R. 269; 14 Digest (Repl.) 119, 822.
- R. v. De Berenger (1814), 3 M. & S. 67; 105 E.R. 536; 15 Digest (Repl.) 915, 8802.

Appeal against a conviction of conspiracy at Worcestershire Assizes.

The appellant, with a man named Brindley, was indicted before JELF, J., at Worcestershire Assizes for conspiracy. The fifth count of the indictment alleged that in May, 1909, a man named Clark was committed by the magistrates on a charge of felony to Worcestershire Quarter Sessions, that Clark was granted bail, and that the appellant and Brindley entered into recognisances on his behalf, each of them being bound in the sum of £50. The count charged against the appellant and Brindley alleged that they unlawfully did conspire together with Clark, while

A the charge against the latter was pending, that Clark should indemnify the appellant and Brindley against their liability on their recognisances which they had duly entered into as sureties for the appearance of Clark at the next Worcestershire Quarter Sessions in June, 1909. The indictment contained other counts setting out the overt acts of the conspiracy and alleging that the appellant and Brindley had conspired to obstruct and pervert the due course of law and justice at the trial of Clark, and with the intent that Clark might evade justice and go unpunished.

B JELF, J. (following *Wilson v. Strugnell* (2)), told the jury that, if the parties had entered into the alleged agreement, they were guilty of a criminal conspiracy, inasmuch as a contract to indemnify a bail against his liability was contrary to public policy and, therefore, illegal, even if there was no intent to defeat the ends of justice. The jury found that the appellant and Brindley were parties to an

C agreement with Clark under which they were to receive £50 each in respect of their going bail for Clark, so that they would stand to lose nothing if Clark absconded before the trial. The jury found, however, that the appellant and Brindley had not entered into such agreement with the intent that Clark should abscond. JELF, J., held this to be a verdict of guilty on the fifth count and bound the appellant over in his own recognisance of £20 to come up for judgment if

D called on.

Sherwood for the appellant.

Acland, K.C., and *R. W. Coventry* for the Crown.

LORD ALVERSTONE, C.J., delivered the following judgment of the court.—

E In this indictment for conspiracy, the only count that it is necessary to consider is the fifth, which alleges an unlawful conspiracy by the appellant, Brindley and Clark, that Clark should indemnify the appellant and Brindley against their liability on their recognisance which they had entered into as sureties for the appearance of Clark at quarter sessions.

F The question we have to decide is whether this fifth count, alleging no intent, discloses any offence. Judgments to the effect that an agreement to indemnify bail is one which cannot be enforced have been delivered by STEPHEN, J., in *Wilson v. Strugnell* (2), by LORD ESHER, M.R., in *Herman v. Jeuchner* (3), and by NORTH, J., in *Consolidated Exploration and Finance Co. v. Musgrave* (4), with which judgments we agree. It is, therefore, clear that the agreements in this case cannot be enforced. But there are many contracts which, though not enforceable, are not

G contracts so unlawful as to render them the subject of an indictment for conspiracy. This question was discussed in *R. v. Brailsford* (5), and I there pointed out ([1905] 2 K.B. at p. 745) that

“it cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law, but the distinction between acts which are merely improper or immoral and those that tend to produce a public mischief has long been recognised.”

H Having referred to the cases cited, I went on to say (*ibid.* at pp. 746, 747):

I “Without saying that there cannot be acts upon which an innocent construction might be put or that in some cases it might not be for the jury to find as a fact whether the act was innocent or not, we are clearly of opinion that no such argument can possibly be urged in this case. . . . We are of the opinion that it is for the court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given.”

Applying that principle to the present case we have to see whether the learned judge at the trial drew the right conclusion of law on the facts found by the jury. The jury found, that, although the appellant was a party, with Brindley and Clark, to the agreement in question, he did not become a party to it with the intention that Clark should abscond. It has been argued that this conviction cannot stand

because the jury did not find that the appellant had entered into the agreement with intent to obstruct and pervert the course of justice, and because, failing such intent, the agreement is not illegal in itself in the sense of making the parties to it guilty of a criminal conspiracy. It is, in our opinion, difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and for many years it has been held that not only are persons who go bail responsible on their recognisance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has also been suggested that the modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail is not illegal. If that were so, an indemnity to a bail would make him utterly careless with regard to seeing that the accused was forthcoming on his trial, and it is obvious that criminals possessed of means would frequently abscond from justice. The decision of MARTIN, B., in *R. v. Broome* (1), as followed by the Recorder of London in *R. v. Stockwell* (6), has been cited to us. It is sufficient to say that we do not agree with that opinion.

We think, therefore, that JELF, J., was right in holding that the appellant entered into an illegal contract; illegal because tending to produce a public mischief. The learned judge rightly held that the appellant, by being a party to that agreement, was guilty of a criminal conspiracy, and that it was not necessary that it should be found that he had intended to pervert or obstruct the course of justice. The conviction, therefore, was a good conviction on the fifth count of the indictment, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Blewitt & Co.*, Birmingham; Registrar, Court of Criminal Appeal.

[Reported by GERALD DODSON, Esq., Barrister-at-Law.]

JONES v. PRITCHARD

[CHANCERY DIVISION (Parker, J.), January 16, 17, February 6, 1908]

[Reported [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.T. 386;
24 T.L.R. 309]

Easement—Implied grant—Grant of divided moiety of outside wall—Use of moiety by adjoining house—Implied grant and reservation of easements necessary to carry out intention of parties regarding wall.

Easement—Nuisance—Grantor or grantee doing on land granted what was in contemplation that they should do—No negligence—Liability to other party.

If a man grant a divided moiety of an outside wall of his own house with the intention of making it a party-wall between that house and an adjoining house to be built by the grantee, the law will imply the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall, the nature of those easements varying with the particular circumstances of each case. Subject to such easements, the grantor and grantee, being absolute owners of their respective divided moieties of the wall, may deal with those moieties in such manner as they please: *Richards v. Rose* (1) (1853), 9 Exch. 218, applied.

A If a grantor is doing, on land retained by him, only what was at the time of the grant in the contemplation of the parties that he should do, and is guilty of no negligence or want of reasonable care or precaution, he cannot be liable for nuisance entailed on the grantee; and where the grantee is occasioning a nuisance to the grantor by doing on the land granted what it was at the time of the grant in the contemplation of the parties that he should do, and there is no negligence or want of care or precaution, a fortiori he cannot be liable to the grantor: *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (2), [1907] A.C. 476, applied.

B Prior to 1886, the plaintiff's predecessor in title built C., house, constructing the western wall thereof with fireplaces and flues, useless for the purposes of C. house but capable of being used for the purposes of an adjoining house built on the adjoining land. In 1886 the defendant and the plaintiff's predecessor in title entered into an agreement for the sale to the defendant of the western half of the western wall of C. house, that wall being treated as divided from top to bottom throughout its whole length by a vertical plane in the centre thereof, the intention being that the wall should be a party-wall, owned in divided moieties by the parties. Shortly after, the defendant built G. house in such a way as to enable the use of the fireplaces and flues on his side of the party-wall for the purpose of G. house. The plaintiff purchased C. house in 1900. Subsequently, the flue connected with the defendant's dining-room became defective, by reason of cracks in the surrounding masonry, and smoke found its way therefrom through the plaintiff's half of the party-wall into the plaintiff's rooms. There was no evidence of negligence or want of reasonable precaution on the part of the defendant, either at the time of building G. house or thereafter. In an action by the plaintiff claiming an injunction to restrain the defendant from causing a nuisance and from doing anything on the defendant's premises, or so using them, as to occasion danger by fire to C. house,

F **Held:** the action failed.

Notes. Considered: *Pwllach Colliery Co., Ltd. v. Woodman*, [1914-15] All E.R.Rep. 124. Applied: *Sack v. Jones*, [1925] All E.R.Rep. 514. Referred to: *Phelps v. London Corpn.*, [1916] 2 Ch. 255; *Hansford v. Jago*, [1920] All E.R.Rep. 580; *Simpson v. Weber*, [1925] All E.R.Rep. 248; *Aldridge v. Wright*, [1929] 2 K.B. 17; *Vanderpant v. Mayfair Hotel Co., Ltd.*, [1929] All E.R.Rep. 296; *Liddiard v. Waldron*, [1933] 2 K.B. 319; *Bond v. Norman, Bond v. Nottingham Corpn.*, [1939] 2 All E.R. 610; *Re Webb, Sandom v. Webb*, [1950] 2 All E.R. 828.

As to the creation of easements by express grant, see 12 HALSBURY'S LAWS (8rd Edn.) 520 et seq.; and for cases see 19 DIGEST 22 et seq.

Cases referred to:

- H** (1) *Richards v. Rose* (1853), 9 Exch. 218; 2 C.L.R. 311; 23 L.J.Ex. 3, 22 L.T.O.S. 104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93; 19 Digest 42, 223.
 (2) *Lyttelton Times Co., Ltd. v. Warners, Ltd.* [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 31 Digest (Repl.) 145, 2846.
 (3) *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321; 2 Keb. 543, 569; 1 Sid. 429, 1 Vent. 26, 44; 85 E.R. 454; 19 Digest 43, 230.
I (4) *Taylor v. Whitehead* (1781), 2 Doug.K.B. 745; 99 E.R. 475; 19 Digest 116, 765.

Also referred to in argument:

- Tenant v. Goldwin (or Golding)* (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, 356.
Humphries v. Cousins (1877), 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; 25 W.R. 371, D.C.; 19 Digest 161, 1117.

- Turbervill (Tubervil) v. Stamp* (1697), Holt, K.B. 9; Carth. 425; Skin. 681; Comb. 459; 1 Com. 32; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; 90 E.R. 846; 2 Digest (Repl.) 91, 551.
- Egremont v. Pulman* (1829), Mood. & M. 404, N.P.; 19 Digest 161, 1115.
- Blake v. Woolf*, [1898] 2 Q.B. 426; 67 L.J.Q.B. 813; 79 L.T. 188; 62 J.P. 659; 47 W.R. 8; 42 Sol. Jo. 688, D.C.; 36 Digest (Repl.) 150, 788.
- Ross v. Fedden* (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; 26 L.T. 966; 36 J.P. 791; 36 Digest (Repl.) 164, 878.
- Nichols v. Marsland* (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174, 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 165, 880.
- Sanders-Clark v. Grosvenor Mansions Co., Ltd. and D'Allessandri*, [1900] 2 Ch. 373; 69 L.J.Ch. 579; 82 L.T. 758; 48 W.R. 570; 16 T.L.R. 428; 44 Sol. Jo. 502; 36 Digest (Repl.) 269, 219.

Witness Action for an injunction.

The plaintiff and defendant owned adjoining houses at Beaumaris, in the county of Anglesea. The plaintiff's house, which was known as Chauntrey House, was built, some time prior to 1886 by the plaintiff's predecessor in title. The defendant's house, which was known as Gwynfa, was built by the defendant, but not until after Aug. 26, 1886. Chauntrey House was originally a detached residence, its western wall abutting on the site on which Gwynfa afterwards stood; but the plaintiff's predecessor in title, foreseeing that the owner of this site would some day desire to erect a house thereon, constructed the western wall of Chauntrey House with fireplaces and flues, useless for the purpose of Chauntrey House, but capable of being used for the purposes of any house adjoining Chauntrey House, on the west side, if at any time such house should be erected. The defendant desired to build a house adjoining Chauntrey House on the west side thereof, and to make use of the fireplaces and flues for the purposes of such house when erected. Accordingly, he and the then owner of Chauntrey House entered into an agreement of Aug. 26, 1886, for the sale to the defendant of the western half of the western wall of Chauntrey House, such wall being treated as divided from top to bottom throughout by a vertical plane in the centre thereof and parallel to its length, the intention being that the wall should thereafter be a party-wall, owned, not in undivided but in divided moieties, by the plaintiff's predecessor and the defendant respectively. For the purpose of considering the rights of the parties, the judge treated the agreement as having been completed by an actual conveyance to the defendant of the western moiety of the wall in question, with the ground on which such western moiety was situate. Shortly after the date of the agreement, the defendant erected the house known as Gwynfa in such a way as to utilise (as it was intended he should) the fireplaces on his own side of the party-wall, and he afterwards used such fireplaces and the flues connected therewith for the purposes of Gwynfa, being in fact the purposes for which such fireplaces and flues were originally constructed by the plaintiff's predecessor in title. The plaintiff purchased Chauntrey House in 1900. The flue connected with the defendant's drawing-room became defective in the sense that, by reason of cracks which had developed in the surrounding masonry, smoke found its way therefrom through the plaintiff's half of the party-wall into the plaintiff's drawing-room, and apparently at times also into his dining-room, doing some damage to the decorations and furniture.

The plaintiff brought the action against the defendant, claiming a perpetual injunction to restrain the defendant from causing an alleged nuisance by unwholesome smoke, soot, and other offensive matters and vapours to the plaintiff's house, and from doing anything on the defendant's premises, or so using them, as to occasion danger by fire to the plaintiff's house.

Buckmaster, K.C., and *Napier* for the plaintiff.

Romer, K.C., and *Austen-Cartmell* for the defendant.

Cur. adv. vult.

Feb. 6, 1908. **PARKER, J.**, stated the facts, and continued: The question I have to consider is whether, under these circumstances, the defendant is liable in respect of nuisance. Now, if a man grant a divided moiety of an outside wall of his own house, with the intention of making such wall a party-wall between such house and an adjoining house to be built by the grantee, the law will, I think, imply the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall, the nature of those easements varying with the particular circumstances of each case. Subject, however, to the easements, the grant or reservation of which will be so implied, the grantor and grantee, being respectively absolute owners of their respective divided moieties of the wall, may deal with such moieties in such manner as they please. Thus, if, for example, it is within the contemplation of the parties that the grantee shall support the roof of the house he intends to build on that moiety of the wall which is comprised in the grant, the other moiety of the wall will be subject to an easement of lateral support for the benefit of the roof when erected; and, similarly, the grantee's moiety of the wall will pass to him, subject to the easement of lateral support for the benefit of the grantor's roof if supported by his half of the wall. If authority is wanted for the above propositions, I think it will be found in *Richards v. Rose* (1) and the recent case of *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (2). The latter case seems to show that, if a grantor is doing, on land retained by him, only what was at the time of the grant in the contemplation of the parties that he should do, and is guilty of no negligence or want of reasonable care or precaution, he cannot be liable for nuisance entailed on the grantee. And, of course, where the grantee is occasioning a nuisance to the grantor by doing on the land granted what it was at the time of the grant in the contemplation of the parties that he should do, and there is no negligence or want of care or precaution, the case is an a fortiori one.

In the present case, it appears that the imaginary plane which divides that part of the wall which was sold to the defendant from the part which was retained by the plaintiff's predecessor in title, and is now vested in the plaintiff, passes approximately through the centre of all the chimney flues constructed in the wall, including as well the flues connected with the fireplaces in the plaintiff's house as the flues connected with the fireplaces on the defendant's side of the wall. Under these circumstances there must, I think, be implied in favour of the plaintiff and defendant respectively a reservation and grant of such easements as would be necessary to enable the plaintiff to use the flues connected with his own fireplaces, although he had sold part of them to the defendant, and to enable the defendant to use the flues connected with fireplaces on his side of the wall, though part of them had been retained by the plaintiff. Apart from negligence or want of reasonable care and precaution, neither party is, in my judgment, subject to any liability to the other in respect of nuisance or inconvenience caused by an exercise of the rights or easements so impliedly granted or reserved. There seems to be no authority in which the precise nature of the easements impliedly granted or reserved on the sale of a divided moiety of such a wall as that which separates Chauntrey House from Gwynfa is considered, but the general principles of the common law relating to easements are, I think, sufficiently defined to afford assistance in dealing with the question now at issue. In the first place, it appears to me that, on principle, the owner of a servient tenement cannot so deal with it as to render the easement over it incapable of being enjoyed or more difficult of enjoyment by the owner of the dominant tenement. On this principle, neither party can in the present case pull down his half of the wall or stop up his half of any flue used for the purpose of his neighbour's house. In the next place, it appears to me that, apart from any special local custom or express contract, the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoy-

ment of the easement by the owner of the dominant tenement. The grantor of a right of way over a bridge is not by common law liable, nor does he impliedly contract, to keep the bridge in repair for the convenience of the grantee. On this principle, neither party is in the present case subject to any liability if, by reason of natural decay or other circumstances beyond his control, his half of the wall falls down, or otherwise passes into such a condition that the easement thereover becomes impossible or difficult of exercise.

Once again, the grant of an easement is *primâ facie* also the grant of such ancillary rights as are reasonably necessary for its exercise or enjoyment. Thus, the grantee of an easement for a watercourse through his neighbour's land may, when reasonably necessary, enter his neighbour's land for the purpose of repairing, and may repair, such watercourse. On this principle, each party in the present case may do such acts on the property of the other as are reasonably necessary for the continued enjoyment of the easement; for example, each party would be entitled to repair the other's half of the wall in question so far as was reasonably necessary for the enjoyment of any easement impliedly granted or reserved: *Pomfret v. Ricroft* (3). Lastly, my attention was called to *Taylor v. Whitehead* (4), in which LORD MANSFIELD said that, by the common law of England, he that hath the use of a thing ought to repair it. Though, in my opinion, LORD MANSFIELD was in that case referring only to the fact above mentioned, that, by the common law, the owner of the servient tenement is not under any liability for not repairing the subject of the easement, yet there is undoubtedly a class of cases in which the nature of the easement is such that the owner of the dominant tenement not only has the right to repair the subject of the easement, but may be liable to the owner of the servient tenement for damages due to any want of repair. Thus, if the easement be to take water in pipes across another man's land and pipes are laid by the owner of the dominant tenement and fall into disrepair, so that water escapes on to the servient tenement, the owner of the dominant tenement will be liable for damage done by such water. Strictly speaking, I do not think that, even in this case, the dominant owner can be said to be under any duty to repair. I think that the true position is that he cannot, under the circumstances mentioned, plead the easement as justifying what would otherwise be a trespass, because the easement is not, in fact, being fairly or properly exercised. I cannot, however, discover any case in which this principle has been applied unless the easement includes the laying on another man's land of some artificial work to be used for the purposes of and belonging to the dominant owner. It would, in my opinion, be quite impossible to apply the principle where, for example, the easement consisted in turning water on to another's land at a definite point, such water being carried away by a surface drain belonging to the servient owner, even though, as a matter of fact, such drain served no other purpose.

To determine whether this principle has any application to the present case, I have to consider the precise nature of the easement granted in respect of the plaintiff's moiety of the flues connected with the defendant's fireplace. I can readily conceive an easement by virtue of which a dominant owner might have the right to carry his smoke away by a pipe overhanging his neighbour's land. In this case, if the pipe at any point developed a hole so that smoke escaped to the injury of the servient owner, it might well be that the dominant owner might be liable for nuisance. He would not be really exercising his easement, for the pipe could no longer be an efficient pipe for the purpose of carrying away the smoke. In my opinion, however, the defendant's easement is, in the present case, of a different nature. It is, I think, the right to allow smoke from his fireplace to pass into the flue connected therewith, notwithstanding that, at any point of its passage up the flue, it may pass from the defendant's moiety into the plaintiff's moiety of the flue. If this be so, the principle I am considering can have no application for, though there be cracks in the plaintiff's moiety of the flue, the defendant is none the less exercising his rights fairly and reasonably in the manner in which he was intended to exercise them when the easement was granted. It was suggested

A that, even on this view of the nature of the easement and the law applicable thereto, the defendant was liable because the cracks in the plaintiff's wall were due to a subsidence or settlement of the defendant's house. It is, I think, established that there has been some such subsidence or settlement, and that the cracks in question have been caused thereby. But the cause of the subsidence or settlement is undetermined, and there is no evidence at all that the defendant either in building
B his house or in anything which he has since done, has been guilty of any negligence or want of reasonable precaution or has acted otherwise than he was justified in acting under the circumstances of the case.

I am of opinion, therefore, that this action fails, and I see no reason to think that the conclusion to which I have come involves any hardship on the plaintiff. The wall in question has eight flues, four connected with fireplaces in the plaintiff's
C house and four connected with fireplaces in the defendant's house. It is a mere accident that the flue which is defective is connected with a fireplace in the defendant's house, and at any moment a similar defect may develop in one of the plaintiff's flues. If either party as a condition of using his own flue were liable to keep his neighbour's wall in repair, each party would have the right from time to time to enter into his neighbour's house and test the condition of
D the wall. For want of notice of any disrepair would be no excuse at law for injury arising from disrepair. My decision is, therefore, a convenient one under the circumstances. It throws no greater burden on the plaintiff than it does on the defendant, and by making each party responsible for his own moiety of the wall, saves him from the necessary annoyance of periodic inspections by his neighbour. With regard to the costs, I think they must follow the event.

E Solicitors: *Jaques & Co.*, for *Glynne Jones*, Bangor; *Ullithorne, Currey & Co.*, for *J. Rice Roberts & Laurie*, Llangefni, Anglesea.

[Reported by R. C. CARTER, Esq., Barrister-at-Law.]

F

HARRIMAN v. HARRIMAN

G [COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Vaughan Williams, Fletcher Moulton, Farwell, Buckley and Kennedy, L.JJ.), January 18, 19, February 9, 1909]

[Reported [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 25 T.L.R. 291; 53 Sol. Jo. 265]

H *Divorce—Evidence—Matrimonial offence—Proof—Duty of court to be satisfied on evidence—Effect of admission of party or consent—No estoppel of party by finding on complaint before justices.*

I Proof of a matrimonial offence in the Divorce Court [see Matrimonial Causes Act, 1950, s. 4 (2) (a)] means proved as a fact and not merely proved inter partes. Hence the grant of a separation order in a magistrates' court does not estop the party found to be in desertion in that court from denying statutory desertion in subsequent proceedings in the High Court for divorce. The court must be satisfied on the evidence that the petitioner's case has been proved.

Nor can the admission of a matrimonial offence, however formal, bind the Divorce Court and justify the pronouncement of a decree. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied. It is the duty of the court to protect the public by seeing that divorce is obtained only on proper evidence.

Divorce—Desertion—Evidence—Intention of respondent—Petitioner glad of respondent's absence.

Desertion is evidenced much more by the intention of the [respondent] than by the ready acquiescence of the [petitioner] in [the respondent's] absence, or even the desire of the [petitioner] for that absence. The words of Cockburn, C.J., in *Ward v. Ward* (1) (1858), 1 Sw. & Tr. 186: "The act of desertion must be done against the will of the wife," must be read with their context, viz., "if she was a party to his leaving and consented to it." In that context I agree with them. But if they are to be understood as meaning that desertion cannot be predicated of a husband where his wife is thankful that he has left her (because, say, she went in bodily fear of him), then, with great respect I do not agree: per BUCKLEY, L.J.

Hand and Wife—Summary proceedings—Separation order—Inclusion in magistrates' order only where cruelty found.

A provision that the complainant in a matrimonial proceeding in a magistrates' court be no longer bound to cohabit with the defendant should be included in an order made by the court [in the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, referred to as a "matrimonial order"] only where there is a finding of cruelty, not, e.g., where there is a finding of desertion and no more.

Divorce—Desertion—Termination—Separation order made by magistrate.

Where a court of summary jurisdiction on a complaint by a wife that her husband had deserted her made an order that the husband should pay to his wife a specified sum per week and her costs of the complaint and also that the wife was no longer bound to cohabit with him, **held**, that the non-cohabitation order had the effect of terminating the husband's desertion and preventing it from continuing so long as the order was in force, with the result that the separation of the parties after the date of the order could not be relied on by the wife as desertion without cause in subsequent divorce proceedings.

Per FLETCHER-MOULTON, L.J.: It is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has not the right to cohabit.

Per VAUGHAN WILLIAMS, L.J.: The non-cohabitation order is based on the assumption that the husband's desertion, as proved before him, was of such a character as to justify the making of the order, and it may be argued that a husband who by his conduct puts his wife in a position that she cannot be called on to continue cohabitation is as much deserting her as if he absented himself with the intention to desert, and that, if this is so, the magistrate's order negating the wife's obligation to cohabit ought not to prevent the continuance of the running of the desertion on the complaint of which the order was based.

Per BUCKLEY, L.J.: The question whether there was a continuing desertion after the non-cohabitation order may well be a question of fact. Desertion might be held to continue if the wife proved that after the making of the order she wrote frequently to her husband urging him to return and saying that, if he did so, she would receive him and abandon the order, and that he had persistently refused to return.

Notes. The Matrimonial Causes Act, 1857, and the Summary Jurisdiction (Married Women) Act, 1895, have been repealed. The grounds for divorce are now to be found in s. 1 (1) of the Matrimonial Causes Act, 1950; 29 HALSBURY'S STATUTES (2nd Edn.) 388; and as to matrimonial proceedings in magistrates' courts, see the Matrimonial Proceedings (Magistrates' Courts) Act, 1960: 40 HALSBURY'S STATUTES (2nd Edn.) 394; s. 1 (1) of which prescribes the grounds on which an order under the Act can be obtained, while s. 2 (1) prescribes the provisions which the order can contain, s. 2 (1) (a) providing for a provision equivalent to that in s. 5 (a) of the Act of 1895.

Explained: *Stevenson v. Stevenson*, [1911] P. 191. Distinguished: *Churner v. Churner* (1912), 106 L.T. 769. Considered: *Robinson v. Robinson*, [1919] P. 352;

- A** *Hyman v. Hyman, Hughes v. Hughes*, [1929] P. 1; *Countess Russell v. Earl Russell*, [1934] All E.R.Rep. 569; *Bush v. Bush*, [1938] 4 All E.R. 598; *Cohen v. Cohen*, [1940] 2 All E.R. 331; *Cooper v. Cooper*, [1940] 3 All E.R. 579. Applied: *Mackenzie v. Mackenzie*, [1940] 1 All E.R. 256. Considered: *James v. James*, [1948] 1 All E.R. 214. Applied: *Hudson v. Hudson*, [1948] 1 All E.R. 773. Considered: *Winnan v. Winnan*, [1948] 2 All E.R. 862; *Barnett v. Barnett*, [1954] 3 All E.R. 689. Applied: *Tursi v. Tursi*, [1957] 2 All E.R. 828. Referred to: *Eastbourne Gardens v. Croydon Gardens*, [1910] 2 K.B. 16; *Timmins v. Timmins*, [1949] P. 75; *Rutherford v. Rutherford*, [1922] P. 144; *Statham v. Statham*, [1928] All E.R.Rep. 219; *Herod v. Herod*, [1938] 3 All E.R. 722; *Spence v. Spence*, [1939] 1 All E.R. 52; *Whittaker v. Whittaker*, [1939] 3 All E.R. 833; *Gatward v. Gatward*, [1942] 1 All E.R. 477; *Petty v. Petty*, [1943] 2 All E.R. 511;
- C** *Beard v. Beard*, [1945] 1 All E.R. 704; *Klosser v. Klosser*, [1945] 2 All E.R. 708; *Cohen v. Cohen*, [1947] 2 All E.R. 69; *Thory v. Thory*, [1948] 1 All E.R. 553; *Kara v. Kara and Holman*, [1948] 2 All E.R. 16; *Prince v. Prince*, [1949] W.N. 402; *Jones v. Jones*, [1952] 2 T.L.R. 225; *Kinnane v. Kinnane*, [1953] 2 All E.R. 1114; *Bright v. Bright*, [1953] 2 All E.R. 939; *Skull v. Skull*, [1954] 1 All E.R. 1030; *W. v. W. (No. 2)*, [1954] 2 All E.R. 829; *Fishburn v. Fishburn*, [1955] 1 All E.R. 230.
- D**

As to desertion, evidence at trial, and matrimonial summary jurisdiction, see 12 HALSBURY'S LAWS (3rd Edn.) 241, 371, 479; and for cases see 27 DIGEST (Repl.) 333, 516, 693.

Cases referred to:

- E** (1) *Ward v. Ward* (1858), 1 Sw. & Tr. 185; 27 L.J.P. & M. 63; 31 L.T.O.S. 238; 6 W.R. 867; 164 E.R. 685; 27 Digest (Repl.) 343, 2840.
- (2) *Dodd v. Dodd*, [1906] P. 189; 75 L.J.P. 49; 94 L.T. 709; 70 J.P. 163; 54 W.R. 541; 22 T.L.R. 484; 50 Sol. Jo. 528; 27 Digest (Repl.) 360, 2981.
- (3) *Bland v. Bland* (1866), L.R. 1 P. & D. 237; 35 L.J.P. & M. 104; 15 W.R. 9; 27 Digest (Repl.) 308, 2563.
- F** (4) *Finney v. Finney* (1868), L.R. 1 P. & D. 483; 37 L.J.P. & M. 43; 18 L.T. 489; 27 Digest (Repl.) 375, 3092.
- (5) *Re Bank of Hindustan, China and Japan, Campbell's Case, Alison's Case* (1873), 9 Ch. App. 1; 43 L.J.Ch. 1; 29 L.T. 524; 22 W.R. 113; L.C. & L.J.J.; 21 Digest 160, 215.
- (6) *Sickert v. Sickert*, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 48 W.R. 268; 15 T.L.R. 506; 27 Digest (Repl.) 350, 2897.
- G** (7) *Bradshaw v. Bradshaw*, [1897] P. 24; 66 L.J.P. 31; 75 L.T. 391; 61 J.P. 8; 45 W.R. 142; 13 T.L.R. 82, D.C.; 27 Digest (Repl.) 694, 6637.
- (8) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14, 19 L.T. 575; 17 W.R. 264; 27 Digest (Repl.) 334, 2784.
- (9) *R. v. Leresche*, [1891] 2 Q.B. 418; 60 L.J.M.C. 153; 65 L.T. 602; 56 J.P. 37; 40 W.R. 2; 7 T.L.R. 685; 17 Cox, C.C. 384, C.A.; 27 Digest (Repl.) 346, 2872.
- H** (10) *Haswell v. Haswell and Sanderson* (1859), 1 Sw. & Tr. 502; Sea. & Sm. 32; 29 L.J.P. & M. 21; 1 L.T. 69; 23 J.P. 825; 8 W.R. 76; 164 E.R. 832; 27 Digest (Repl.) 444, 3759.
- (11) *Russell v. Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 13 T.L.R. 516; 41 Sol. Jo. 660, H.L.; 27 Digest (Repl.) 307, 2551.
- I** (12) *Judd v. Judd*, [1907] P. 241; 76 L.J.P. 120; 98 L.T. 59; 23 T.L.R. 538; 51 Sol. Jo. 500; 27 Digest (Repl.) 309, 2569.
- (13) *Smith v. Smith*, [1905] P. 249; 74 L.J.P. 113; 93 L.T. 457; 54 W.R. 220; 27 Digest (Repl.) 362, 2999.
- (14) *Failes v. Failes*, [1906] P. 326; 75 L.J.P. 95; 95 L.T. 547; 22 T.L.R. 687; 27 Digest (Repl.) 362, 3001.

Appeal by the wife from a decision of BUCKNILL, J., dismissing her petition for divorce on the ground of her husband's adultery and desertion.

On Mar. 9, 1906, upon a complaint made to a metropolitan police magistrate by the wife, Mrs. Harriman, that her husband had unlawfully deserted her, the magistrate adjudged that the matter of the complaint was true, and ordered, under the Summary Jurisdiction (Married Women) Act, 1895, that she be no longer bound to cohabit with her husband, and that the husband should pay to her 25s. a week, with the costs of the application. On Dec. 24, 1907, Mrs. Harriman petitioned for a divorce, alleging desertion by her husband from July 18, 1905, for two years and upwards, without reasonable excuse, and his adultery on two occasions in the year 1907. At the hearing before BUCKNILL, J., without a jury, the wife proved the alleged adultery, that her husband had deserted her on July 18, 1905, and had never lived with her since, and also the order of the magistrate.

The learned judge, following the decision in *Dodd v. Dodd* (2), held that desertion for two years without reasonable excuse had not been proved, and, as the wife declined to amend her petition and ask for a judicial separation on the ground of adultery, he dismissed the petition. The wife appealed.

By s. 27 of the Matrimonial Causes Act, 1857 :

... it shall be lawful for any wife to present a petition to the said court praying that her marriage may be dissolved on the ground that since the celebration thereof her husband has been guilty of . . . adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards; and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded."

By the Summary Jurisdiction (Married Women) Act, 1895 :

"Section 4. Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of s. 43 of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act . . ."

"Section 5. The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz. (a) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty). (b) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant. (c) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding £2 as the court shall, having regard to the means both of the husband and wife, consider reasonable. (d) A provision for payment by the applicant or the husband, or both of them, of the costs of the court and such reasonable costs of either of the parties as the court may think fit."

Emery and E. S. Hart for the wife.

The Attorney-General (Sir William Robson, K.C.), J. Harvey Murphy and Willock for the King's Proctor.

Feb. 9, 1909. The following judgments were read.

Sir HERBERT COZENS-HARDY, M.R.—This appeal raises an important question as to the effect of the Summary Jurisdiction (Married Women) Act, 1895, upon the jurisdiction and practice of the Divorce Court.

On Mar. 9, 1906, upon a complaint made to a metropolitan police magistrate by Mrs. Harriman that her husband did unlawfully desert her, the magistrate adjudged that the matter of the complaint was true, and ordered that the applicant be no longer bound to cohabit with her husband, and that the husband should pay to her 25s. a week, with the costs of the application. The husband was served with the summons, but did not appear. On Dec. 24, 1907, the wife petitioned for a divorce, alleging desertion from July 18, 1905, for two years and upwards, coupled with adultery. At the trial before BUCKNILL, J., the husband did not appear. The adultery was proved. But the learned judge, following the decision of the President in *Dodd v. Dodd* (2), dismissed the petition. Against this decision the present appeal is brought.

The jurisdiction to grant a divorce is conferred by s. 27 of the Matrimonial Causes Act, 1857 [see now Matrimonial Causes Act, 1950, s. 1, s. 4]. If the wife is petitioner, she must allege and prove adultery coupled (i) with cruelty, or (ii) with desertion without reasonable excuse for two years or upwards, and the court is required to "satisfy itself" as to the facts alleged (s. 29). The necessity for the continuance of desertion for two years has been expressly altered in one case only—viz., where the respondent had failed to comply with a decree for restitution of conjugal rights (s. 5 of the Matrimonial Causes Act, 1884: now s. 15 of Act of 1950). The present case does not fall within that exception, and the petitioner's right to a divorce must depend upon s. 27 of the Act of 1857. It was contended, though not very strenuously, that desertion without reasonable excuse for more than two years had been proved. But, in my opinion, it is impossible that the petitioner, who in March, 1906, obtained an order that she should no longer be bound to cohabit with her husband, can be allowed, in the absence of any further evidence on her part, to say that her husband's desertion continued after that date. By obtaining the order she not only expressed her desire that cohabitation should not be resumed, but effectually prevented it. The order cannot have a less effect than a separation deed made after desertion, and such a deed would prevent the period of desertion from running on. But it is contended that, although cruelty was neither alleged nor proved, the effect of s. 5 (a) of the Act of 1895 is to make the non-cohabitation provision in the magistrate's order have "the effect in all respects of a decree of judicial separation on the ground of cruelty," and thus indirectly to treat the desertion as equivalent to cruelty, and thus to justify a divorce. I am unable to follow this argument. What is the effect of a decree of judicial separation on the ground of cruelty? It has the same force and the same consequences as a divorce a mensa et thoro under the old law: see ss. 7 and 16 of the Act of 1857 [now s. 14 of Act of 1950], and it makes the wife a feme sole so far as property and contract and suing and being sued are concerned: ss. 25 and 26. Beyond this it has no absolute effect. It may perhaps operate by way of estoppel inter partes, so as to prevent the husband from thereafter denying that he has been guilty of cruelty, though I desire to express no opinion on that point. It cannot in any way estop the court. For the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied. The utmost effect by way of estoppel which the order of March, 1906, can have is to prove desertion at that date, but not desertion for two years. If the order had been made on complaint of cruelty, and it had been adjudged that the matter of the complaint was true, the Divorce Court might, perhaps, have granted a divorce on proof of subsequent adultery. The result is that I agree entirely with the

judgment of the President in *Dodd v. Dodd* (2), and I do not think it necessary to discuss minutely the earlier statutes prior to 1895, which are fully dealt with by the President.

I will only add a few words upon the language of ss. 4 and 5 of the Act of 1895. I find in s. 4 several distinct acts or omissions on the part of the husband which may justify an order under the Act. Most of these involve cruelty. One, viz., desertion—does not necessarily involve cruelty. And I find in s. 5 jurisdiction to make orders containing all or any of four distinct provisions. I am not satisfied that s. 5 ought not to be read so as to limit the non-cohabitation provision to cases of cruelty as distinct from mere desertion. But, however that may be, I feel strongly that the magistrates ought not to treat it as a matter of course, a mere matter of form, to insert that provision. And, if that provision is not inserted, the difficulties of which this case is an illustration could not arise.

VAUGHAN WILLIAMS, L.J.—This appeal raises the question what is the effect of a separation order obtained under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, obtained upon a complaint of desertion, and no more. Section 4 of that Act provides for a separation order based on four distinct grounds respectively. The section is in the following terms:

“Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of s. 43 of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction acting within the city borough, petty sessional or other division or district, in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act; provided that where a married woman is entitled to apply for an order or orders under this section on the ground of the conviction of her husband upon indictment, she may apply to the court before whom her husband has been convicted, and that court shall, for the purposes of this section, become a court of summary jurisdiction, and shall have the power without a jury to hear an application, and make the order or orders applied for.”

Section 5 sets forth the provisions, any of which may be included in the separation order. The section is in the following terms:

“The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.—(a) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty); (b) a provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant; (c) a provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding £2 as the court shall, having regard to the means both of the husband and wife, consider reasonable; (d) a provision for payment by the applicant or the husband, or both of them, of the costs of the court and such reasonable costs of either of the parties as the court may think fit.”

One of these provisions is that the applicant is no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty).

A It was urged before us, first, that the separation order was not inconsistent with the continued running of the desertion, upon complaint of which the magistrate's order relieving the wife from the duty of cohabitation was based. The argument was put in this way. True, it was said, that the order in a sense renders voluntary desertion by the husband impossible because the order prevents his return to cohabitation except by the consent of the wife, but the magistrate's order is based upon the assumption that the husband's desertion, as proved before him, was of such a character as to justify a non-cohabitation order, and it may be argued that a husband who by his conduct puts his wife in a position that she cannot be called upon to continue cohabitation is as much deserting his wife as if he absented himself with the intention to desert, and that, if this is so, the magistrate's order negating the wife's obligation to cohabit ought not to prevent the continuance of the running of the desertion on the complaint of which the magistrate's order was based. I think that in principle this argument is sound, but, for reasons which I will presently give, I do not think that the facts of this case admit of the application of this principle.

D The next ground urged on behalf of the wife was that, even though there was no evidence of cruelty brought before the court on the hearing of the petition, yet on proof of adultery by her husband she was entitled to a decree for dissolution of marriage by reason of the estoppel arising on the separation order in the police-court. It was argued that inasmuch as it was decided in *Bland v. Bland* (3) that where a wife obtained in the Divorce Court a decree of judicial separation on the ground of cruelty and the husband subsequently committed adultery she could obtain a decree for dissolution of marriage on proof of the adultery and of the decree for judicial separation; and inasmuch as in *Finney v. Finney* (4) estoppel was held to prevent a wife from setting up in a petition for dissolution the same charges of cruelty which she had alleged and failed to prove on a petition for judicial separation, which was upon such failure of proof dismissed, the same result ought to follow from the proof of the magistrate's order, and that, inter partes, cruelty ought to be taken to be conclusively proved by the proof of such order, because of the words contained in s. 5 (a),

F "a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty)."

G This seems *prima facie* right. The answer by the Attorney-General to this argument was that, although estoppel might arise between the parties, no such estoppel bound the court, for s. 31 of the Act of 1857 provides for pronouncing a decree for dissolving marriage in case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and that, if the court was not satisfied, that was not a sufficient reason for dismissing the petition notwithstanding the estoppel inter partes. It occurred to me that, if the separation order by the magistrate was inter partes conclusive evidence, the court could not dismiss the petition on the ground of not being satisfied unless the court had some evidence before it rebutting the fact concluded by the estoppel; but I think this view was wrong. I think in the present case the court had before it materials upon which it could say it was not satisfied; first, the fact that no cruelty was alleged or proved before the magistrate, but only desertion and no aggravating circumstances; and, I secondly, that in the petition in the High Court the only allegations against the husband are that on July 18, 1905, the husband left the petitioner and has ever since lived separate and apart from her and deserted her without reasonable excuse for two years and upwards, and that the husband in July and October, 1907, committed adultery. There is no allegation of cruelty, and the only question of fact to be decided on the petition was not proved, but, on the contrary, disproved by the production of the magistrates order, which by reason of preventing cohabitation negated the possibility of the husband returning to the wife unless by her consent; moreover, the judgment of a court of competent jurisdiction is conclusive between

the parties only as to matters precisely and directly alleged on the face of the record and also with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered: see the judgment of MELLISH, L.J., in *Alison's Case* (5) (9 Ch. App. at p. 25).

Unless, therefore, the principle can be applied which I have already mentioned, that where the conduct of the husband is such that the wife cannot reasonably be expected to cohabit with him (I use cohabit here both in the narrow sense of living under the same roof or in a common house and also in the wider sense of having conjugal relations as man and wife), there may be desertion by the husband, whose conduct caused the separation, whether separation brought about by the wife absenting herself because she could no longer endure to live with her husband, or by a non-cohabitation order of the magistrate, the result must be that the separation order put an end to desertion by the husband so long as that order remains in force. There seems to be authority for the contention, but inasmuch as in this case there is nothing to show that there was any evidence before the magistrate of conduct, such as I have just described, by the husband rendering it unreasonable to expect or call upon the wife to live with her husband, I think the judgment of BUCKNILL, J., must be supported: see *Sickert v. Sickert* (6), which case, although it is very different from the present by reason of the conduct of the husband which led the wife to withdraw from cohabitation and leave the house, conduct which the court held sufficient to justify the wife in leaving the house, and, nevertheless, to constitute desertion by the husband who by his conduct forced her to leave it, yet does justify the proposition that, if the situation brought about by the conduct of the husband forces the wife to leave the house, this may constitute desertion by the husband. The principle is right, but I find here no evidence or facts justifying this conclusion. I think that the judgment of BUCKNILL, J., must be supported and this appeal be dismissed.

I wish to say that I am not satisfied that a non-cohabitation order ought not to be made in cases where the complaint is of desertion without allegation of persistent cruelty, or any mention of the cruelty of the kinds mentioned in s. 4 as bases of complaint on which separation orders may be made. I think that, if the wife is intended to live separately from her husband, the non-cohabitation order, in its narrow sense, may be very necessary, lest he should molest her by his presence. Moreover, I think that "cohabit" in s. 5 covers cohabitation in the narrow sense as well as in the wider. This subject is fully dealt with in *Bradshaw v. Bradshaw* (7), which seems to show that cohabitation is frequently used in what is called the narrow sense in the above case of living in a common home or common residence, which is regarded as sufficient evidence of conjugal relations: see also *Fitzgerald v. Fitzgerald* (8) and *R. v. Leresche* (9).

FLETCHER MOULTON, L.J.—The petition of the wife in this case is in the ordinary form of a wife's petition for divorce, founded upon desertion and adultery on the part of her husband. There is no dispute or doubt as to the facts of the case. The adultery has been open and persistent, and no question arises as to it. It is the facts of the desertion that raise the important legal question which we have to decide. The matrimonial offence known as desertion must, by the Act of 1857, have continued for a period of not less than two years up to the date of the petition. It is true that, by the Matrimonial Causes Act, 1884, this period could in practice be shortened by the innocent spouse applying for and obtaining an order for the restitution of conjugal rights. If the offender refused to obey this decree he committed a matrimonial offence equivalent to the desertion for two years which had previously been necessary in order to found a petition for divorce. But nothing of this kind has occurred in the present instance, and therefore, although considerable reference was made to the Act of 1884 in the argument, it is, in my opinion, irrelevant to the question before us.

The desertion in the present case commenced on July 18, 1905, and the husband has not returned to cohabitation. Inasmuch as the petition is dated Dec. 24, 1907,

A the interval would be adequate if desertion in the legal sense of the term was continuous during that period. But it appears that on Mar. 9, 1906, when the desertion had continued only about eight months, the wife made a complaint to a court of summary jurisdiction under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, based upon this desertion, and obtained from the magistrate a summons to the husband to appear on a certain day to answer the complaint. The husband did not appear, and after due proof of the matter of the complaint, the court found that the matter of the complaint was true, and made an order that the husband should pay to the wife the weekly sum of 25s., and awarded 8s. costs. But such order also contained the following in its operative part: "And it is ordered that the said applicant be no longer bound to cohabit with her husband the said defendant." It appears, therefore, that at the request of the wife the court made an order which, if valid and effective, took away from the husband the right to cohabitation. If that order was valid, there is, to my mind, no possible doubt that desertion by the husband in the legal sense of the term ceased at that date. It is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has not the right to cohabit. Subject, therefore, to the question whether this portion of the order was valid, it afforded a complete answer to the allegation of desertion for the purposes of the divorce petition.

To this the wife's counsel makes the following answer. So far from alleging that the magistrate's order is invalid in this respect, he relies upon it. But he points out that, under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, an order containing the above provision, which I will call for shortness the non-cohabitation clause, shall, while in force, have the effect in all respects of a decree of judicial separation on the ground of cruelty, and he contends that such a decree, coupled with the unquestioned adultery, would entitle the wife to a decree of divorce just as much as desertion for two years coupled with the adultery. It is to be observed that this suggested answer is inconsistent with the petition, and alters the grounds on which the divorce is claimed; but, as that is a matter of form and not of substance and might be remedied by an amendment of the petition in the proper manner, I shall not allow it to affect this judgment, and I shall treat the case as though it raised in a regular form the question whether a magisterial order under the Summary Jurisdiction (Married Women) Act, 1895, containing a non-cohabitation clause, forms an adequate ground for divorce if coupled with proof of the adultery of the husband.

To decide this question it is necessary, in my opinion, to consider carefully the history of the legislation upon the subject. The relief given to women in respect of matrimonial offences committed by the husband remained exclusively in the jurisdiction of the Divorce Court until the year 1878, when, by the Matrimonial Causes Act of that year, it was provided that, if a husband should be convicted summarily or otherwise of an aggravated assault upon his wife, the court or magistrate before whom he should be so convicted might, if satisfied that the future safety of the wife was in peril, order that the wife should no longer be bound to cohabit with her husband. Such an order would in its operation place her substantially in the position of a wife who had obtained a decree of judicial separation from her husband. But it is clear that the legislature intended to go further than this and to make such an order identical in its legal effect with an order for judicial separation, for it proceeds to enact specifically that such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty. This language is so clear that, to my mind, there is no room for doubt as to its meaning. It means that in all courts and for all purposes such an order shall be deemed to be the equivalent of a decree for judicial separation on the ground of cruelty obtained in the only manner in which it can be obtained—viz., by a decree of the Divorce Court. It must be remembered that this clause appears in an Act entitled "An Act to Amend the Matrimonial Causes Act"—that is to say, to amend the Act of 1857, which first placed jurisdiction to grant a

divorce in a court as opposed to Parliament alone. I have no doubt, therefore, that in any proceedings, whether in the Divorce Court or otherwise, the production of such an order must have the same value in all respects, evidential or otherwise, as the production of a formal decree for judicial separation on the ground of cruelty. One of the most important consequences of the obtaining of such a decree is that it constitutes a binding estoppel between the parties as to the husband having committed the matrimonial offence of cruelty. To my mind, it was plainly the intention as well as the effect of the language of the statute that an order made under it by a court of summary jurisdiction should have a like effect. This provision has two important consequences. In the first place it makes the magistrate's order producible in evidence under the same circumstances as a decree for judicial separation would be, and, secondly, it is a legislative recognition that the issue which the magistrate has to decide is equivalent to the matrimonial offence of cruelty. In thus providing, the legislature appears to me to have acted most reasonably. It is the serious reproach of our existing divorce laws that the relief they grant is practically out of the reach of the working classes in this country by reason of expense and the absence of local courts empowered to grant it. These provisions constitute a small step in the direction of reform in this respect. It seems to me to be most reasonable that, having proved the issue of cruelty before a court of competent jurisdiction, the wife, probably a poor woman, should be able to rely upon it and not necessarily be compelled to prove the commission of the cruelty afresh before the Divorce Court, should the adultery of her husband lead her to seek therein the more complete relief of divorce. In 1886 the legislature took up the question of the relief of married women deserted by their husbands, and it gave to the wife the right to summon her husband before two justices in petty sessions or a stipendiary magistrate and to obtain from them an order for the payment of a weekly allowance not exceeding £2, on proof that he had deserted her or had wilfully refused or neglected to maintain her and his family when able to do so. This statute is not and does not purport to be an Act amending the Matrimonial Causes Act, 1857. It did not in any way deal with the tie of matrimony or the right or duty of cohabitation. It simply gave to a court of summary jurisdiction the power of compelling a husband to do his duty in the way of maintaining his wife and family if and so far as it was in his power to do so.

We now come to the Summary Jurisdiction (Married Women) Act, 1895, under which the order was made in this case. This was an Act for repealing, for the purpose of amending by re-enactment in an altered form, the provisions of the Act of 1878 and the Act of 1886 to which I have already referred. I cannot agree with the dictum of the learned President of the Probate Division in his judgment in *Dodd v. Dodd* (2) that this is not an Act which alters the Matrimonial Causes Acts as applicable to the Divorce Court. On the contrary, it appears to me impossible to deny that it is an Act which was intended to and did alter the Matrimonial Causes Acts. This would, to my mind, be sufficiently established by the fact that it repealed s. 4 of the Matrimonial Causes Act, 1878, of which the title is "An Act to Amend the Matrimonial Causes Acts," and among the provisions of that section we find not only that jurisdiction is given to a court of summary jurisdiction to make an order which shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty, but also that orders made under that section shall be subject to appeal to the Probate, Divorce, and Admiralty Division of the High Court of Justice. But its right to be regarded as an Act affecting the Matrimonial Causes Acts is further established by the fact that it re-enacts in an ampler form provisions such as those contained in s. 4 of the Act of 1878, retaining the appeal to the Probate, Divorce, and Admiralty Division of the High Court of Justice, and continuing until alteration or repeal the rules then already made as to such appeals.

On examining the provisions of this Act we find that it deals both with cruelty to the wife and desertion or neglect to maintain her or her infant children, thus combining and amplifying the grounds upon which up to that time complaint

A could be made by the wife to a court of summary jurisdiction under the Acts of 1878 and 1886. By a natural sequence, the relief which the court is empowered to give comprehends all the relief which it could give under those two Acts. It is clear, therefore, that it was the intention of the legislature to consolidate and amend the Act of 1886 and s. 4 of the Act of 1878, and accordingly these are entirely repealed by s. 12 of the Act. But, to my mind, it is clear that the draftsman has effected this consolidation in a most imperfect way. He has enumerated the whole of the grounds on which a complaint can be made, and has gone on to provide that the court to whom the application is made may give all or any of the relief which it was empowered to give under the two previous Acts. He has not perceived that, by so framing the statute, he has given jurisdiction to the court to give the relief embodied in the non-cohabitation clause (which was perfectly suitable to applications on the grounds set forth in the Act of 1878) in cases of complaints of desertion to which it is wholly inapplicable and where it was never intended to be given. The mistake arose, no doubt from the intention that s. 5 should state and delimit the whole of the powers given to the court, and it was never contemplated that the court would avail itself of the whole of those powers in every case. It was assumed that it would only grant such relief in each case as was suitable to the particular application before it. Unfortunately, however, there are no words thus limiting the exercise by the court of the jurisdiction given to it, and the magistrate in the present case has made an order, which contains the non-cohabitation clause, upon an application based on desertion—that is to say, that although the complaint of the wife was that her husband had deserted her, part of the relief given is that he has no longer the right to go back. By s. 5 (a) the legislature re-enacts the provision that the non-cohabitation clause while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty. This indicates so clearly the intention that this relief should not be given except on an application based upon a complaint of cruelty, that one is greatly tempted to reject it in the present case as being inconsistent with the order which sets out clearly that it is desertion alone of which the husband has been found guilty. We are not asked to do this in the present case and if we do not do this, we are bound, in my opinion, loyally to obey the provisions of the Act by giving to this separation order the effect in every respect of a decree of judicial separation on the ground of cruelty, and to look upon it as creating an estoppel between the parties as to the husband having been guilty of this offence to the same extent as a decree granted by the Divorce Court would do. If we should have been bound to do so in the case of an order under the Act of 1878, I cannot think that we are less bound so to do in the case of an order made under the Act of 1895.

It remains to consider the effect of a decree of judicial separation granted to the wife on the ground of cruelty, in the case of a subsequent application by her for divorce based on proof of adultery committed by the husband. This involves an important question as to the rules of evidence in the Divorce Court. So far as the parties are concerned, I see no reason why the admissibility or effect of evidence should be different in that court from what they are in the other branches of the High Court, but it does not follow that the effect of that evidence on the issue of the cause is to be determined in a like manner. By s. 31 of the Matrimonial Causes Act, 1857, the relief is made dependent on the court being satisfied on the evidence that the case of the petitioner has been proved [see now Matrimonial Causes Act, 1950, s. 4]. “Proved” here means proved as a fact and not merely proved *inter partes*. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them. Hence the production of a decree for a judicial separation on the ground of cruelty is not as a matter of law sufficient to make it the judicial duty of the court to accept as a fact that the respondent has been guilty of such cruelty; and, if the circumstances under which the decree was obtained are such as to raise

a doubt in the mind of the court whether the cruelty was in fact committed, it would be entitled and bound to require such additional evidence as should be sufficient to convince it of the fact. But, although this is so, the respect paid to a judicial determination of a fact between parties (which in civil actions is evidenced by its creating a binding estoppel) would, I should presume, in ordinary cases lead the court to consider the fact of the cruelty to be adequately established by the production of the decree. Applying these principles to the present case, it is obvious that the court was justified in holding that the magistrate's order was not sufficient to satisfy it as to the matrimonial crime of cruelty, or the matrimonial crime of desertion for two years, having been committed. The order itself shows that there never was any allegation or proof of the offence of cruelty having been committed, or that the desertion therein spoken of was desertion for a period of two years. The court was, therefore, in my opinion, entitled and bound to declare itself as not satisfied that the case of the petitioner had been proved. I desire to add, however, that, in my opinion, the legislature intended that an order, rightly containing the non-cohabitation clause by reason of the complaint being based on a charge of cruelty by the husband which has been proved before it, is entitled to be treated by the court as having the same evidential effect as between the parties as a decree of judicial separation granted by the Divorce Court itself on the ground of cruelty. This seems to me to be the intention of the legislature clearly expressed in the Act, and the courts are bound to give to that language its full effect. I, therefore, agree that this appeal should be dismissed.

FARWELL, L.J.—I am of opinion that the judgment of the President in *Dodd v. Dodd* (2), which **BUCKNILL, J.**, has followed in the present case, was correct. Divorce a vinculo matrimonii was unknown to our law, both civil and ecclesiastical, before the Act of 1857, and could only be obtained by Act of Parliament. Divorce a mensa et thoro could be obtained in the ecclesiastical courts on certain grounds, but desertion was not one of them. The Act of 1857 abolished the old ecclesiastical jurisdiction (s. 2) and created a new civil tribunal with new powers, including a power to dissolve marriages altogether, but this power, trenching as it did on the binding sanctity of the marriage tie, and affecting, therefore, not only the parties to the suit, but also their children (if any) and society generally, was limited by the Act, especially by ss. 29, 30, and 31. Although under s. 31 a petitioner who proves adultery by his wife has a right to a decree, unless it is shown affirmatively that the husband deserted or separated himself without reasonable excuse, etc.: (*Haswell v. Haswell and Sanderson* (10)), yet the court has to be satisfied by proper evidence of the adultery. No consent or admission can justify a decree; it is the duty of the court to protect the public by seeing that divorce is obtained only on proper evidence, and so fully is the interest of the public recognised in the matter that, by the Matrimonial Causes Act, 1860, s. 7 [see now Matrimonial Causes Act, 1950, s. 10], any person may intervene between nisi and decree absolute to show cause why the decree should not be made absolute on the ground of collusion or the suppression of facts, and the King's Proctor may intervene at any time during the progress of the cause or before decree absolute. The grounds, and the only grounds, on which a decree for dissolution can be made are set forth in s. 27 of the Act of 1857 [s. 1 of Act of 1950]. It is sufficient to say that a decree for judicial separation is not made available by the Act as one of such grounds. If such a decree is available at all, it is by virtue of the ordinary rules of evidence. I do not doubt that, as between the parties, the ordinary doctrine of estoppel applies, as was held by the judge ordinary in *Finney v. Finney* (4), but estoppel is only a rule of evidence, and the duty imposed on the judge by s. 29 of the Matrimonial Causes Act, 1857 [s. 4 of Act of 1950], which emphasises by express enactment the necessity for the court being satisfied as required by s. 31, is not restricted by any such rule. Neither the consent nor the admission of the parties justifies the court in granting a decree, although such consent or admission is acted on continually in ordinary civil suits, and by parity of reasoning no rule

A of evidence which prevents a party as against the other litigant from giving evidence of the truth can bind the court to shut its eyes if it is not satisfied that all the truth is before it. It is plain that the King's Proctor, if he intervenes, can give evidence to show that the decree for judicial separation (on the hearing of which he had no power to intervene) was improperly obtained if it forms one of the grounds on which divorce is asked; and that he or any other person intervening
B between the decree nisi and the decree absolute can do the same; and it would be strange if the court cannot *mero motu* declare that it is not satisfied by the former decree, even although it may, as a general rule, think fit to act on it; the court is at liberty, but is not bound, to accept it.

The present case arises under the Summary Jurisdiction (Married Women) Act, 1895, which enacts that a magistrate's order providing that the applicant be no
C longer bound to cohabit with her husband shall have the effect in all respects of a decree of judicial separation, on the ground of cruelty. The Act of 1857 draws no distinction between such a decree on the ground of cruelty and a decree on any other ground; and it is said that these words must, therefore, mean that there is an estoppel which prevents the parties or the court from showing that there was no cruelty. I will assume, without expressing any opinion, that there is such an
D estoppel between the parties, but there is certainly none on the court, for the reason that I have just given. If the decree for judicial separation does not prevent the court from going behind it, and inquiring into the facts on which it is founded when it is sought to use it as the ground for divorce, a magistrate's order having the effect of such a decree on one particular ground cannot have any greater effect than the decree itself. And in the present case it would, to my mind,
E be shocking that the court should be so bound, because the order shows, on the face of it, that cruelty was neither alleged nor proved, and the argument must be that s. 29 is repealed to this extent, that the judge is bound to accept a magistrate's order made on evidence of desertion as conclusive evidence of cruelty, although no such evidence was in fact given.

Further, the order was, in my opinion, wrong in containing the provision against
F cohabitation; the section is perhaps not very lucid, but it is only reasonable, when an Act specifies various wrongful acts, and also specifies three different heads of relief, to construe it as intending to give to the magistrates jurisdiction to grant such of the forms of relief only as may be appropriate to the evidence in each case. Desertion was no ground for a decree *a mensa et thoro*, but only for restitution of conjugal rights—the logical redress—nor is it a ground for a judicial
G separation unless continued for two years; it seems illogical to answer a complaint of desertion for a short period, not by an order to cease from, but by an order to continue the desertion. The basis of the Matrimonial Causes Act, 1884, is logical; the order is for restitution of conjugal rights; and it is only disobedience to such an order that is treated as equivalent to two years' desertion—desertion of such length that the legislature has treated it as equivalent to cruelty as a ground for divorce. The purport of that Act is (as LORD HALSBURY says in *Russell v. Russell* (11) ([1897] A.C. at p. 426)

“simply to provide a new remedy where a decree for restitution of conjugal rights had been granted, and where the person disobeyed the order.”

In my opinion, BUCKNILL, J., was right in refusing to accept this order as evidence
I of cruelty; it is apparent, on the face of it, that the cruelty was not alleged or proved; and, in my opinion, he would have been free to require evidence of cruelty, even if the order had found cruelty on the face of it, if in the exercise of his duty under s. 29 he thought right to do so. I agree with the judgment in *Judd v. Judd* (12) of BARGRAVE DEANE, J., with which the President concurred. He there said ([1907] P. at p. 243):

“It must not be taken that in cases of cruelty this court will be satisfied with the mere production of a certificate of conviction or order for separation founded on a finding of ‘persistent cruelty’ before a court of summary jurisdiction, and

the reason will be apparent to anyone's mind. In every case before this court where cruelty is alleged it is for the court to be satisfied, upon evidence given before it, that the charge of cruelty in the petition is established. It does not necessarily follow that the evidence given before a court of summary jurisdiction will be satisfactory to this court. This is shown by the fact that this Division, sitting as a Divisional Court, is constituted a court of appeal from the decisions of courts of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, on questions of fact as well as upon points of law; and in some cases of appeal we have quashed convictions because we thought that the courts of summary jurisdiction were not justified in arriving at their decisions."

The other point taken appears to me hardly arguable; it is said that the husband deserted the wife during the period of two years preceding the petition. But I fail to see how a husband, who is prevented by a separation order obtained by his wife from returning to live with her, can be said to have deserted her; the wife who has rejected her husband cannot call herself deserted by him. I entirely agree with COCKBURN, C.J., in *Ward v. Ward* (1) where he says (1 Sw. & Tr. at pp. 185, 186):

"Suppose an arrangement had been made by the advice of the police magistrate to separate by mutual consent. Though the husband may have left her, yet if there were a corresponding animus on the part of the wife, if she were a party to his leaving and consented to it, that would not constitute desertion. The act of desertion must be done against the will of the wife."

In my opinion, therefore, the appeal fails and must be dismissed.

BUCKLEY, L.J.—The Matrimonial Causes Act, 1857, by ss. 16 and 27, entitled the wife to certain relief in case of desertion without cause or adultery coupled with "desertion without reasonable excuse" for two years and upwards. The Act of 1884, by s. 5 [s. 15 of Matrimonial Causes Act, 1950], provided machinery by which under the circumstances there mentioned the wife might obtain relief notwithstanding that the two years had not elapsed. The period of two years remained as established by the Act of 1857, but the Act of 1884 gave a right to relief under circumstances although the two years had not expired. Those circumstances were that the wife had obtained a decree for the restitution of conjugal rights, and that the husband had failed to comply with it. The question in the present case may be said to be whether the Act of 1895 has amended or added to the provisions of s. 5 of the Act of 1884. Is it the law that, where the husband has been absent from his wife by way of desertion for, say eight months, and has for a further period of sixteen months and upwards been absent from her in obedience to an order or after the existence in point of fact of an order obtained by the wife for non-cohabitation under the Act of 1895, the wife is without more entitled to a divorce on the ground that he has been guilty of desertion without cause or without reasonable excuse for two years and upwards?

There has been argued before us at great length a question of estoppel. In my opinion, there is no question of estoppel pertinent to that which we have to decide. What is the fact which the husband is estopped from denying, if he be estopped at all, by the order of the magistrate of Mar. 9, 1906? That was an order whereby, upon the complaint by the wife that her husband did unlawfully desert her, it was adjudged that the complaint was true. The estoppel, if any, is that there had at the date of that order been desertion; but that is not the point to be here proved. The matter for proof is desertion without cause or without reasonable excuse for two years and upwards—that is, over a period extending to a date sixteen months later than the order which is relied upon as an estoppel. But, further, it was suggested, by an argument which I am incapable of following, that the fact which is by estoppel to be taken as true is that there has been cruelty. That contention was based upon this, that the Act of 1895 provides that the non-cohabitation order shall while in force have the effect in all respects of a decree of judicial separation on the ground of cruelty. Those are words which provide that a certain order which has

been made shall have the same effect as another order which has not in fact been made. Estoppel, of course, is as to fact. How that order can establish by way of estoppel the fact that there was cruelty, when the complaint was desertion, and the fact found was desertion, and the fact of cruelty never was in issue at all, I am unable to understand.

The case then stands thus, that the wife establishes that her husband has been absent by way of desertion for eight months, and has remained absent after she was no longer bound to cohabit with him. He may have remained absent in obedience to the order, or may have remained absent with a continuing intention to desert. It is at least necessary for her to establish that his absence was due to the latter and not to the former cause. I do not at all intend to decide that the existence of a non-cohabitation order precludes the possibility of proving desertion continuing after its date. I think that notwithstanding a non-cohabitation order the wife might prove continuing desertion. Desertion is evidenced much more by the intention of the absent husband than by the ready acquiescence of the wife in his absence, or even the desire of the wife for his absence. COCKBURN, C.J.'s words in *Ward v. Ward* (1), "The act of desertion must be done against the will of the wife," must be read with their context—viz., "if she was a party to his leaving and consented to it." In that context I agree with them. But, if they are to be understood as meaning that desertion cannot be predicated of a husband where his wife is thankful that he has left her (because, say, she always went in bodily fear of him), then, with great respect, I do not agree. Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may nevertheless have deserted her. Further, suppose the wife proved that after the co-habitation order she wrote frequently to her husband urging him to return, and saying that, if he did so, she would receive him and abandon the order, and that he had persistently refused to return. The order is, not that the husband shall remain away, but only that the wife is not bound to cohabit with him if he returns. Such considerations as these seem to me to show that the question whether there was a continuing desertion after the non-cohabitation order may well be a question of fact. In the present case the wife has not put forward a case or adduced evidence from this point of view. The absence of the husband after the non-cohabitation order is not, *ex necessitate rei*, desertion without cause or without reasonable excuse, which are the words of the Act of 1857, because the existence of the order may have been the cause of or excuse for his absence.

I may add that, in my opinion, the non-cohabitation clause in the order of Mar. 9, 1906, was relief inconsistent with the complaint made. The wife complained that her husband had left her, and obtained an order, not that he should return, but that she should not be bound to cohabit with him. I do not think this order was justified by the facts proved. She might probably obtain that portion of the order to be struck out, and then, after such further lapse of time as to make up the two years, might obtain relief, but, so long as that part of the order stands, it is, as a subsisting order of a court of competent jurisdiction, a serious impediment to the wife obtaining relief, because it affirms that, until she takes action to the contrary, she is a consenting party to his continuing absence. The learned President in *Dodd v. Dodd* (2) pointed out that the powers of the Divorce Court to grant a decree of divorce are limited to certain specific causes which the Act of 1895 does not touch, and said ([1906] P. at p. 201) that to uphold the contention there made

"would in effect be permitting the Act of 1895 to alter the Act of 1857, though the former is only an Act to amend the law relating to the summary jurisdiction of magistrates in reference to married women, and contains no express provision varying or amending the latter Act, and would, in effect, be giving new grounds upon which a divorce could be obtained by a woman."

With these observations I agree. In my opinion, *Dodd v. Dodd* (2) was rightly

decided. The Act of 1895 has not, in my opinion, altered in any way the causes for which the Divorce Court can give relief by way of divorce. I think this appeal must be dismissed.

KENNEDY, L.J.—The Summary Jurisdiction (Married Women) Act, 1895, bestows upon a married woman a method of relief against her husband, by procedure in a court of summary jurisdiction, in particular cases of marital misconduct on his part, which are set forth in s. 4—namely (i) certain specified cases of assault, where the husband has been convicted of such assault; (ii) desertion; (iii) persistent cruelty; or (iv) wilful neglect to provide reasonable maintenance for the wife or her infant children, wherever by such persistent cruelty or wilful neglect he has caused her to leave and live separately and apart from him. The form in which, according to the same section, the relief is given, is an order to be made by the court of summary jurisdiction upon proof of the wife's complaint; and s. 5 sets forth four distinct provisions all or any of which may be included in the order—the legislature thus entrusting the court of summary jurisdiction with the exercise of a judicial discretion to fit the order, in regard to these provisions, to the nature and needs of the particular case alleged and proved by the applicant for relief under s. 4. Of the four provisions (a), (b), (c), and (d), only (a) needs, for the purpose of this appeal, to be cited at length:

“(a) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty).”

Provision (b) relates to the custody of children; provision (c) to the payment of a weekly allowance by the husband; and (d) to the payment of the costs of the application to the court. It is to be observed that this Act really consolidated, with amendment, previous legislation contained, so far as regards protection of the wife against the husband's cruelty and violence, in s. 4 of the Matrimonial Causes Act, 1878, and, so far as regards the desertion of the wife by the husband and the wilful refusal or neglect of the husband to maintain his wife or his wife and family, in the Married Women (Maintenance in Case of Desertion) Act, 1886. The schedule to the Act of 1895 repeals all this previous legislation, the substantive enactments in ss. 4 and 5 of this Act being substituted for the remedies for the husband's misconduct which the Act of 1878 gave in the case of cruelty, and the Act of 1886 gave in the case of desertion and wilful neglect to maintain.

This history, in my view, strongly confirms the interpretation of ss. 4 and 5 of the Act of 1895 to which the language of the text itself and consideration of reasonableness alike point in regard to the proper application of the non-cohabitation order in s. 5 (a), which has given rise to the question argued before us in the present appeal. The provision was taken by the draftsman bodily from s. 4 of the Act of 1878, which authorised its use in cases in which a husband had been convicted of an aggravated assault upon his wife, if the court or magistrate before whom he was convicted was satisfied that the future safety of the wife was in peril. Its use in an order made under ss. 4 and 5 of the Act of 1895 is permissive; it is not in express terms confined to the cases in which the complaining wife has proved violence or cruelty of the husband, as specified in s. 4. Neither, on the other hand, is its use obligatory. And, in my judgment, the history of this provision, the language of the context, the very nature of the protection which the provision gives, and the enactment in (a) that it shall have the effect of a decree of judicial separation on the ground of cruelty, unite in showing that the discretion given by Parliament to the court of summary jurisdiction as to the framing of orders under ss. 4 and 5 is not rightly exercised if this non-cohabitation provision is inserted in the order made for the wife's relief, except where the court has been satisfied by evidence, in the words of the Act of 1878, “that the future safety of the wife is in peril.” I do not mean, in saying this, that the non-cohabitation provision ought

A to be inserted in the order only where the wife has proved the conviction and assault, or the persistent cruelty, expressly specified in s. 4 of the Act of 1895. It is possible that a wilful neglect to maintain may be proved to have been accompanied by occasional acts of dangerous violence, and so justify the inclusion in the order of this non-cohabitation provision. But I am clearly of the opinion that it is neither in accordance with the intention of the legislature, as appearing in B this statute, nor in the interest of the wife or of public morals that the provision should be included in an order which is sought for and obtained solely on the ground of the husband's desertion.

The present case excellently exemplifies a result which might, perhaps, on a superficial view, appear to be a hardship upon the wife, but which arises in truth from the inappropriate inclusion of the non-cohabitation provision in such a case. C In the present case the material facts are these. In March, 1906, Mrs. Harriman applied under the Act of 1895 to a metropolitan police magistrate for relief against her husband. The one and only ground which she alleged and proved was desertion since July 18, 1905. She was granted an order which contained, not only a provision for the payment of weekly maintenance under s. 5 (c) and for costs under s. 5 (d), but also an order for non-cohabitation under s. 5 (a). D as the single complaint alleged by Mrs. Harriman or proved before the magistrate was the desertion (from July, 1905 to March, 1906), the insertion of provision (a) in the order granted to her by the magistrate was not right; but what this court has to consider on the present appeal is, not the correctness of this portion of the magistrate's order, but the effect of it in the event, which has happened here, of legal proceedings for a dissolution of marriage being subsequently instituted by the E married woman in the Divorce Division of the High Court of Justice, in which it becomes essential, in order to satisfy the requirements of the Matrimonial Causes Act, 1857, in regard to desertion, that she should be able to prove a continuance of the husband's desertion without reasonable excuse during a period subsequent to the date of the magistrate's order. Mrs. Harriman's petition for divorce was dated Dec. 24, 1907. It alleged against her husband desertion without reasonable F excuse from July 18, 1905, and his adultery on two occasions in the course of the year 1907. There was sufficient proof of the adultery of the husband, and that he had left his wife on July 18, 1905, and had never lived with her since. Mrs. Harriman was, therefore, entitled to a decree of dissolution of marriage, if the judge of the Divorce Court could properly consider the period of time, subsequent to the magistrate's order of March, 1906, as forming part of a space of two years and G upwards during which her husband had deserted her without reasonable excuse, so as to constitute the offence of desertion contemplated by the Matrimonial Causes Act, 1857. BUCKNILL, J., sitting as a judge in divorce, held that he could not so consider it, and therefore, the petitioner declining to amend her petition so as to ask for a decree of judicial separation on the ground of the husband's adultery, he dismissed the petition. He did so, however, solely in deference to the decision H of the President of the Probate, Divorce, and Admiralty Division in the recent case of *Dodd v. Dodd* (2).

The present appeal is, therefore, virtually an appeal from that decision. In *Dodd v. Dodd* (2) SIR GORELL BARNES, P., held that a wife who takes a separation order under the Act of 1895 within two years from the time when the desertion began cannot subsequently, after the expiration of the two years, allege that her husband has deserted her for the space of two years and upwards without reasonable excuse so as to constitute the offence of desertion contemplated by the Matrimonial Causes Act, 1857. Counsel for the wife in the present case has asked us to hold that this was a wrong decision. His argument is put by him in two ways. In the first place, he relies upon a contention which appears to have found favour with BARGRAVE DEANE, J., in the undefended case of *Smith v. Smith* (13) and with BUCKNILL, J., in the undefended case of *Failes v. Failes* (14). This contention appears, I think, sufficiently for the purposes of comment, in a passage in the

judgment of BARGRAVE DEANE, J., in *Smith v. Smith* (13) ([1905] P. at p. 252):

"I am forced to conclude that this decision of the justices [i.e., the making of the non-cohabitation order] is a nullity so far as it affects the jurisdiction of this court, and was only intended to operate for her [the wife's] protection at the time when it was made. I can ignore it."

With sincere respect to both the learned judges, I cannot accept this as a correct view. It appears to me that, in truth, the result of adopting it is, whilst in one sense ignoring the magisterial order, to ignore, when dealing in the Divorce Court with a pure question of fact, the change in the relative rights and duties of husband and wife which has necessarily followed the magisterial order, and thereby, in such cases as *Smith v. Smith* (13), *Dodd v. Dodd* (2), *Failes v. Failes* (14), and the present case, in fact to abrogate, so far as regards the matrimonial offence of desertion on the part of a husband, s. 16 of the Matrimonial Causes Act, 1857, which defines the desertion which is to constitute a ground of a decree of judicial separation [now Matrimonial Causes Act, 1950, s. 1 (1) (b), s. 14] as "desertion without cause for two years and upwards," and also s. 27 of the same Act, which authorises a wife to present a petition for divorce on the ground of the husband's adultery coupled with "desertion without reasonable excuse for two years or upwards." How can a husband be said to be deserting his wife "without cause" or "without reasonable excuse" so long as his wife has obtained an order which is still on foot and which debars him from returning to her? How can he be bound to cohabit if she is not? SIR GORELL BARNES put those pertinent questions in the course of the argument and in his judgment in *Dodd v. Dodd* (2), and, but for the opinions of my brethren who decided *Smith v. Smith* (13) and *Failes v. Failes* (14), I should, I confess, have thought it plain that they could be answered only in one way, and, if they are so answered, then this line of argument cannot successfully be maintained by the wife in the present case.

But this was not the principal argument of her counsel at the hearing in this court. He contended, further, that, inasmuch as the non-cohabitation provision of the magistrate's order has, in the language of s. 5 (a), "the effect of a decree of judicial separation on the ground of cruelty," and, by virtue of ss. 7, 16, and 27 of the Matrimonial Causes Act, 1857, a wife who satisfied the Divorce Court that her husband has been guilty of adultery coupled with such cruelty as would entitle her to a decree of judicial separation may obtain on these grounds a decree declaring a dissolution of marriage, and a decree of judicial separation on the ground of cruelty is (as he contends) *prima facie* proof of such cruelty, a wife who, like Mrs. Harriman in the present case, can put in evidence the magistrate's separation order and can prove adultery on the part of her husband is entitled to sue him for a divorce, and, subject always to the provisions of s. 31 of the Matrimonial Causes Act, 1857, is entitled to the decree for which she has asked. Section 5 (a) would, as it appears to me, be a strange piece of legislation if the court were obliged to give to its language the effect which the wife has thus invited us to give to it. A wife goes to a court of summary jurisdiction; she asks for relief, not alleging or proving against her husband cruelty in any form, but desertion only; she obtains an order containing provision (a), and thereby, if the wife's present argument is correct, obtains that which, if the husband afterwards commit adultery, she can use as proof of such cruelty as, coupled with adultery, will justify her petition for a divorce. It seems to me to be impossible to suppose that Parliament, in passing the Act of 1895, intended such a result. If it contemplated an alteration in the law of divorce by making a magistrate's order for the relief of a wife who has been deserted by her husband for a less period than two years equivalent, in her proceeding for a divorce, to a decree of judicial separation on the ground of desertion, it surely would have said so either in explicit terms or by adding some such words to s. 5 (a), after the words "on the ground of cruelty," as "or on the ground of desertion, as the case may be." But, as the President of the Probate, Divorce, and Admiralty Division has pointed out,

A the words "shall have the effect in all respects of a decree of judicial separation on the ground of cruelty" have a natural and sufficient meaning and effect given to them, if they are interpreted as conferring upon the wife the benefits of ss. 25 and 26 of the Act of 1857. I agree with him that the argument of the wife, which I am now considering, and which he had to consider in *Dodd v. Dodd* (2), though ingenious, is entirely unsound, and I desire to adopt, and, therefore, I need not re-state here, the clear and cogent reasoning expressed in his judgment in support of this conclusion.

B I desire briefly to make two further remarks. A good deal was said in the course of the argument on this appeal as to the effect, as a matter of evidence in divorce proceedings, of a prior decree of judicial separation. The case (very briefly reported) of *Bland v. Bland* (3) was especially referred to in this connection. As at present advised, I am of opinion, having regard to the peculiar functions and responsibilities of the Divorce Court and the provision of ss. 29, 30, and 31 of the Act of 1857, that a decree of judicial separation ought not in subsequent proceedings for divorce affecting the same parties to be treated, in regard to the matters upon which the decree is based, as constituting either conclusive proof by way of estoppel or even as constituting a *prima facie* proof in the sense of being evidence upon which, in the absence of proof to the contrary by the adverse party, the court would be bound to act. The other remark which I desire to make is this. The consideration was pressed upon us by the learned counsel for the wife of a suggested hardship on her unless the period of desertion required by statute to constitute the desertion a matrimonial offence was held to continue to run after the date of the magistrate's separation order. The same argument, according to the report, appears to have been used by counsel for the wife in *Smith v. Smith* (13), and to have weighed with the learned judge who decided *Failes v. Failes* (14) for he says ([1906] P. at p. 329) that

E "to hold the contrary would mean this, that the fact that a man's wife had proceeded against him for an order by the magistrate to maintain her whom he had deserted would destroy the wife's right to proceed against him for a decree nisi afterward, and would enable him with impunity to commit adultery with any person or persons as against his wife, and that her hands are to be held tied because of the order of the magistrate."

F It appears to be desirable, on public grounds, not to leave a statement of this nature uncorrected, if it is founded, as I believe it to be, upon a misconception. G The married woman in that case, as Mrs. Harriman has done in the present case, had created the difficulty for herself. Proceeding in the court of summary jurisdiction for maintenance, as the learned judge says, because her husband had deserted her, she might, if she pleased, have obtained an order giving her the maintenance and not containing provision (a), the non-cohabitation provision. Without the inclusion of that provision, the order would not have operated to stop H the running of the statutory period of desertion which had begun already. There is no necessity in such a case for the insertion of that provision, as SIR GORELL BARNES was careful to point out in *Dodd v. Dodd* (2), and, in my view, and I think in his view also, it is appropriate only in cases in which the evidence shows the court of summary jurisdiction that the wife's safety is in jeopardy. If, on the other hand, the husband has been guilty of cruelty, and, therefore, this non-cohabitation provision is properly included in the order, the wife, if the husband I commits adultery, can rely upon that cruelty, coupled with the adultery, in proceedings instituted to obtain a divorce. In my opinion, this appeal should be dismissed.

Appeal dismissed.

Solicitors: *H. A. Brady; Solicitor to the Treasury.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

HIGGINS v. KING'S PROCTOR. KING'S PROCTOR v. CARTER

[COURT OF APPEAL (COZENS-HARDY, M.R., FLETCHER MOULTON and BUCKLEY, L.J.J.),
February 10, 17, 1910]

[Reported [1910] P. 151; 79 L.J.P. 37; 102 L.T. 259;
26 T.L.R. 303; 54 Sol. Jo. 405]

Divorce—Queen's Proctor—Costs—Unsuccessful intervention—Liability to pay costs.

By s. 2 of the Matrimonial Causes Act, 1878 [see now Matrimonial Causes Act, 1950, s. 11]: "Where the Queen's Proctor or any other person shall intervene or show cause against a decree nisi in any suit or proceeding for divorce or for nullity of marriage, the court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto... as may seem just...."

Held: under this section the court had a complete discretion to order the Queen's Proctor to pay the costs of an unsuccessful intervention, there being no settled practice except in cases where the Queen's Proctor had acted unreasonably.

Westcott v. Westcott (1), [1908] P. 250, approved.

Notes. The Matrimonial Causes Acts, 1860, and 1878, have been repealed. For s. 7 of the 1860 Act see now the Matrimonial Causes Act, 1950, ss. 10, 11 and 12. For s. 2 of the 1878 Act, see now s. 11 of the 1950 Act.

Considered: *Kennard v. Kennard*, *Morris v. Morris*, [1915] P. 194; *Thompson (otherwise Hulton) v. Thompson*, [1938] 4 All E.R. 1.

As to interventions by the Queen's Proctor, see 12 HALSBURY'S LAWS (3rd Edn.) 412 et seq.; and for cases see 27 DIGEST (Repl.) 579 et seq. For the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

- (1) *Westcott v. Westcott*, [1908] P. 250; 77 L.J.P. 102; 99 L.T. 310; sub nom. *Westcott v. Westcott*, 24 T.L.R. 425; 27 Digest (Repl.) 590, 5513.
- (2) *Lautour v. Queen's Proctor* (1864), 10 H.L.Cas. 685; 33 L.J.P.M. & A. 89; 10 L.T. 198; 10 Jur.N.S. 325; 12 W.R. 611; 11 E.R. 1193, H.L.; 27 Digest (Repl.) 488, 3683.
- (3) *Howard v. Howard and Drew* (1903), Times, Feb. 4; 27 Digest (Repl.) 590, 5512.
- (4) *Sillitoe v. Sillitoe*, Feb. 5, 1902, unreported.
- (5) *Hunter v. Hunter*, [1905] P. 217; 74 L.J.P. 157; 93 L.T. 451; 53 W.R. 666; 21 T.L.R. 602; 27 Digest (Repl.) 583, 5426.
- (6) *Hilbinger v. Hilbinger*, Nov. 23, 1908, unreported.
- (7) *Batley v. Batley*, Dec. 4, 1880, unreported.
- (8) *Forrester v. Forrester* (1884), Times, May 19; 27 Digest (Repl.) 591, 5518.
- (9) *Deussen v. Deussen*, Nov. 16, 1896, unreported.
- (10) *Howe v. Howe and Howe* (1910), 54 Sol. Jo. 252; [1910] W.N. 30; 27 Digest (Repl.) 590, 5514.

Appeals from decisions of SIR JOHN BIGHAM, P., in *Higgins v. Higgins*, reported [1910] P. 1, and BARGRAVE DEANE, J., in *Carter v. Carter*, reported [1910] P. 4.

The question raised in both these appeals was whether the court had jurisdiction to order the King's Proctor to pay costs in cases where he intervened unsuccessfully.

In *Higgins v. Higgins* the husband obtained a decree nisi and the King's Proctor afterwards intervened, alleging that the husband had withheld material facts from the court, and charging him with cruelty and adultery. The husband denied the charges, and, after a hearing which lasted several days, the President dismissed the intervention, but stated he considered the intervention was justified.

A Counsel for the King's Proctor then asked that intervention should be dismissed without costs, and, after hearing arguments for both the King's Proctor and the husband, the President reserved his decision, and on Oct. 28, 1909, he gave judgment dismissing the intervention without costs on the ground that it was not the practice to order the King's Proctor to pay costs if he intervened unsuccessfully unless there was some reason to blame him; but his attention was not called to the report of *Westcott v. Westcott* (1) as reported in 99 L.T. 310 and [1908] P. 250, but only to a report in the "Times" newspaper.

In *Carter v. Carter* the petitioner was the wife, and she claimed a divorce on the ground of desertion, cruelty, and adultery. The suit was undefended, and a decree nisi was pronounced on July 24, 1908. The King's Proctor then intervened, alleging that the desertion had never taken place, and that the decree was obtained by collusion. The intervention came before the President on Mar. 15, 1909. The wife's solicitors in the meanwhile had communicated with the King's Proctor to the effect that she had put forward the allegation of desertion under misapprehension, and she withdrew the charge. The decree nisi was accordingly rescinded, and she was ordered to pay the costs. But her counsel stated that she desired to keep on the file her petition alleging her husband's cruelty and adultery, and he inquired whether the adultery would have to be proved again, and the President thought that it had better be re-proved and that the King's Proctor should watch the case when it came on again. The petition was amended and new charges of adultery were added. The King's Proctor again intervened, alleging collusion and that the husband had not been guilty of adultery and cruelty as alleged in the petition. The case was heard by BARGRAVE DEANE, J., who held that the King's Proctor had failed to prove collusion and the petitioner had established her charges of cruelty and adultery, and he pronounced a decree nisi and directed the King's Proctor to pay the costs of his intervention. He held that there was no such practice as that referred to by the President in *Higgins v. Higgins*, that the King's Proctor was not ordered to pay costs where he intervened unsuccessfully unless he was to blame, and that this was shown by *Westcott v. Westcott* (1); and that under s. 2 of the Matrimonial Causes Act, 1878, there was no difference so far as costs were concerned between the King's Proctor and any other unsuccessful intervener, and the court had the same discretion as to costs in each case.

From these two decisions the petitioner and the King's Proctor respectively appealed on the question of costs.

Barnard, K.C., and *Bayford* for the petitioners in both cases.

G The Attorney-General (*Sir William Robson, K.C.*), *C. F. Gill, K.C.*, and *W. O. Willis* for the King's Proctor in *Higgins v. Higgins*.

The Attorney-General (*Sir William Robson, K.C.*), *Rawlinson, K.C.*, and *W. O. Willis* for the King's Proctor in *Carter v. Carter*.

Cur. adv. vult.

I Feb. 17, 1910. The following judgments were read.

Sir HERBERT COZENS-HARDY, M.R.—These two appeals, which are presented by leave of the President and BARGRAVE DEANE, J., relate only to costs, but they involve the consideration of the position of the King's Proctor as unsuccessful intervener in divorce proceedings, and the nature and extent of his duties and privileges.

I By s. 7 of the Matrimonial Causes Act, 1860, every decree for a divorce is in the first instance to be a decree nisi, and during the period, now six months, before it can be made absolute, "any person" may show cause why it should not be made absolute by reason of its having been obtained "by collusion or by reason of material facts not brought before the court." The section goes on to provide that any person may give information to the King's Proctor of any matter material to the decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient. It was decided by the House of Lords in *Lautour v. Queen's Proctor* (2) that if the King's Proctor takes proceedings under

that part of s. 7 to which I have referred he appears only as one of the public giving information to the court, and not as a litigant entitled to receive or liable to pay costs. It is otherwise if he intervenes under the second part of s. 7 upon the ground of collusion only. Nothing turns upon that part of s. 7. The law on this point was amended by the Matrimonial Causes Act, 1878. By s. 2 where the King's Proctor "or any other person" intervenes and shows cause against a decree nisi the court is authorised to make such order as to the costs of the King's Proctor or of any other person who shall intervene or show cause or of any party to the suit occasioned by such intervention or showing cause "as may seem just." And provision is made that the Treasury may, if it thinks fit, order any costs which the King's Proctor shall by order of the court pay to a party to the suit to be deemed part of the expenses of his office.

On the construction of this section, it is plain that there is jurisdiction to order the King's Proctor to pay the costs of an unsuccessful intervention. And there is nothing to indicate that he is placed in a different position from "any other person" except in so far as he has the public purse to fall back upon. It has been strenuously argued by the Attorney-General that as the King's Proctor has highly important and delicate duties cast upon him in the public interest, and as he acts reasonably upon such information as reaches him, and under the direction of the Attorney-General, he ought not to be ordered to pay costs if the intervention should ultimately fail, and that the party who obtained the decree nisi ought to regard the costs of resisting the intervention as part of the price of obtaining the decree absolute, and the analogy of the wife's costs was relied upon. This analogy fails, for the liability to pay the wife's costs depends upon statute or upon rules having statutory effect, and there is no such provision with respect to the King's Proctor's costs. I am unable to assent to the contention of the Attorney-General. It seems to me that by the Act of 1878 the costs of every intervention, whether started by the King's Proctor or by "any other person," are in the discretion of the court, which is the meaning of the words "as may seem just," and that we ought not to assent to the suggestion that the King's Proctor occupies a position of special advantage. The petitioner for a divorce has been obliged to incur heavy costs by reason of the intervention, which, though reasonably started, has been proved to be without justification. Common fairness requires that, in the absence of some qualifying circumstances, the petitioner should recover these costs from the intervener. If the intervener is a private person he will be personally liable. If the intervener is the King's Proctor the burden will not really fall upon him, but upon the public whom he represents. Both the President and BARGRAVE DEANE, J., seem to have taken this view, but the President considered that he was bound by the settled practice of the Divorce Court that the King's Proctor should never be ordered to pay costs unless he had acted unreasonably. It seems to me that a statutory discretion given to the judge ought to be exercised with reference to the facts of the particular case before him, unfettered by any supposed settled practice. But I am satisfied that there is no such settled practice as is suggested. I need only refer to the considered judgment of SIR GORELL BARNES, P., in *Westcott v. Westcott* (1).

It only remains to deal with the particular cases. In *Higgins v. Higgins* there is no difficulty. The President would, in his discretion, have ordered the King's Proctor to pay the costs of the intervention but for the supposed settled practice. I feel no doubt that such an exercise of discretion would have been just. The appeal must be allowed, with costs. In *Carter v. Carter* BARGRAVE DEANE, J., in the exercise of his discretion, ordered the King's Proctor to pay the costs of the intervention, and I see no reason to doubt that his discretion was properly exercised. The petitioner was condemned in the costs of an earlier intervention, in which the King's Proctor succeeded. But this circumstance in no way justifies the contention that the costs of the subsequent intervention, in which he failed, should not be paid by him. I may add that the learned judge, who saw

A the petitioner in the witness-box, believed her testimony, and expressly exonerated her from moral blame. This appeal must be dismissed with costs.

FLETCHER MOULTON, L.J.—These two cases raise an important question with regard to the costs of the King's Proctor in cases in which he intervenes under the statutory powers and duties given to him when he charges collusion as well as when he intervenes in the position of a member of the public on other grounds. In both cases the intervention was unsuccessful. In *Higgins v. Higgins* SIR JOHN BIGHAM, P., refused to dismiss the intervention with costs on the ground that he did not think it unreasonable conduct on the part of the King's Proctor to intervene, and that it was the settled practice that, if there was no reason to blame the King's Proctor in respect of the intervention, he ought not to be ordered to pay the costs. In *Carter v. Carter*, which was decided a little later, and in which case also BARGRAVE DEANE, J., who tried the case, was of opinion that no fault could be found with the King's Proctor for intervening, he was ordered to pay the costs of the intervention, the learned judge holding that no such settled practice existed as that which the President had purported to follow in *Higgins v. Higgins*; and accordingly he dismissed the intervention with costs against the King's Proctor.

The question for us to decide is as to what are the principles upon which the costs of an unsuccessful intervention should be ordered to be borne, and, having settled the principle, what order ought to be made in each of the individual cases before us. No doubt or difficulty exists as to the statutory power of the court with regard to these costs. Prior to the Matrimonial Causes Act, 1878, the King's Proctor could only receive costs in respect of an intervention on the ground of collusion, which is the only statutory function which the King's Proctor possesses in this respect. But the King's Proctor, like any other member of the public, has a right to intervene on other grounds. By the decision of *Lautour v. Queen's Proctor* (2) it was decided by the House of Lords that there was at that time no power to give costs to the King's Proctor in respect of any other matter than a plea of collusion, even though his intervention was successful. In cases where he intervened on other grounds than collusion he was held to be in the same position as any other member of the public doing the like, and the court had no statutory power to give him costs in respect of such intervention. To remedy this state of things the Matrimonial Causes Act, 1878, was passed. It provides as follows:

"Where the Queen's Proctor or any other person shall intervene or show cause against a decree nisi in any suit or proceeding for divorce or for nullity of marriage, the court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or showing cause as aforesaid as may seem just; and the Queen's Proctor, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases: Provided that the Treasury may, if it shall think fit, order any costs which the Queen's Proctor shall, by any order of the court made under this section, pay to the said party or parties to be deemed to be part of the expenses of his office."

If anything were necessary to make it clear that this enactment authorises the court in proper cases to direct the King's Proctor to pay costs, special reference is made in the proviso at the end of the section to such a case. It is, therefore, clear that the court has full power to direct that the cost of an intervention shall be borne by any party thereto, including the King's Proctor. And the words "as may seem just" make it a matter in the discretion of the court.

The Attorney-General on behalf of the King's Proctor argued that, although this is so, a settled practice prevents the court from making an order for costs against the King's Proctor except in cases where he has acted unreasonably. Before inquiring whether any such practice exists, I wish to state emphatically that, in

my opinion, where costs are left by statute in the discretion of the court, the power and duty of deciding in each case and from the circumstances of the case how that discretion should be exercised cannot be taken away by any decision of the court or even by any series of decisions. When the legislature directs that the court shall make such order as it may deem just, it is not giving to a judge the authority to displace that statutory enactment by a fixed rule merely because he may in one or many cases think that justice requires that he should follow one and the same course. He cannot take away from his successors or from himself the power and duty of deciding in a future case according to the circumstances of that case. No doubt the fact that eminent judges in the past have taken a particular view as to the circumstances which justify a particular order, and the reasons which they have given for adopting a particular course, would influence their successors; but they do not bind them, nor do they excuse those successors from exercising their judgment afresh in each individual case. It is, therefore, only under protest that I examine the question whether any such settled practice does exist in the matter. Even if I should find that it does, it would not, in my opinion, decide these appeals. The cases that have been cited to us convince me that no such settled practice exists. The contention of the King's Proctor is based mainly on the report in the "Times" newspaper of the judgment of SIR GORELL BARNES in *Howard v. Howard* (3), which appears to lay down the principle that an order for costs should not be made against the King's Proctor except in cases where he has acted unreasonably in intervening. I doubt the accuracy of that report. It makes the learned judge treat as a settled practice a course which is diametrically opposed to that which he followed in *Sillitoe v. Sillitoe* (4) and *Westcott v. Westcott* (1), the latter being a considered judgment in which the matter is gone into in the most careful and elaborate manner. It is impossible in the face of such cases as these to hold that there is any such settled practice as is contended for, and, in my opinion, the question whether or not the King's Proctor should be ordered to pay the costs of an unsuccessful intervention is a matter which both by statute and by the practice of the court remains in the discretion of the tribunal.

I shall, therefore, proceed to examine the circumstances of the two cases in order to see what order ought to be made with regard to the costs in each of them. *Higgins v. Higgins* presents no difficulty. It is a plain case where the King's Proctor intervened on various grounds and failed in all of them. I can see no reason in justice why he should not bear the petitioners' costs caused by his intervention. It has been urged before us that he is a public officer acting on behalf of the public, and therefore it is a hardship to make him pay the costs occasioned by his action against the petitioner. I entirely fail to appreciate the force of this remark or even the appropriateness of the word "hardship." No one supposes that the King's Proctor will personally have to pay the costs. He is acting on behalf of the public against an individual, and it seems to me immeasurably more just that, if he fails, the public should bear the costs of the mistaken action of their representative (which will be the result if the intervention is dismissed with costs) than that the individual petitioner should bear them. I am of opinion, therefore, that this appeal should be allowed with costs and that the intervention should be dismissed with costs against the King's Proctor.

The facts of *Carter v. Carter* are somewhat different. In this case the petitioner was wrong in the first instance by alleging and swearing to a desertion for two years. The King's Proctor therefore rightly intervened after the decree nisi had been pronounced. The petitioner admitted that she was in the wrong, and the King's Proctor received the costs of his intervention and the decree nisi was rescinded. But the petitioner obtained leave to amend the petition (which had from the first contained a charge of cruelty) by adding further charges of cruelty and adultery. The King's Proctor elected again to intervene before the trial, and filed pleas alleging collusion and various other matters. I am by no means satisfied that he had a right so to do, but the case went to trial on those pleas, and the

A King's Proctor failed to support them. It is urged on his behalf that the fact that the petitioner had sworn to a charge of desertion for two years which she subsequently admitted to be unfounded, amounted to conduct justifying the intervention, and that therefore, as it was the petitioner's own misconduct that afforded ground for intervention, costs should not be given against the King's Proctor. I think that there is here a confusion of thought. The decree obtained by the

B erroneous evidence was rescinded and the King's Proctor received his costs. But I can find no misconduct on the part of the petitioner in respect of any of the matters which thereafter formed the subject-matter of the inquiry. The learned judge saw the petitioner and heard her evidence, and came to the conclusion that she had acted with perfect bona fides in the matter, and that she thought that absence of marital intercourse constituted desertion although she was living in the

C same house as her husband. I do not think that we should be justified in departing from this considered finding of the learned judge, and I look upon the second intervention of the King's Proctor as relating solely to the charges of adultery and cruelty and collusion against the respondent, in respect of all of which it failed. I can see, therefore, no reason why we should set aside the order as to costs which the learned judge made in the exercise of his discretionary power. He acted on no

D mistaken view as to his power and duty, and therefore this appeal should be dismissed with costs.

BUCKLEY, L.J.—Section 7 of the Matrimonial Causes Act, 1860, provides that if the King's Proctor suspects that any parties to the suit are or have been acting in collusion he may under the direction of the Attorney-General intervene alleging collusion, and empowers the court to order the parties, or such of them as it shall see fit, to pay his costs. It does not empower him to intervene in any case other than that of collusion. If he intervenes, as he may, on other grounds, or if, intervening upon the ground of collusion, he advances other grounds, he must in such respects other than collusion be treated as one of the public coming in to bring before the court facts for the court's information which had not been presented to it by the parties: see LORD WESTBURY's opinion in *Lautour v. Queen's Proctor* (2). By s. 2 of the Matrimonial Causes Act, 1878, further provision is made as to costs of intervention. That is a section which comprises in one class the King's Proctor and any other person who intervenes and the parties to the proceeding, and provides in the same sentence that the court may make such order as to the costs of all or any of those persons occasioned by such intervention as

F may seem just. The section contains a proviso at the end relating to reimbursement by the Treasury to the King's Proctor of any costs which the King's Proctor shall by any order of the court made under that section have to pay. There is in this section no discrimination between costs incurred by the King's Proctor upon an intervention on the ground of collusion and costs incurred by him upon an intervention on other grounds. Where he intervenes as one of the public—that is, upon

H grounds other than collusion—I see no reason for saying that he does not stand in exactly the same position as to costs as any other intervener. The same, I think, is true in the case where he intervenes on the ground of collusion. His costs of intervention (be it made on what ground it will) are alike dealt with by the section upon the same footing. The only relevant question, therefore, I think, in determining whether the King's Proctor shall be ordered to pay costs or

I not is whether it "seems just" to the court that he should be so ordered to pay. We have been strongly pressed with an argument that the King's Proctor stands in an exceptional position. It is argued that if he intervenes upon reasonable grounds he ought not to be ordered to pay costs notwithstanding that his intervention is wholly unsuccessful. In my opinion the question whether he has acted reasonably or not is not as between the King's Proctor and the other parties to the proceedings a ground upon which to act in determining whether or not to order him to pay costs. The question whether the conduct or misconduct of the parties has rendered the intervention necessary may be a ground. As between the King's

Proctor and the Treasury the question whether he has acted reasonably or not may well be material. But as between the King's Proctor and the parties to the proceedings the question is to be determined, I think, upon considerations similar to those to which the court will have regard in considering how in its discretion it ought to award costs in respect of a contention which has been raised and has failed. In this I see no hardship upon the King's Proctor. He ought, of course, to be placed, and upon grounds of public policy I think it essential that he should be placed, in a position in which in the proper conduct of his office he should be fearless as to costs in determining whether upon the information which reaches him he ought or ought not to intervene. But this is to be insured, not by depriving the parties who succeed in the intervention of costs, but by his being assured of the loyal support of the Treasury in accepting responsibility for the acts of a public officer acting reasonably and under the sanction of the law officer of the Crown. If such support be not accorded to him, it would seem to me impossible for a person of integrity and self-respect to accept the duties of the office. It is plain, and, indeed, not in dispute, that the statute empowers the court to award costs against the King's Proctor "as may seem just."

In *Higgins v. Higgins*, SIR JOHN BIGHAM, P., decided as he did upon the footing that there existed a practice not to give costs against the King's Proctor who is unsuccessful in his intervention if there is no reason to blame him for intervening. In my judgment no such practice exists, and if there were such a practice it would be erroneous. If the King's Proctor intervenes and succeeds, or succeeds as to some of the grounds of his intervention, he will get his costs (*Hunter v. Hunter* (5)), or get his costs of the issues upon which he succeeds: (*Hilbinger v. Hilbinger* (6)). If he intervenes and fails, the court may in its discretion either make no order as to costs or give costs against him. In determining which course to take, the court may no doubt regard amongst other material circumstances the question whether the parties by conduct, not necessarily by misconduct, have brought the intervention and its consequent costs upon themselves, and may give no costs (*Batley v. Batley* (7); *Forrester v. Forrester* (8)), or may even, though his conduct has been perfectly reasonable, dismiss his intervention with costs: (*Deussen v. Deussen* (9); *Sillitoe v. Sillitoe* (4)). There is a decision of SIR GORELL BARNES in *Howard v. Howard* (3), a report of which, taken from the "Times" newspaper of Feb. 4, 1903, is to be found in [1910] P. 8. SIR GORELL BARNES is there reported to have said that unless the King's Proctor acted unreasonably he ought not to be condemned in costs. This report cannot, I think, be accurate, for the language attributed to the learned President is directly in contradiction of his own words in the subsequent case of *Westcott v. Westcott* (1), where, after stating that it had been argued that the King's Proctor unless he acts unreasonably cannot be or ought not to be condemned in costs, he says: "I cannot agree with that view." In *Westcott v. Westcott* (1) SIR GORELL BARNES discussed the whole matter, and, while holding the intervention to be quite reasonable and properly conducted, held that, inasmuch as it was unsuccessful and the petitioner was not in any way to blame, the King's Proctor ought to pay the costs. These are the authorities, and they show, in my opinion, that no such practice has prevailed in the court as SIR JOHN BIGHAM, P., thought himself constrained to follow in *Higgins v. Higgins*. From his judgment in that case, and from what he said subsequently in *Howe v. Howe* (10), his opinion when he decided *Higgins v. Higgins* was that the fact that the King's Proctor had failed ought to be sufficient to justify him in fixing him with costs although his intervention had been reasonable, and he would have made an order against him for costs but that he supposed himself to be bound by an established practice. We ought now to exercise our discretion in the way in which he should and would have exercised his if he had not felt himself bound by a supposed practice, and ought, I think, to give costs against the King's Proctor in *Higgins v. Higgins* and accordingly to allow the appeal in that case. As regards *Carter v. Carter*, I need not add anything to what has been said as to the reasons why the discretion should be exercised in the same way. In that case I agree with the

A judgment of BARGRAVE DEANE, J., and think that in *Carter v. Carter* the appeal should be dismissed. The result is that in *Higgins v. Higgins* the appeal should be allowed with costs, and in *Carter v. Carter* the appeal should be dismissed with costs.

B Solicitors: *The King's Proctor*; *Smith, Rundell & Dods*, for *Evan Davies*, Cardiff; *Braby & Waller*.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

DIRECTOR OF PUBLIC PROSECUTIONS v. BALL AND ANOTHER

[HOUSE OF LORDS (Lord Loreburn, L.C., the Earl of Halsbury, Lord Ashbourne, Lord Alverstone, Lord Atkinson, Lord Gorell, Lord Shaw, Lord Mersey and Lord Robson), December 15, 1910]

[Reported [1911] A.C. 47; 80 L.J.K.B. 691; 103 L.T. 738;
75 J.P. 180; 55 Sol. Jo. 139; 22 Cox, C.C. 366;
6 Cr. App. Rep. 31.]

Criminal Law—Evidence—Evidence of similar acts—Incest—Evidence of previous incestuous acts—Proof of guilty relationship and sexual passion between parties—Punishment of Incest Act, 1908 (8 Edw. 7, c. 45).

F Two persons were indicted for incest under the Act of 1908, and in the indictment the offence was alleged to have been committed on certain dates in 1910. It was proved that at the dates set out in the indictment the respondents were living together, passing as husband and wife, and occupying the same bedroom. Evidence was tendered that at a time earlier than the dates set out in the indictment the respondents had lived together in the same manner, and that the female respondent had had a child which she had registered as being the child of herself and the male respondent.

C **Held:** the evidence that the respondents had previously carnally known each other and had had a child was admissible, not to prove mens rea, but to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had had illicit connection in fact on or between the dates charged.

H *Makin v. A.-G. for New South Wales* (1), [1894] A.C. 57, applied.

Notes. The Punishment of Incest Act, 1908, has been repealed. See now the Sexual Offences Act, 1956, ss. 10, 11.

I Considered: *R. v. Bloodworth* (1913), 9 Cr. App. Rep. 80. Referred to: *R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Rodley* [1911-13] All E.R. Rep. 688; *R. v. Thompson* (1913), 9 Cr. App. Rep. 252; *R. v. Shellaker*, [1914] 1 K.B. 414; *R. v. Thompson*, [1917] 2 K.B. 630; *Harris v. D.P.P.*, [1952] 1 All E.R. 1044.

As to evidence of similar acts, see 10 HALSBURY'S LAWS (3rd Edn.) 443-445; and for cases see 14 DIGEST (Repl.) 416 et seq. For the Sexual Offences Act, 1956, ss. 10, 11, see 36 HALSBURY'S STATUTES (2nd Edn.) 222.

Case referred to:

- (1) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, 4094.

Also referred to in argument:

R. v. Watson (1817), 2 Stark. 116; 32 State Tr. 1, N.P.; 14 Digest (Repl.) 404, 3953.

R. v. Burdett (1820), 4 B. & Ald. 95; 1 State Tr.N.S. 1; 106 E.R. 873; 14 Digest (Repl.) 498, 4801.

Duke of Norfolk v. Germaine, 12 Howell's State Trials, 927.

Boddy v. Boddy and Grover (1860), 30 L.J.P.M. & A. 23; 27 Digest (Repl.) 329, 2731.

Wales v. Wales, [1900] P. 63; 69 L.J.P. 34; 27 Digest (Repl.) 329, 2732.

R. v. Bond, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, 4091.

R. v. Chitson, [1909] 2 K.B. 945; 79 L.J.K.B. 10; 102 L.T. 224; 73 J.P. 491; 25 T.L.R. 818; 58 Sol. Jo. 746; 22 Cox, C.C. 286; 2 Cr. App. Rep. 325, C.C.A.; 14 Digest (Repl.) 432, 4193.

R. v. Oddy (1851), 2 Den. 264; T. & M. 593; 4 New. Sess. Cas. 602; 20 L.J.M.C. 198; 17 L.T.O.S. 136; 15 J.P. 308; 15 Jur. 517; 5 Cox, C.C. 210, C.C.R.; 14 Digest (Repl.) 502, 4851.

Appeal from an order of the Court of Criminal Appeal (DARLING, PICKFORD and LORD COLERIDGE, JJ.), who had quashed the conviction of the respondents, who were indicted under the Punishment of Incest Act, 1908, on the ground that the learned judge who tried the case (SCRUTTON, J.) had improperly admitted certain evidence.

The appeal was brought under s. 1 (6) of the Criminal Appeal Act, 1907, which provides that

"If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional and public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords."

The Attorney-General (Sir R. Isaacs, K.C.), *R. D. Muir*, *Rowlatt* and *Graham-Campbell* for the appellant.

Holman Gregory, *K.C.*, *Forrest Fulton* and *Eustace Fulton* for the respondents.

LORD LOREBURN, L.C.—In this case two persons, a brother and a sister, were indicted for incest in July, 1910, and September, 1910. Certain evidence, which was obviously admissible, was given to establish that there was, at all events, ample opportunity for this offence, and that there were circumstances which, to say the least, were very suggestive of incest; also these two persons lived together, and occupied the same bedroom and the same bed. Further evidence was then tendered to show that these persons had previously carnally known each other and had had a child in 1908. The object of that evidence was to make good that they had a guilty passion towards each other, and that therefore the proper inference from their occupying the same bedroom and the same bed was an inference of guilt, or, which is the same thing in another way, that the defence of innocent living together as brother and sister ought to fail. The law on this subject is stated in the judgment of LORD HERSCHELL, L.C., in *Makin v. A.-G. for New South Wales* (1). It is well known, and I need not repeat it. The question is only of applying it. In accordance with the law laid down in that case, which is applied daily in the Divorce Court, I consider that this evidence was clearly admissible on the issue that this crime was committed, not to prove a mens rea, as DARLING, J., considered, but to establish the guilty relations between the parties, and the existence of a sexual passion between them, as elements in proving that they had illicit connection in fact on or between the dates charged. Their passion for each other was as much evidence as was their presence together in the bed of the fact that when there they had guilty relations with each other. I agree that the courts

A of law ought to be very careful to preserve the time-honoured law of England, that you cannot convict a man of one crime by proving that he has committed some other crime. That, and all other safeguards of our criminal law, will be jealously guarded. But here I think that the evidence went directly to prove the actual crime for which these persons were indicted.

B **THE EARL OF HALSBURY.**—I am entirely of the same opinion, and I agree with the Lord Chancellor.

LORD ASHBOURNE, LORD ALVERSTONE, LORD ATKINSON, LORD GORELL, LORD SHAW, LORD MERSEY and LORD ROBSON concurred.

Order appealed from reversed.

Solicitors: *Director of Public Prosecutions; F. A. Stern.*

[*Reported by C. F. MALDEN, ESQ., Barrister-at-Law.*]

BRISTOL TRAMWAYS, ETC., CARRIAGE CO., LTD. v. FIAT MOTORS, LTD.

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), June 17, 18, 20, 21, July 29, 1910]

[Reported [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443;
26 T.L.R. 629]

Sale of Goods—Implied condition of fitness—Sale of specified article under patent or trade name—Merchantable quality—Such quality as reasonable buyer would accept it—Saleability—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 14 (1), (2).

The plaintiffs entered into a contract with the defendants for the purchase of a 24 to 40 h.p. Fiat motor omnibus and six 24 to 40 h.p. Fiat motor chassis, and brought an action claiming damages for delay in delivery, and for the expense of repairs and reconstruction on the ground that the goods delivered were unsatisfactory and not fit to perform the particular purpose for which they were purchased. There was evidence that the defendants were told that the omnibus and the chassis were required for heavy traffic, and also that the plaintiffs relied on their skill and judgment in the matter.

Held: (i) the defendants were in breach of the condition implied in the contract by s. 14 (1) of the Sale of Goods Act, 1893, that the goods should be reasonably fit for the purpose for which they were required; (ii) the goods had not been ordered under a "patent or other trade name" within the proviso to s. 14 (1) of the Act as at the time the contract was entered into a Fiat omnibus was not a trade name; (iii) (per COZENS-HARDY, M.R., and FARWELL, L.J.), the goods were not of "merchantable quality" within s. 14 (2) of the Act; and, therefore, the plaintiffs were entitled to damages for breaches of contract.

Per FARWELL, L.J.: (i) If a man orders in express terms an article known by a patent or trade name under that name and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it, even although he told the vendor before he ordered it the purpose for which he required it. Where an article has in fact a patent or trade name under which it is known and dealt in, the seller of such an article is not bound to refrain from carrying

out an order for the article because it is ill-adapted for, or even wholly incapable of, effecting a purpose mentioned in the order unless the purchaser makes it an express condition that it shall be fit for that purpose.

(ii) The phrase "merchantable quality" in s. 14 (2), of the Sale of Goods Act, 1893, means that the article is of such quality and in such condition that a reasonable man acting reasonably would, after a full examination, accept it under the circumstances of the case in performance of his offer to buy that article, and whether he buys for his own use or to sell again so as to make the term "saleable" apply.

Notes. Considered: *Niblett v. Confectioners' Materials Co.*, [1921] All E.R. Rep. 459. Referred to: *Sanday v. British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; *Sumner, Pearmain & Co. v. Webb & Co.*, [1921] All E.R. Rep. 680; *Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] All E.R. Rep. 605; *Morelli v. Fitch and Gibbons*, [1928] All E.R. Rep. 610; *Cammell, Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.*, [1934] All E.R. Rep. 1; *Grenfell v. E. B. Meyrowitz, Ltd.*, [1936] 2 All E.R. 1313; *Wilson v. Rickett, Cockerell & Co.*, [1954] 1 All E.R. 868; *Godley v. Perry*, [1960] 1 All E.R. 36.

As to implied terms as to quality or fitness, see 34 HALSBURY'S LAWS (3rd Edn.) 51 et seq.; and for cases see 39 DIGEST 433 et seq. For the Sale of Goods Act, 1893, s. 14, see 22 HALSBURY'S STATUTES (2nd Edn.) 993, 994.

Cases referred to:

- (1) *Chanter v. Hopkins* (1838), 4 M. & W. 399; 1 Horne H. 377; 8 L.J.Ex. 14; 3 Jur. 58; 150 E.R. 1484; 39 Digest 447, 753.
- (2) *Shepherd v. Pybus* (1842), 3 Man. & G. 868; 4 Scott, M.R. 434; 11 L.J.C.P. 101; 133 E.R. 1390; 39 Digest 441, 700.
- (3) *Erskine v. Adeane* (1873), 8 Ch. App. 756; 42 L.J.Ch. 849; 29 L.T. 234; 38 J.P. 20; 21 W.R. 802, L.J.J.; 12 Digest (Repl.) 895.
- (4) *Morgan v. Griffith* (1871), L.R. 6 Exch. 70; 40 L.J.Ex. 46; 23 L.T. 783; 19 W.R. 957; 12 Digest (Repl.) 142, 894.
- (5) *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311; 48 L.J.Ch. 846; 41 L.T. 1; 43 J.P. 814; 27 W.R. 585, H.L.; 12 Digest (Repl.) 80, 440.
- (6) *Inglis v. Buttery* (1878), 3 App. Cas. 552, H.L.; 7 Digest (Repl.) 341, 18.
- (7) *Laing v. Fidgeon* (1815), 4 Camp. 169; 6 Taunt. 108; 128 E.R. 974; 39 Digest 449, 765.
- (8) *Gardiner v. Gray* (1815), 4 Camp. 144; 171 E.R. 46; 39 Digest 451, 790.
- (9) *Kennedy v. Panama, etc., Mail Co.* (1867), L.R. 2 Q.B. 580; 8 B. & S. 571; 36 L.J.Q.B. 260; 17 L.T. 62; 15 W.R. 1039; 12 Digest (Repl.) 260, 2020.

Also referred to in argument:

- Gillespie Bros. & Co. v. Cheney, Eggar & Co.*, [1896] 2 Q.B. 59; 65 L.J.Q.B. 552; 12 T.L.R. 274; 40 Sol. Jo. 354; 1 Com. Cas. 373; 39 Digest 448, 759.
- Jones v. Just* (1868), L.R. 3 Q.B. 197; 9 B. & S. 141; 37 L.J.Q.B. 89; 18 L.T. 208; 16 W.R. 643; 39 Digest 434, 632.
- Drummond v. Van Ingen* (1887), 12 App. Cas. 284; 56 L.J.Q.B. 563; 57 L.T. 1; 36 W.R. 20; 3 T.L.R. 541, H.L.; 39 Digest 454, 813.
- Beer v. Walker* (1877), 46 L.J.Q.B. 677; 37 L.T. 278; 41 J.P. 728; 25 W.R. 880; 39 Digest 442, 714.

Appeal by the defendants from a decision of LAWRENCE, J., sitting without a jury.

The plaintiffs claimed damages for breaches of two contracts for the supply respectively of a 24 to 40 h.p. Fiat motor omnibus and six 24 to 40 h.p. Fiat motor chassis. They alleged there was delay in the delivery of the chassis, and that the omnibus and chassis when delivered were unfit for the work for which they were bought. LAWRENCE, J., after a trial which lasted several days, gave judgment for the plaintiffs for £2,300 and costs, a small portion of the damages being separately assessed for delay in the delivery of the chassis.

A The two contracts were respectively contained in a separate letter, both the letters being dated Feb. 14, 1906, addressed to the defendants and signed by the manager of the plaintiff company. The plaintiffs required the omnibus under the first contract and six chassis under the second for the purposes of their business, which was the conveyance of passengers in motor omnibuses in and near Bristol, a heavy traffic in a hilly district. The goods delivered proved unsatisfactory and unfit for the heavy work required of them. The judge found as a fact that the plaintiffs fully made known to the defendants, an English company dealing in motor vehicles, and in especially close relations—not precisely disclosed in the case—with the manufacturing company in Turin, known as the Fiat Co. (Fabbrica Italiana di Automobili, Torino), the particular purpose for which the omnibus and the six chassis were required. There was no express contract of warranty, but the judge expressly found in regard to the contracts: (i) That the buyers relied upon the sellers' skill and judgment to supply goods which should be free from the defects which the plaintiffs had experienced in the case of certain Thornycroft omnibuses; (ii) that the goods were of a description which it was in the course of the sellers' business to supply; (iii) that, in regard to the omnibus, an examination of it by the plaintiffs' assistant traffic manager on a visit to London shortly before Feb. 14, 1906, was not such as to enable the plaintiffs to discover the defects in that omnibus; (iv) that the omnibus and the six chassis alike were unfit for the purpose for which they were bought by the plaintiffs, and at different dates broke down and became useless; (v) that thereby great loss and expense in repairs and reconstruction, amounting altogether to £2,000, was caused to the plaintiffs; (vi) that the defects which occasioned these losses and expenses were not due to any mismanagement or want of skill on the part of the plaintiffs' servants.

Montague Lush, K.C., and W. Whateley for the defendants.

Simon, K.C., and Leck for the plaintiffs.

Cur. adv. vult.

F July 29, 1910. The following judgments were read.

G Sir HERBERT COZENS-HARDY, M.R.—The plaintiffs claim damages in respect of a Fiat motor omnibus and six chassis sold by the defendants to the plaintiffs. The learned judge, LAWRENCE, J., who tried this case without a jury, has held that the omnibus and chassis as delivered were not fit to perform the duty required of them, and that the plaintiffs made fully known to the defendants the particular purpose for which the omnibuses were required, and that they relied upon the defendants' skill and judgment in the matter. The case really turns upon s. 14 of the Sale of Goods Act, 1893. I rather deprecate the citation of earlier decisions such as *Chanter v. Hopkins* (1) or *Shepherd v. Pybus* (2). The object and intent of the statute of 1893 was no doubt simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law.

I Turning to s. 14, it is plain that the defendants were told that the omnibus and chassis were required for heavy passenger traffic at Bristol. I am disposed to think that such a statement of purpose suffices to show that the buyer relied upon the seller's skill or judgment without any further evidence on the point, but, however that may be, I think there was in the present case ample evidence that the plaintiffs did rely upon the defendants' skill or judgment. This being so, there was an implied condition that the omnibus and chassis should be reasonably fit for the declared purpose, unless the defendants can rely upon the proviso at the end of sub-s. (1) of s. 14. That proviso is as follows:

"Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

The orders in the present case are in writing. The first was for a 24 to 40 h.p. Fiat motor omnibus complete, which had been run from London to Edinburgh, and which the representatives of the plaintiffs saw for a short time. The other order was for six 24 to 40 h.p. Fiat motor omnibus chassis. In my opinion, neither of these orders falls within the proviso. It was not a contract for the sale of a specified article under its patent name, nor was it under its trade name. It is to me plain from the evidence that, at the time when these contracts were entered into, a Fiat omnibus was not a trade name. It no doubt meant an article sold by the defendants, an English company, and manufactured by an Italian company having intimate business relations with the English company, but the whole design and structure and arrangement of the Fiat omnibus was a matter of uncertainty according as the makers might from time to time consider improvements to be desirable. The defects in the omnibuses sold were apparently due to their being too slightly built, and being suitable for touring purposes rather than for heavy traffic. I think, therefore, that on the findings of fact by the learned judge there was an implied condition that the goods should be reasonably fit for the purpose. I also think that the case may be brought within s. 14 (2)—namely, that there was an implied condition that the goods should be of merchantable quality. In the face of the report of Oct. 25, 1907, which comes from the defendants' custody, I cannot doubt that the goods sold were not of merchantable quality within the fair meaning of those words, and I see no reason to doubt the finding of the learned judge that the slight inspection by the representatives of the plaintiffs of one of the complete omnibuses was not of such a nature as sufficed to disclose the defects. In my opinion there is no ground for interfering with the judgment of the learned judge, and the appeal must be dismissed with costs.

FARWELL, L.J.—I think that it is impossible to interfere with any of the findings of fact of the learned judge. I understand that he has not found any express contract of warranty, although he gave leave to amend by pleading such a contract; at any rate, I am of opinion that evidence of such a contract as was alleged by the amendment is inadmissible. There are no doubt cases where evidence may be given to show that a contract was entered into in consideration of a collateral antecedent contract between the parties, as in *Erskine v. Adeane* (3) and *Morgan v. Griffith* (4), but no subsequent contract, founded only on the same consideration as the principal contract, can be given in evidence, for it obviously cannot form the consideration of the main contract which was complete before it came into existence, and it cannot add to or vary such contract without infringing the elementary rules of evidence, and, unless it can form part of such contract, it has no consideration to support it. There may be cases in which a contract has to be extracted from a long correspondence, in which case the whole of it must be considered, as in *Hussey v. Horne-Payne* (5); but when the contract is expressed in a formal document or in a letter of offer and a letter of acceptance, no antecedent or subsequent negotiations are admissible to construe such contract: see LORD BLACKBURN'S speech in *Inglis v. Buttery* (6), 3 App. Cas. at p. 577.

The present case, therefore, resolves itself into the question whether there is any implied warranty on which the plaintiffs can recover damages. In order to carry into effect the true intention of the contracting parties, the courts for many years held that certain warranties or conditions were implied in certain contracts, and these have now been codified in the Sale of Goods Act, 1893, those that are material for the present case being (i) reasonable fitness for the purpose for which the goods are purchased, and (ii) merchantable quality. On (i) the learned judge's findings are conclusive in the plaintiffs' favour, unless the proviso in s. 14 (1) applies. This is a question of considerable difficulty, but I have come to the conclusion that he was right in holding that it does not apply. The reason of the exception in the proviso is plain. If a man orders in express terms an article known by a patent or trade name under that name and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it, even although he

A told the vendor before he ordered it the purpose for which he required it. The proviso assumes the absence of any express assurance by the vendor, and deals only with the case of express or implied information by the purchaser of the purpose for which he requires the article so framed as to show that the purchaser relied on the seller's skill or judgment. For example, if he asks for A.'s patent safety shaving machine he cannot complain if he gets it, even although he added that the purpose for which he required it was to cut cheese. It was open to him to make an express condition if he desired that it should cut cheese; but the seller is not bound to refrain from carrying out his order for the machine because it is ill-adapted for, or even wholly incapable of, effecting the purpose mentioned in the order. But this must, in my opinion, be confined to articles which have in fact a patent or trade name under which they can be ordered. By A.'s patent shaving machine I mean a known article dealt in under that name. But at the time when the omnibus and the chassis were ordered in this case there was nothing that could properly be called a Fiat omnibus or a Fiat chassis: the industry was in the tentative stage, and the order was really for the particular omnibus and the chassis to be completed and made respectively by the Fiat Co. on such lines and patterns as that company should find expedient for the purpose. It is one thing to order an article known as a "Fiat omnibus," an order which is intelligible only if there be such an article known to the public or the trade; it is quite another thing to order an omnibus to be made by the Fiat Co., although in the latter case that company might adopt patterns and devices which were its own exclusive property: the former is within the proviso, the latter is not. An omnibus made by the Fiat Co. may well be described as a Fiat omnibus, but such nomenclature does not necessarily constitute a trade name within the Act; if it did, a manufacturer could always get the benefit of the proviso by labelling all the goods made by him with his own name, a trade name not acquired by user, and whether it has or has not been so acquired is a question of fact in each case. In the present case LAW-
RANCE, J., has found that it has not, and I see no reason to differ from him. The real substance of the transaction was that the plaintiffs required the defendants to provide them with an omnibus and chassis that would work in Bristol and the defendants undertook to supply them, and both parties understood that they were to be reasonably fit for the purpose. For this purpose I do not think that the English and the Italian companies can be fairly distinguished. No evidence was given of the arrangements between them, and the plaintiffs were entitled to treat the defendants as if they were the manufacturing company.

Further, there is the second exception in s. 14, on which LAW-
RANCE, J., has also found in the plaintiffs' favour, and to this the proviso to the first exception does not apply; the implied condition that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name or otherwise. The only proviso in s. 14 (2)—viz., examination by the buyer—is negatived by the finding of fact by LAW-
RANCE, J., in this case. The phrase "merchantable quality" seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products such as grain, wool, or flour than to a complicated machine; but it is clear that it extends to both. The definition of "goods" in s. 62 makes that word include "all chattels personal other than things in action and money"; and "quality of goods" includes their state or condition. And this is in accordance with the older cases, such as *Laing v. Fidgeon* (7), where it was held that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable. In *Gardiner v. Gray* (8) LORD ELLEN-
BOROUGH says (4 Camp. at p. 145):

"The intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on the dunghill."

The phrase in s. 14 (2) is, in my opinion, used as meaning that the article is of such

quality and in such condition that a reasonable man acting reasonably would, after a full examination, accept it under the circumstances of the case in performance of his offer to buy that article, and whether he buys for his own use or to sell again so as to make the term "saleable" apply. It is not, as counsel for the defendants argued, a case of the omnibus or the chassis not being an omnibus or chassis at all, so that the reasoning of LORD BLACKBURN in *Kennedy v. Panama, etc., Mail Co.* (9) and the illustration of *æs pro auro*, or beans for peas, would apply; but it is like the case of *Shepherd v. Pybus* (2), where it was held that there was an implied warranty that the thing sold was reasonably fit for the use for which it purported to be designed, even although there is no warranty that it is reasonably fit for the particular purpose for which the purchaser required it. It might well be, and was in fact, held that the barge was so unmerchantable as not to be fit for use as a barge, irrespective of any particular purpose for which the purchaser required her. In the present case the materials used, especially as regards the size and strength of material fittings, were not of merchantable quality. It is as though a man bought the patent shaving machine to which I have already referred by way of illustration and found that the blades would not fit the frame, or that the frame broke from the brittleness of the metal used. The purchaser would in such a case be entitled either to return the article or, if he had accepted it within s. 35, to bring his action for breach of warranty under s. 11, not because he had not got a shaving machine at all, although it would not shave, but because the machine that was delivered was not of merchantable quality. I agree that this appeal should be dismissed with costs.

KENNEDY, L.J.—LAWRANCE, J., who tried this case without a jury, held the defendants to be liable to the plaintiffs in damages for breaches of two contracts for the sale of goods made in February, 1906. In regard to so much of these damages as he has awarded for delay in the delivery of the six motor omnibus chassis included in the second contract, it is unnecessary to say anything. The defendants' notice of appeal applied to these damages as well as to the rest of the judgment. But the defendants could not dispute that some damages were properly payable, and the question of amount was so clearly one upon which, if there was any evidence to justify the finding of the learned judge, this court would not interfere, that the defendants' counsel early in his argument desisted from further contest of this point. This court, therefore, has only to consider the question of the liability of the defendants in respect of the other and larger portion of the damages, which were separately assessed in the judgment under appeal. Here, again, there is, I think, no serious contention as to amount. Its correctness is not admitted by the defendants, but there was evidence on which the judge's assessment, as a matter of figures, could be justified, and the able and interesting argument of the defendants' counsel was properly devoted to the contention that the bulk, if not quite the whole, of these damages, was, according to the true understanding of the two contracts, not legally recoverable.

[HIS LORDSHIP then referred to the facts of the case and continued:] The defendants' counsel have not, in my judgment, shown any sufficient cause for dissatisfaction with any of these findings of fact. If they stand, the issue to be decided between the parties on the present appeal depends upon the proper application to these contracts of s. 14 (1) and (2) of the Sale of Goods Act, 1893, and the arguments in this court were conducted upon this basis.

In regard to s. 14 (1), it is clear upon the facts as found by the learned judge that the plaintiffs are entitled to succeed, unless, as the defendants contend, the proviso of that subsection is applicable to the present case. Was either the contract for the sale of the "24 to 40 h.p. Fiat omnibus complete" or the contract for "six 24 to 40 h.p. Fiat omnibus chassis" a contract "for the sale of a specified article under its patent or the trade name" within the meaning of the proviso? In my opinion it was not. There was not at that time any specified article known

A as a "24 to 40 h.p. Fiat omnibus," or a "24 to 40 h.p. Fiat chassis." The expres-
sion, to put the same thing in a rather different way, did not connote a particular
uniformly constructed piece of machinery as a patent smoke-consuming furnace did
in one of the cases referred to (*Chanter v. Hopkins* (1)). On the contrary, the
B correspondence shows that the defendants through their communications in respect
of these six chassis with their Italian manufacturing firm were busy in altering the
design from time to time. Indeed, it was by the importance and radical value of
such alterations that the defendants sought to excuse their delay in making
deliveries until after the contract date. What the plaintiffs contracted for was the
supply, in the one case, of an omnibus, and, in the other case, of six chassis, reason-
ably fit to perform a certain class of work; and, as they were led by the plaintiffs'
C recommendation and the reputation of the non-stop run from London to Edinburgh
to trust the workmanship of the Fiat Co. to be made for them by that company.
In a sense, indeed, the defendants were themselves to be the manufacturers, for in
their letter of Feb. 8, 1906, they described the chassis which they recommended
as "our 24 to 40 h.p. motor bus chassis." It appears to me that in contracting
with the defendants that the mechanism, which, as they made known to the
D defendants, the plaintiffs required for a particular purpose, should be manufactured
by the Fiat Co., the plaintiffs did no more than a buyer of a steam engine which
shall be reasonably fit to effect a particular work does when he stipulates with the
seller who contracts to supply such an engine that it shall be an engine made by
some specified manufacturer of repute. I do not think that such a case falls within
the proviso of s. 14 (1).

E The plaintiffs also rely upon s. 14 (2), and say that the omnibus and chassis
were not of merchantable quality. The point was taken in the court below, and
the judgment of LAWRENCE, J., expressly negatives the applicability of the proviso
as to the revelation of defects to the plaintiffs at the time when the omnibus was
inspected by the plaintiffs' assistant manager. But the learned judge does not
expressly find that the articles delivered under the contract were of unmerchantable
F quality, which is, of course, a result which is not necessarily involved in the finding
that they did not fulfil the conditions of reasonable fitness under s. 14 (1) for the
particular purpose for which the buyer required them. An article may be of
merchantable quality and yet not fulfil the special condition of fitness for the par-
ticular purpose for which the article was bought and upon which the purchaser
may insist under s. 14 (1). I felt some doubt as to the propriety of holding that
G the omnibus and chassis were not merchantable as a Fiat omnibus and Fiat chassis,
the chief cause, at any rate, why they failed to fulfil the conditions of fitness being,
as the learned judge states, that their machinery was not adapted for the heavy
work of the Bristol traffic. For light work they might have been sufficient. In
these circumstances I prefer to base my affirmance of the judgment on the breach
of the defendants of the conditions of fitness for particular work under s. 14 (1).

H Solicitors: *Amery Parkes, Macklin & Co.; Stanley, Wasborough, Doggett & Baker.*

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

WILSON v. CARNLEY

[COURT OF APPEAL (Vaughan Williams, Farwell and Kennedy, L.J.J.), January 31, 1908]

[Reported [1908] 1 K.B. 729; 77 L.J.K.B. 594; 98 L.T. 265;
24 T.L.R. 277; 52 Sol. Jo. 239]

Breach of Promise—Promise to marry by married man on death of his wife—Illegality—Public policy.

A promise made to a woman by a married man to marry her after the death of his wife, the woman being at the time of the promise aware that he was a married man, is against public policy, and is, therefore, void.

Notes. Applied: *Siveyer v. Allison*, [1935] 2 K.B. 403. Considered: *Fender v. Mildmay*, [1937] 3 All E.R. 402. Referred to: *Naylor, Benson & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *Davies v. Elmslie*, [1937] 4 All E.R. 68.

As to promise of marriage by married person, see 8 HALSBURY'S LAWS (3rd Edn.) 139; and for cases see 12 DIGEST (Repl.) 298 et seq.

Cases referred to:

- (1) *Spiers v. Hunt*, [1908] 1 K.B. 720; 77 L.J.K.B. 321; 98 L.T. 27; 24 T.L.R. 183; 12 Digest (Repl.) 298, 2297.
- (2) *Frost v. Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex. Ch.; 12 Digest (Repl.) 380, 2973.
- (3) *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 23 W.R. 463; 12 Digest (Repl.) 272, 2093.
- (4) *Wilson v. Wilson* (1848), 1 H.L.Cas. 538; 12 Jur. 467; 9 E.R. 870, H.L.; 27 Digest (Repl.) 220, 1757.
- (5) *Egerton v. Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, 2072.
- (6) *Hunt v. Hunt* (1862), 4 De G.F. & J. 221; 31 L.J.Ch. 161; 5 L.T. 778; 26 J.P. 243; 8 Jur.N.S. 85; 10 W.R. 215; 45 E.R. 1168, L.C.; 27 Digest (Repl.) 242, 1949.
- (7) *Gilbert v. Sykes* (1812), 16 East, 150; 104 E.R. 1045; 25 Digest 397, 24.
- (8) *Paddock v. Robinson* (1871), 14 Am. Rep. 112.
- (9) *Wild v. Harris* (1849), 7 C.B. 999; 7 Dow. & L. 114; 18 L.J.C.P. 297; 13 L.T.O.S. 283; 13 Jur. 961; 137 E.R. 395; 12 Digest (Repl.) 298, 2295.
- (10) *Millward v. Littlewood* (1850), 5 Exch. 775; 20 L.J.Ex. 2; 155 E.R. 339; sub nom. *Milward v. Littlewood*, 16 L.T.O.S. 128; 12 Digest (Repl.) 298, 2296.
- (11) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 12 Digest (Repl.) 270, 2074.
- (12) *Evanturel v. Evanturel* (1874), L.R. 6 P.C. 1; 43 L.J.P.C. 58; 31 L.T. 105; 23 W.R. 32, P.C.; 12 Digest (Repl.) 270, 2073.

Also referred to in argument:

Cartwright v. Cartwright (1853), 3 De G.M. & G. 982; 1 Eq. Rep. 138; 22 L.J.Ch. 841; 31 L.T.O.S. 214; 17 Jur. 584; 1 W.R. 245; 43 E.R. 385, L.J.J.; 27 Digest (Repl.) 217, 1728.

Re Hope Johnstone, Hope Johnstone v. Hope Johnstone, [1904] 1 Ch. 470; 73 L.J.Ch. 321; 90 L.T. 253; 20 T.L.R. 282; 27 Digest (Repl.) 217, 1730.

Duchess of Marlborough v. Duke of Marlborough, [1901] 1 Ch. 165; 70 L.J.Ch. 244; 83 L.T. 578; 49 W.R. 275; 17 T.L.R. 137; 45 Sol. Jo. 116, C.A.; 40 Digest (Repl.) 642, 1339.

Davis v. Pryor (1901), 112 Fed. Rep. 274.

Haviland v. Halstead (1866), 34 N.Y. 643.

Noice v. Brown (1876), 20 Am. Rep. 388; 23 Am. Rep. 213.

Re Missouri Steamship Co. (1889), 42 Ch.D. 321; 58 L.J.Ch. 721; 37 W.R. 696; sub nom. *Re Missouri Steamship Co., Monroe's Claim*, 61 L.T. 316; 5 T.L.R. 438; 6 Asp.M.L.C. 423, C.A.; 11 Digest (Repl.) 424, 728.

Hartley v. Rice (1808), 10 East, 22; 103 E.R. 683; 12 Digest (Repl.) 278, 2137.

Swift v. Swift (1865), 4 De G.J. & Sm. 710; 6 New Rep. 137; 34 L.J.Ch. 394; 12 L.T. 435; 29 J.P. 613; 11 Jur.N.S. 458; 13 W.R. 731; 46 E.R. 1095, L.J.J.; 27 Digest (Repl.) 213, 1693.

Richardson v. Mellish (1824), 2 Bing. 229; 1 C. & P. 241; 9 Moore, C.P. 435; 3 L.J.O.S.C.P. 265; 130 E.R. 294; 12 Digest (Repl.) 270, 2078.

Besant v. Wood (1879), 12 Ch.D. 605; 40 L.T. 445; 23 Sol. Jo. 443; 27 Digest (Repl.) 236, 1894.

Appeal by the defendant from the judgment of LORD COLERIDGE, K.C., reported 23 T.L.R. 757, sitting as commissioner of assize at Lincoln, on further consideration after the trial of the action with a jury.

The action was brought in respect of a breach of promise to marry made in 1894, the defendant being at the time, as the plaintiff knew, a married man. In 1906 the defendant's wife died, and upon the refusal by the defendant to carry out his promise, the plaintiff brought the present action.

By his statement of defence the defendant pleaded that the alleged promise was contrary to public policy and good manners, and was illegal and void. The point of law thus raised by the pleadings was argued before CHANNELL, J. (23 T.L.R. 578), who held that every promise of the kind relied upon by the plaintiff was not necessarily void as being contrary to public policy, and that the action must therefore go to trial. At the trial at Lincoln assizes with a jury before LORD COLERIDGE, K.C., sitting as commissioner of assize, the jury returned a verdict for the plaintiff for £100 damages. LORD COLERIDGE, K.C., reserved judgment, but upon further consideration gave judgment for the plaintiff in accordance with the verdict. The defendant appealed.

Hugo Young, K.C., and *T. Hollis Walker* for the defendant.

McCardie for the plaintiff.

VAUGHAN WILLIAMS, L.J.—This case raises a question of some general importance which has been discussed before CHANNELL, J., before LORD COLERIDGE, K.C., when sitting as a commissioner of assize, and before PHILLIMORE, J., in *Spiers v. Hunt* (1). The question that I refer to is whether a promise made by a man in the lifetime of his wife to marry some other woman, presumably after his wife's death, can be enforced.

It is convenient that I should mention at the outset that in the case now before us there is no question but that the plaintiff was perfectly well aware at the time of the alleged promise that the defendant was then a married man. I do not say that because I think that it has any bearing on our decision of the case before us upon the abstract question whether a promise to marry made by a married man can be enforced, but I may say at once that upon this point I have come to the same conclusion as that arrived at by PHILLIMORE, J., who said ([1908] 1 K.B. at p. 724):

"Upon consideration I have come to the conclusion that in general such a contract as that is against public policy and morals and not to be enforced."

I myself am of opinion that such a contract is one which cannot be enforced. My personal opinion is that such a contract is one which ab initio cannot be enforced, and that it does not matter at what time or after what contingencies an action may be brought upon it. The promise is one which at no moment of time is enforceable. Counsel for the plaintiff, who put before us a very able argument, felt himself bound to admit that the position taken up by his client logically compelled

him to contend that the promise by the defendant was one which was enforceable ab initio. He did not say that it was merely a contract in respect of a breach of which an action might be brought after the death of the defendant's wife. He accepted the application to such a contract of the doctrine laid down in *Frost v. Knight* (2), and he said that if, after the making of the promise and while the defendant's wife was still alive, the defendant for some cause or other had determined not to carry out his promise and had announced his final determination not to perform what he had undertaken to do, the plaintiff could at once, if the promise was a binding contract, have brought an action against him for breach of promise of marriage. That seems to me to be a necessary and logical result of the argument addressed to us by counsel for the plaintiff.

In my judgment, such a contract is against public morality and is ab initio void and is one that can never be enforced. I think I cannot do better than quote the words of PHILLMORE, J., in his judgment in *Spiers v. Hunt* (1), where, after expressing his conclusion that in general such a contract is against public policy and morals and is not to be enforced, he says ([1908] 1 K.B. at p. 724):

"It is, in my opinion, within the language of SIR GEORGE JESSEL in *Printing and Numerical Registering Co., Ltd. v. Sampson* (3) (L.R. 19 Eq. at p. 465), as a contract which will induce another to do something against the general rules of morality."

So that we have the decision of PHILLMORE, J., confirmed by the language of SIR GEORGE JESSEL. Counsel for the plaintiff suggested that, since the decisions of the House of Lords in *Wilson v. Wilson* (4) and in *Egerton v. Earl Brownlow* (5) and of LORD WESTBURY in *Hunt v. Hunt* (6), it is no longer possible to say that an agreement which in form is a legal contract and cannot be described as illegal can be refused enforcement on the ground of its tendency to make one of the parties to it do something which is against the general rules of morality. Unfortunately, there have been cases in which the courts, in refusing to enforce contracts on that ground, have carried the doctrine to an extent which ALDERSON, B., when giving his opinion to the House of Lords in *Egerton v. Earl Brownlow* (5) described as ridiculous. ALDERSON, B., referred especially to *Gilbert v. Sykes* (7) where it was held that a wager on the life of Napoleon Bonaparte (then first consul of the French Republic) was void, as it might induce the plaintiff to protect the life of Napoleon in case of his invasion of England and might induce the defendant to escape liability under the wager by contriving the assassination of that prince. But though the doctrine has in some cases been carried too far, there is no case where it has ever been suggested that a contract having a tendency to induce one of the parties to it to do something contrary to the general rules of morality is not one which the courts may refuse to enforce on the ground of its being contrary to the general rules of morality. In the present case the contract has a tendency to make the defendant do something which is in contravention of the obligations which a husband owes to his wife. It is sufficient for me to say that. It is obviously a contract which a man cannot enter into during his wife's lifetime without being disloyal to his wife. It seems to me that in fact, when this promise was made, the plaintiff and defendant thought that the defendant's wife was soon going to die, and I cannot help feeling that in such a contract the wish is father of the thought. But however that may be, I am of opinion that such a contract tends to make the parties disregard the acknowledged rules of morality with regard to married life and is against public policy and cannot be enforced.

I do not propose to go through the American cases, because I think that the decisions of our own courts amply justify the conclusion that I have arrived at in the present case. But I cannot help reading a passage from the judgment of LAWRENCE, C.J., of Illinois, in *Paddock v. Robinson* (8), as it shows the high view of married life taken in America. He said:

"Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are, in themselves, a violation of marital duty, and

the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong—a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose—such a contract should certainly not be recognised as valid in a court of justice.”

I have been through the cases cited to us and I wish to say that I have not devoted much consideration to the case in the YEAR BOOK (Lib. Ass., 40 Edw. 3, pl. 13), because it is quite uncertain what the facts were and what the decision was, so that the case is really no authority one way or the other. I come, therefore, at once to *Wild v. Harris* (9) and *Millward v. Littlewood* (10). It is said that the facts of those cases prevent them from being any direct authority in the present case. Looking carefully through the report of *Millward v. Littlewood* (10), I observe that the decision of the court can well be supported on the ground of estoppel. In a case where the woman was unaware at the time of the contract that the man had a wife, one can well conceive that he, when seeking to maintain that the contract was not enforceable, might be held to be estopped from saying that he had a wife alive at the time of the making of the contract. I only say that it might well be so held, and that this seems to be in accordance with the view expressed by PARKE, B. It was suggested that an action might be brought on an implied warranty by the man that he was in a position to marry—that is to say, that he was not a married man. It is possible that an action in that form might be sustained, but all that I say is that we have not now got to decide that question. Speaking for myself, however, I may say that the express terms of the contract might make such a claim difficult to be supported. The decisions in *Wild v. Harris* (9) and *Millward v. Littlewood* (10) do not conflict with the judgment that I am now giving, and, even if they do, they are not binding upon the Court of Appeal. Moreover, in a note in the report of *Wild v. Harris* (9) it is pointed out by the reporter that no point was taken in the argument of the case whether or not the promise was void as being against public policy.

There is another matter also which I wish to notice. Counsel for the plaintiff in his argument said that there has been a tendency in modern judicial decisions to hold that the doctrine that agreements should not be enforced if they are contrary to public policy is not to be extended. He said that in modern times the courts have very rarely applied that doctrine, and that the category of cases in which the courts will refuse to enforce an agreement upon the ground of its being contrary to public policy has been long ago settled, so that no new case could be added to that category. Now as to that contention, I wish to cite two passages from the judgment of BOWEN, L.J., in *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt* (11). He says ([1893] 1 Ch. at pp. 661 and 665):

“Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification;”

and then further on he quotes from the judgment of the Privy Council in *Evanturel v. Evanturel* (12) (L.R. 6 P.C. at p. 129):

“The determination of what is contrary to the so-called ‘policy of the law’ necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion.”

Therefore I cannot in the least acquiesce in the suggestion that, as habits change and as time goes on, there may not be found new instances of contracts which will not be enforced by the courts on the ground of their being contrary to the rules of morality. It was suggested that our present views of what married life ought

to be might undergo some change. How that may be I do not know. I am content to base my decision on rules that now exist in England. For myself I think that the fact that many people now do not look upon marriage as a sacrament has not altered those rules one jot. I do not think that there is the slightest justification for the suggestion I have referred to. It is true that in the old view of the church as to the sanctity of marriage an action for divorce was not known, yet I am glad to think that the institution of the Divorce Court has not in any way altered the obligations existing between husband and wife. In my judgment this appeal must succeed. I wish, however, to add something with regard to the judgments delivered by CHANNELL, J., and by LORD COLERIDGE, K.C., whose judgment was based upon that delivered by CHANNELL, J. The judgment of CHANNELL, J., was based upon the proposition that, if this was a contract which under some circumstances would not be contrary to public policy, it was not one to which the abstract rule of public policy could be applied; and the learned judge mentioned two instances in which it might not be against public policy for a married man to promise marriage to another woman. One instance was the case where the man's wife was in a lunatic asylum and the other was a case where a man's wife asked him in the event of her death to marry a particular person. As to the first of those two cases I do not at all agree with the learned judge; neither am I of opinion that in the second case the promise ought to be enforced.

FARWELL, L.J.—*Wild v. Harris* (9) and *Millward v. Littlewood* (10) have decided the question whether an action will lie upon a promise by a married man to marry the plaintiff in a case where the plaintiff was ignorant, at the time of the promise, that the defendant was married. Our judgment in the present case does not in the least impeach those two decisions. Here the plaintiff knew that the defendant had a wife at the time of the making of the promise. In my opinion no action will lie upon such a promise, upon the ground that it is against public policy. Public policy in such a case is based upon the necessity of preferring the public good to the claim of the plaintiff to enforce a contract. Whatever may have been said in the course of the argument addressed to us, I am of opinion that our courts have always regarded the sanctity of the marriage tie as a matter of the highest importance. So an agreement for future separation is not allowed by the courts to be enforced because it is subversive to the affection and confidence that ought to exist between husband and wife, and is in derogation of the duties which they owe to each other. These points have often been considered in the Court of Chancery in cases dealing with agreements as to the custody of children. Speaking for myself, I cannot easily understand how a man who promises marriage to a woman while his wife is alive can reconcile his position to that woman with his duties to his wife. It is clear that all agreements which are contra bonos mores as conducive to immorality or crime are within the doctrine by which contracts are avoided as being against public policy, and the agreement here is of that kind, it is more than "inconsistent with that affection which ought to subsist between married persons," if I may quote the words used by POLLOCK, C.B., in *Millward v. Littlewood* (10). PHILLIMORE, J., in *Spiers v. Hunt* (1) has given illustrations of the way in which such an agreement is conducive to immorality, and CHANNELL, J., said (23 T.L.R. 578) that he had no doubt that the reason why there was no authority was that in practice such a question never arose in the abstract form in which it was before him, because when such promises were in fact made they were generally accompanied by immorality and were not binding. In many cases such a promise would be made for the very purpose of inducing the woman to yield to the passions of the man upon some plausible excuse, such as that they were already married in the sight of heaven. This seems to me enough to show that the promise in this case cannot be enforced. But further than this, it is plain that such a promise might even lead to crime, by inducing the man to accelerate the destruction of the marriage bond which prevented his marriage with the other woman. The doctrine by which contracts can be held to be void on the ground of public policy

A is one which must be applied with very great care; but as long as the courts have existed, certain principles with regard to the mutual duties between husband and wife have also existed, and I think it would be wrong to depart from them now. I will only add one observation with reference to the case in the YEAR BOOK. It is almost impossible to make out what was really decided there, but it seems very likely that the question was whether the condition had been waived or had become
B for some reason inoperative, and the reporter's note rather seems to show that the point that the condition was void on the ground that the feoffee had a wife living was not really raised.

KENNEDY, L.J.—I am of the same opinion. The action is brought upon the breach of a promise by the defendant to marry the plaintiff on the death of the
C defendant's wife. The defence is that no action can be brought upon such a promise because the agreement is against public policy, and therefore void. The plaintiff contends that the authorities show that such an action as this is maintainable, and, apart from the old case in the YEAR BOOK, the real effect of which it is difficult to extract, reliance is placed on *Wild v. Harris* (9), decided by the Court of Common Pleas, and *Millward v. Littlewood* (10), decided in the Court of
D Exchequer. Now, the pleadings in those two cases differ materially from the pleadings in the case before us. In *Wild v. Harris* (9) the defendant's promise was not to marry after the death of his wife, but to marry within a reasonable time. In *Millward v. Littlewood* (10) the promise was as in *Wild v. Harris* (9). There was, in fact, the essential difference which the pleadings indicate, that in each of those cases the plaintiff was ignorant, at the time of the promise, that the defendant
E had a wife, while in the present case the plaintiff knew at the time of the promise that the defendant was a married man. It is impossible, therefore, to treat those two cases as authorities upon the question now before us. Apart from those two cases the plaintiff has not been able to cite any authority in her favour. On the other hand we have the passage from GROTIUS (*DE JURE BELLI ET PACIS*, bk. 2, ch. 11, s. 8 (3)), cited by PHILLIMORE, J., in *Spiers v. Hunt* (1), and also the
F uniform decisions in American courts which, though not binding upon us, have been very properly cited. The passage cited from the judgment of LAWRENCE, C.J., in *Paddock v. Robinson* (8), eloquently expresses the inconsistency of such a promise as that which the plaintiff relies upon with the fundamental elements of public morality. I should have thought that discussion was needless to show that such a promise is against public policy as tending to immorality, and that nothing
G but mischief could follow from upholding such an unhallowed bargain, which would always be a temptation to bring about the dissolution of the marriage tie which hindered the defendant from carrying out his promise.

I wish to add a few words as to the use of the term "public policy." It is a large and general expression which embraces very different cases. Some of those cases do not touch upon morality at all; they are cases in which certain contracts are
H forbidden merely because it is considered that it is for the public convenience and advantage that they should not be allowed. In other cases contracts are treated as being against public policy on the ground of elementary considerations of morality. Now, though I admit that in the former class of cases public policy may alter, as time goes on, with changes in social conditions, yet I am not aware that there has been any change of public opinion in the elementary considerations of
I morality, or with regard to the moral obligations involved in marriage. Apart from the especial sanctity which formerly attached to the ecclesiastical view of marriage, and which does not now prevail among the greater part of the population, I think that nothing has been allowed to derogate from the obligations of the marriage tie. It is true that separation deeds may be upheld, yet they have never been allowed to be good when made to provide for the possibility of a future separation. It is only when separation between a husband and wife has been determined upon that a deed settling the terms of that separation has been upheld by the courts. In my opinion, therefore, the promise in the present case, upon

the authorities and upon general principles, is contrary to public policy, and cannot be enforced.

Appeal allowed.

Solicitors: *Collyer Bristow & Co.*, for *Loy*, Alford; *R. Brooks*, for *Carnley*, Alford.

[Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.]

Re UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND. FOWLER v. ATTORNEY-GENERAL

[COURT OF APPEAL (Vaughan Williams, Farwell and Kennedy, L.J.J.), February 22, 1909]

[Reported [1909] 2 Ch. 1; 78 L.J.Ch. 562; 100 L.T. 423;
25 T.L.R. 358; 53 Sol. Jo. 302]

Charity—Charitable bequest—Failure of gift—Failure of specified object—No general charitable intent.

A testator, by his will, made in 1905, bequeathed “£25,000 to the Institute of Medical Sciences Fund, University of London.” The testator died in 1906. A scheme to establish such an institute had been projected by the university in 1902 and an appeal for funds had been made in 1903, but the scheme was abandoned in 1907 owing to lack of funds and a change of opinion on the part of the medical faculty and some of the medical schools, it being resolved that all contributions should be returned to the donors.

Held: the legacy was conditional on the founding of the proposed institute, and, as there was no general charitable intent on the part of the testator, the gift failed.

Notes. Considered: *Re Hillier, Hillier v. Attorney-General*, [1954] 2 All E.R. 59. Referred to: *Re Ulverston and District New Hospital Building Fund, Birkett v. Barrow and Furness Hospital Management Committee*, [1956] 3 All E.R. 164.

As to failure of specified object, see 4 HALSBURY'S LAWS (3rd Edn.) 285; and for cases see 8 DIGEST (Repl.) 387 et seq.

Cases referred to in argument:

Thomson v. Shakespeare (1860), 1 De G.F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.J.J.; 8 Digest (Repl.) 391, 843.

Re Slevin, Slevin v. Hepburn, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 39 W.R. 578; 7 T.L.R. 394, C.A.; 8 Digest (Repl.) 504, 2250.

Chamberlayne v. Brockett (1872), 41 L.J.Ch. 789; 27 L.T. 92; 20 W.R. 739; subsequent proceedings, 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 21 W.R. 299, L.C. & L.J.J.; 8 Digest (Repl.) 439, 1299.

Re Villers-Wilkes, Bower v. Goodman (1895), 72 L.T. 323; 11 T.L.R. 250; 39 Sol. Jo. 298; 8 Digest (Repl.) 469, 1702.

Cherry v. Mott (1836), 1 My. & Cr. 123; 5 L.J.Ch. 65; 40 E.R. 323; 8 Digest (Repl.) 431, 1221.

Re Davis, Hannen v. Hillyer, [1902] 1 Ch. 876; 71 L.J.Ch. 459; 86 L.T. 292; 50 W.R. 378; 46 Sol. Jo. 317; 8 Digest (Repl.) 417, 1086.

Biscoe v. Jackson (1887), 35 Ch.D. 460; 56 L.J.Ch. 540; 56 L.T. 753; 35 W.R. 554; 3 T.L.R. 577, C.A.; 8 Digest (Repl.) 461, 1621.

Appeal by the Attorney-General from an order of Joyce, J., reported [1909] 2 Ch. 1, on an originating summons.

The plaintiffs, J. K. Fowler and H. T. Butlin, were the treasurers of a fund called the "University of London Medical Sciences Institute Fund," hereinafter called the fund. The defendants, Beit, Voelklein, and Wernher, were the executors and trustees of the will of Alfred Beit, dated April 18, 1905, and the other defendants were the University of London. For many years previously to 1902 questions had been raised as to improvements being made in the methods adopted for the training of students for the medical profession in London whereby instruction in the study of the sciences necessary for that profession as well as in the more practical training is given by the medical schools attached to the principal hospitals, and various schemes for the alteration of such methods had been proposed. The Royal Commission appointed to consider the charter for the proposed Teaching University in London reported in 1894

"That the teaching of physics, chemistry, biology, anatomy, physiology, and pharmacology should be concentrated into one or two institutions."

The statutory commission appointed under the University of London Act, 1898, to frame the statutes of the reorganised university adopted this recommendation and embodied it in statute 80. Pursuant to such statute the senate of the University of London referred to the Faculty of Medicine, all of whose members were recognised teachers of the university, to consider and report how the duty devolving upon the Senate under such statute could best be carried out. The Faculty of Medicine, after ascertaining the views of the medical schools in London and carefully considering the whole matter, recommended the senate to establish an institute of medical sciences for the teaching of chemistry, biology, physics, anatomy, and physiology. At a meeting of the senate held on Oct. 22, 1902, it was resolved:

"That steps be taken to secure a site and funds to enable the senate to establish an institute of the medical sciences in the near neighbourhood of the university."

In 1903 the senate determined to make an appeal to the public for funds for establishing the proposed institute, and appointed a committee to supervise such appeal. In pursuance of their objects the committee drew up a form of appeal setting out the circumstances of the case and the purposes for which money was asked, which was sent to the City companies, members of the medical profession, and wealthy persons who it was thought were likely to contribute to the fund. The scheme approved by the senate was issued as part of the appeal. It gave particulars of an institute for teaching all the above subjects, with estimated cost of building and annual expenditure; and also stated the amounts, varying from £250,000 to £15,000, estimated as necessary to establish parts only of the complete scheme. In answer to this appeal donations were promised to the amount of £71,445 4s. By far the largest donor was Mr. Alfred Beit, who gave a donation of £25,000 to be paid in five annual instalments of £5,000 each, of which three instalments—namely, £10,000 on or about Mar. 31, 1905, and £5,000 on or about Mar. 29, 1906, were paid in the lifetime of the said Alfred Beit, leaving two instalments due—viz., £5,000 on Mar. 31, 1907, and £5,000 on Mar. 31, 1908. Alfred Beit wrote to the plaintiff Fowler two letters referring to his donations before making it. These letters, in part, referred to private matters, but the references to the donations were as follows. On Jan. 1, 1904, he wrote:

"I shall be very glad to make my subscription to the Institute of Medical Sciences five thousand pounds (£5,000) payable in five equal yearly instalments."

On Mar. 3, 1905, he wrote :

"I have thought over our conversation of the other night and I shall be glad to contribute to your Institute of Medical Sciences £25,000, which is to include the £5,000 already promised. I shall write you an official letter later on."

No official letter relating to the donation was written by Alfred Beit to Fowler or any other person.

By his will, dated April 18, 1905, Alfred Beit directed, in cl. 3, that :

"Out of my estate shall be paid all my funeral and testamentary expenses including any voluntary liabilities incurred or to be incurred by me. . . . And I direct that all the pecuniary legacies given by this my will or any codicil hereto which are not paid at the expiration of three calendar months after my death shall thenceforward until payment carry interest at the rate of four per cent. per annum."

By cl. 14 of his will the testator gave :

"Two hundred thousand pounds to the University of Johannesburg to be applied in or towards building and equipping university buildings on the site of the property recently given by me to Johannesburg . . . the income of such £200,000 to be applied meanwhile for educational projects as the Board of Education at Johannesburg may determine, but if at the expiration of ten years after my death the said £200,000 shall not have been applied in such building and equipment as aforesaid then this legacy shall lapse and fall into my residuary estate."

The next gift was :

"I give £25,000 to the Institute of Medical Sciences Fund, University of London."

The executors of Alfred Beit paid to the treasurers of the fund, on or about Mar. 4, 1907, the sum of £25,364 7s. 8d. being the amount of the legacy of £25,000 together with interest thereon at the rate of £4 per cent. per annum from the expiration of three calendar months from the date of the death of Alfred Beit. The executors also paid to the treasurers, on or about Mar. 31, 1907, the sum of £5,000, being the instalment of the donation of £25,000 which fell due on that day and was paid by them pursuant to the direction for payment of voluntary liabilities contained in the will. The last instalment of £5,000 of the donation became due on Mar. 31, 1908.

The Royal Commissioners for the Exhibition of 1851, at the request of the University of London, consented to reserve a site on their property in South Kensington on which the proposed institute might be built, and subsequently required a decision as to whether such site would be taken to be come to by Jan. 1, 1908. As the amount of the donations to the fund hereinbefore mentioned was not sufficient to carry out in full the objects for which the fund was raised, the committee appointed by the senate of the University of London for the purpose of raising funds issued in June, 1905, a further appeal in a somewhat modified form, but no further donations to the fund were made in response to such further appeal. Difficulties arose in the application of the fund on account of the amount received or promised not being sufficient to carry out the scheme which was proposed when the appeal was issued, and also because several of the medical schools of London, which were supposed to be favourable to the scheme, changed their opinions and became opposed to the scheme. Under these circumstances the senate of the University of London, on July 24, 1907, appointed a committee of five members to advise the senate on the course to be pursued in regard to the proposed Institute of Medical Sciences, and to consult such persons and to take such evidence as might seem to it desirable. The committee took such evidence as seemed desirable to them and carefully considered the whole question, and reported on the subject to the academic council of the University of London on Nov. 11, 1907, to the effect (a) that owing to the lack of adequate financial support the scheme for the establishment of an institute of medical sciences, as set forth in the original appeal and

(in a modified form) in the appeal of June, 1905, had proved abortive; (b) that apart from the money difficulty, which in the opinion of the committee was of itself fatal, the scheme had also become impractical because the Medical Faculty which formerly reported in its favour had now reported against it and several of the medical schools had changed their opinions in the same sense and some of them had made arrangements involving considerable outlay for providing more efficient instruction in preliminary and intermediate medical studies; (c) that under the above circumstances the university had no claim to the money which had already been paid by subscribers or to the fulfilment of promises by subscribers who had not yet paid their subscriptions; but that (d) in the absence of any special directions in any particular case all subscriptions already paid ought at once to be returned to the donors (including in that term the executors or legal representatives of deceased donors) without any suggestion as to any possible application of the money to any other purpose. The report of the committee was submitted by the academic council to the senate of the University of London on Nov. 20, 1907, and such report, with the evidence taken by the committee and other facts and documents relating to the matters, and also the list of the donors to the fund, was submitted to all members of the senate before the meeting. At the meeting, after discussion, the recommendations were embodied in the resolutions which were passed. In accordance with the resolutions the treasurers of the fund were ready and willing to repay to the donors the several amounts contributed by them respectively to the fund with the interest which had accrued thereon, after payment thereof of the necessary expenses, but questions arose with regard to the legacy of £25,000 under the will of Alfred Beit and the interest of £364 7s. 8d. paid thereon, and the donation of £5,000 paid by his executors on Mar. 31, 1907, and the further donation which fell due on Mar. 31, 1908, on which the direction of the court was necessary.

The plaintiffs, as treasurers of the fund, took out an originating summons for the determination of the following questions:

“(i) Whether in the events which had happened the sum of £25,000 bequeathed by the will of Alfred Beit to ‘The Institute of Medical Sciences Fund University of London’ and the sum of £364 being interest thereon paid by the defendants the executors to the plaintiffs as the treasurers of the said fund ought to be repaid to those defendants or applied to other and what charitable purposes. (ii) Whether in the events that had happened the sum of £5,000 promised to the said fund by Alfred Beit in his lifetime and paid to the plaintiffs as the treasurers of the said fund by the executors on Mar. 31, 1907, under a direction contained in the will ought to be repaid by the plaintiffs to the executors or applied to other and what charitable purposes. (iii) Whether in the events that had happened the further sum of £5,000 promised to the said fund by Alfred Beit in his lifetime and payable to the plaintiffs as treasurers of the said fund by the executors on April 1, 1908, ought to be paid to the plaintiffs by the executors and if so applied to any and what charitable purposes. (iv) That if the said legacy and interest and the respective sums of £5,000 and £5,000, or any or either of them ought to be applied to charitable purposes, a scheme for the administration of the same may be settled.”

On the hearing of the summons before JOYCE, J., the learned judge decided that there was no general charitable intention, but a gift upon a condition which could not be fulfilled, and that therefore the gift failed entirely. The Attorney-General appealed.

The Attorney-General (Sir William Robson, K.C.) and C. H. Sargant for the Crown.

Levett, K.C., and W. Spence for the executors

R. F. Norton, K.C., and E. Knowles Corrie for the plaintiffs.

Howard Wright for London University.

VAUGHAN WILLIAMS, L.J.—I think that the judgment of JOYCE, J., was quite right. In my judgment this legacy in this will was clearly conditional. It is clearly conditional upon a fund being raised sufficient for the objects described in the appeal issued by the committee in 1903. It is not suggested that such a fund has been raised or can be raised. *Primâ facie*, therefore, this being a gift conditional upon there being a sufficient fund for constituting this scheme, and it being impossible to constitute the scheme, not only because of the lack of funds, but also because of opinion having changed and become adverse, and the scheme having accordingly been abandoned, this gift must fail. It has been argued that although this may look like a gift subject to a condition, yet looking at the terms of the will one finds a general intention of charity in the direction of teaching medical science. I find no such general intention but only an intention to join in raising a fund for the particular purpose specified in the appeal issued by the committee. That being so, in my opinion this gift lapses.

I do not know that it makes any difference, but the return of their subscriptions to donors to the fund has been admitted to be right. It is said that that is a different matter, but I cannot see why there should be any difference in principle between a gift by a living person upon a condition and a gift by will upon a condition. In these circumstances it seems to me that the inevitable conclusion is that this is a gift only to take effect upon the happening of a condition. Many cases have been cited to show the leaning of the courts in favour of a general charitable intention; but after all each case must depend upon the terms of the particular gift or will. It cannot be suggested that, where the terms are clear that the gift is upon condition, the court ought to construe the gift contrary to the intention of the testator. This appeal, therefore, fails, and must be dismissed.

FARWELL, L.J.—I am of the same opinion. I think that the judgment of JOYCE, J., was perfectly right. Unfortunately, owing partly to the change of opinion among medical schools, the senate of the university were obliged to abandon the scheme. It has been contended that we ought to construe this will as showing an intention to give this money for general charitable purposes, but I am unable to accede to that argument. It is now well settled that a legacy may be given to a charity upon a condition, express or implied, precedent or subsequent. In my opinion this was a gift upon condition that the proposed scheme could be carried out. Therefore, now that that scheme has totally failed, the executors are entitled to be repaid the money which they have already paid. I decide this case upon the construction of the gift in this particular will, and I agree that the appeal must be dismissed.

KENNEDY, L.J.—I adopt as part of my judgment the statement in *THEOBALD ON WILLS* (7th Edn.) at p. 373:

“If the gift is for a charitable purpose, the question is, is the testator’s intention to promote some specific and well-defined purpose and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way. In the former case the gift fails if the purpose cannot be carried out.”

In this case there is no doubt that the gift is for a charitable purpose, and it seems to me to be equally clear that the intention of the testator in making the gift was to give it for the specific and defined purpose of the proposed medical sciences institute and for no other purpose. As soon as that purpose was abandoned the purpose of the gift failed. The specific object for which the gift was given has been abandoned, and therefore the gift lapses.

Appeal dismissed.

Solicitors: *Solicitor to the Treasury; Russell, Cooke & Co.; Hollams, Son, Coward & Hawksley; Freshfields.*

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

Re EVE. EDWARDS v. BURNS

[CHANCERY DIVISION (Swinfen Eady, J.), March 26, 1909]

[Reported [1909] 1 Ch. 796; 78 L.J.Ch. 388; 100 L.T. 874]

Will—Children—Inclusion of illegitimate children—Mother past age of child-bearing—Children known to be illegitimate by testatrix.

A testator gave her residuary estate to trustees in trust for and to be equally divided between and among the children of her sisters A., B., and C., and her brother D., and the issue of such of them as should die in her lifetime leaving issue, such issue taking his, her, or their parent's share. A. was at the date of the will a widow of sixty-eight, and had had two illegitimate children before her marriage in 1869 and no children since. The children visited the testatrix, she called them her nephew and niece, and she and the rest of the family treated them as legitimate.

Held: as the testatrix knew that the children were illegitimate, and as there never could be any legitimate children of A. to take under the bequest, the two illegitimate children were included in the gift.

Hill v. Crook (1) (1873), L.R. 6 H.L. 265, applied.

Notes. Considered: *Re Dicker (Deceased)*, [1947] 1 All E.R. 317; *Re Wohlge-muth's Will Trusts, Public Trustee v. Wohlge-muth*, [1948] 2 All E.R. 882; *Re Gilpin, Hutchinson v. Gilpin*, [1953] 2 All E.R. 1218. Referred to: *Re Pearce, Alliance Association v. Francis*, [1914] 1 Ch. 254.

As to description by relationship, see 34 HALSBURY'S LAWS (2nd Edn.) 292 et seq.; and for cases see 44 DIGEST 807 et seq.

Case referred to:

- (1) *Crook v. Hill* (1871), 6 Ch. App. 311; 40 L.J.Ch. 216; 24 L.T. 488; 35 J.P. 564; 19 W.R. 649, L.J.J.; affirmed sub nom. *Hill v. Crook* (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 22 W.R. 137, H.L.; 44 Digest 808, 6614.

Also referred to in argument:

Re Haseldine, Grange v. Sturdy (1886), 31 Ch.D. 511; 54 L.T. 322; 50 J.P. 390; 34 W.R. 327; 2 T.L.R. 256, C.A.; 44 Digest 817, 6684.

Re Brown, Penrose v. Manning (1890), 63 L.T. 159; 44 Digest 810, 6624.

Re Du Bochet, Mansell v. Allen, [1901] 2 Ch. 441; 70 L.J.Ch. 647; 84 L.T. 710; 49 W.R. 588; 44 Digest 813, 6658.

Dorin v. Dorin (1873), L.R. 17 Eq. 463; 31 L.T. 281; 38 J.P. 132; 22 W.R. 217; subsequent proceedings (1875), L.R. 7 H.L. 568; 45 L.J.Ch. 652; 33 L.T. 281; 39 J.P. 790; 23 W.R. 570, H.L.; 44 Digest 809, 6616.

Re Hocking, Mitchell v. Loe, [1898] 2 Ch. 567; 67 L.J.Ch. 662; 79 L.T. 164; 47 W.R. 114, C.A.; 44 Digest 599, 4244.

Re Browne, Raggett v. Browne (1889), 61 L.T. 463; 44 Digest 810, 6623.

Re Loveland, Loveland v. Loveland, [1906] 1 Ch. 542; 75 L.J.Ch. 314; 94 L.T. 336; 22 T.L.R. 321; 44 Digest 225, 491.

Adjourned Summons to determine whether illegitimate children were included in a gift of residue to "the children of my sisters" under a will.

By her will, dated Feb. 8, 1907, Priscilla Eve gave all her residuary real and personal estate to trustees upon trust to sell and convert the same and hold the proceeds

"in trust for and to be equally divided between and amongst the children of my sisters, Mary Ann Burns, Clara Davenport, and Sarah Pugh, and of my brother William Sales, and the issue of such of them as shall die in my lifetime leaving issue such issue taking his, her, or their parent's share."

The testatrix made a codicil on June 15, 1907, which did not affect the gift of residue, and died on May 9, 1908.

Mary Ann Burns was born in 1839 and married Arthur Burns in 1869, having previously had two children by him, a son born in 1861 and a daughter born in 1863. She constantly visited the testatrix, who spoke of these children as her nephew and niece. The testatrix knew that these children were illegitimate, and Mrs. Burns resided with her for twelve months before her death. The other sisters and brother had legitimate children living at the testator's death.

This summons was taken out to determine whether the children of Mary Ann Burns were entitled to shares of residue.

Mulligan for the trustees of the will.

Stone for the illegitimate children of Mary Ann Burns.

SWINFEN EADY, J., read the will and continued.—The will was made in February, 1907, and confirmed by a codicil in June, 1907. The testatrix died on May 9, 1908. Her sister, Mary Ann Burns, was at the date of the will within a month of the age of sixty-eight years. The testatrix was about seventy. Mary Ann Burns had had two children only, both born before her marriage in 1869, and she had been left a widow before the date of the will. The two children were registered as the legitimate children of Mary Ann Burns, formerly Sales, and Arthur Burns, and in one case the register is attested by the father. The testatrix knew all the facts about the birth of these children, and that they were the only two children her sister had. They were on friendly terms with the testatrix, and the evidence shows that she and the rest of the family treated them as legitimate. Some twelve months before the testatrix's death Mary Ann Burns came to reside with her and continued to do so till her death. The daughter appears to have been suffering from cancer, and to have undergone an operation at the hospital under the advice of the testatrix's own doctor, and the testatrix took much interest in her recovery and welfare.

The term "children" in a will *primâ facie* means legitimate children. But where it is impossible that any legitimate children could take under the bequest, and the testator must be taken to know the state of his family, the courts hold that illegitimate children are intended: *Hill v. Crook* (1). Who could the testatrix have meant when she made this gift to the two children of her old widowed sister? She knew all about the two illegitimate children, and there never could be any legitimate children to take under the bequest. In the circumstances which existed at the date of the will it was impossible that any legitimate children should take. There were none and there never could be any. It is impossible to come to any conclusion except that the testatrix intended these two children to take, and I must give effect to that intention which I arrive at, not from any conjecture as to what the testatrix meant, but from the will itself with the assistance of such surrounding circumstances as I am bound to look at. I hold that the two illegitimate children of Mary Ann Burns are entitled to shares in the residue.

Solicitors: *Farmer & Carpenter; Crossfield, Cushing & Wheldon.*

[Reported by G. B. HAMILTON, ESQ., Barrister-at-Law.]

Re STEWART. STEWART *v.* McLAUGHLIN

[CHANCERY DIVISION (Neville, J.), May 23, 28, 1908]

[Reported [1908] 2 Ch. 251; L.J.Ch. 525; 99 L.T. 106;
24 T.L.R. 679]*Executor—Gift to—Imperfect gift in lifetime—Perfection by vesting of property in executor—No evidence of change of intention by testator.*

Where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the vesting of the property in the executor at the donor's death completes the imperfect gift made in his lifetime, and the intention of the testator to give the beneficial interest to the executor is sufficient to countervail the equity of beneficiaries under the will, the testator having vested the legal estate in the executor, and, therefore, the executor is entitled to hold the property for his own benefit.

Strong v. Bird (1) (1874), L.R. 18 Eq. 315, applied.

As the whole of the property in personal estate in the eye of the law vests in each executor, it is immaterial whether the donee is the only executor or one of several.

A testator received the proceeds of a bond presented by him to his wife and subsequently drawn, and paid them into his bank at R. He bought another bond in the place of the one drawn and paid for it by his cheque drawn on another bank. By a codicil to his will the testator gave the balance of his account at the R. bank to his wife and appointed her executrix.

Held: the gift by the codicil of the balance at the R. bank was wholly independent of the gift of the bond, and the wife was entitled both to the bond and the balance at the R. bank.

Notes. Distinguished: *Vavasour v. Vavasour* (1909), 25 T.L.R. 250. Considered: *Re Innes*, *Innes v. Innes*, post; [1910] 1 Ch. 188; *Re Freeland*, *Jackson v. Rodgers*, [1952] 1 All E.R. 16. Referred to: *Re Pink*, *Pink v. Pink*, [1911–13] All E.R.Rep. 1037; *Cashin v. Cashin*, [1938] 1 All E.R. 536; *Re Nelson*, *Nelson v. Nelson* (1947), 91 Sol. Jo. 533.

As to the appointment of the donee of an incomplete gift as executor, see 16 HALSBURY'S LAWS (3rd Edn.) 129; and for cases see 25 DIGEST 538 et seq.

Cases referred to:

- (1) *Strong v. Bird* (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 22 W.R. 788; 25 Digest 538, 268.
- (2) *Selwin v. Brown* (1735), 3 Bro. Parl. Cas. 607; 1 E.R. 1527, H.L.; 25 Digest 540, 277.
- (3) *Re Hyslop*, *Hyslop v. Chamberlain* (1894), 3 Ch. 522; 64 L.J.Ch. 168; 71 L.T. 373; 43 W.R. 6; 38 Sol. Jo. 663; 8 R. 680; 25 Digest 540, 278.

Also referred to in argument:

- Re Griffin*, *Griffin v. Griffin*, [1899] 1 Ch. 408; 68 L.J.Ch. 220; 79 L.T. 442; 15 T.L.R. 78; 43 Sol. Jo. 96; 25 Digest 539, 273.
- Re Apple Bee*, *Leveson v. Beales*, [1891] 3 Ch. 422; 60 L.J.Ch. 793; 65 L.T. 406; 40 W.R. 90; 25 Digest 539, 269.

Witness Action by the plaintiff for a declaration that she was entitled to certain bonds given to her by her husband during his lifetime.

By his will the testator, James Stewart, appointed the defendants, J. H. McLaughlin, S. Donnell, W. J. Donnell, and another, executors and trustees thereof, and devised and bequeathed unto his said executors and trustees all the residue of his real and personal estate, and all property over which he might have a disposing power upon trust to sell the same as therein mentioned, and to stand

possessed of the proceeds of such sale, and of his ready money upon the trusts thereby declared, which were chiefly of a charitable nature. On Sept. 11, 1900, the testator married the plaintiff, then Gertrude Daisy Lavender. By a codicil dated Oct. 23, 1903, the testator, who had made other provision for his wife, also gave and bequeathed to her (inter alia) his house and land called "Morningside," situate at Rickmansworth, and all the furniture and effects belonging thereto, and all the Argentine Republic bonds enumerated in the attached schedule, and deposited in the Birkbeck Bank, and all moneys at his credit in the London and County Bank, Rickmansworth, at his death, absolutely for her own use and benefit. He also thereby appointed his wife sole executrix thereof. On June 2, 1906, the testator died suddenly, and on July 18 his said will and the said and an earlier codicil were proved by the defendants, power being reserved to make the like grant to the plaintiff, the estate of the testator in the United Kingdom being sworn by the defendants at the sum of £135,604. On May 11, 1907, probate of the will and codicils was also granted to the plaintiff. It did not appear what construction the Probate Division had put upon the expression "sole executrix," but it was suggested it meant the sole female personal representative.

According to the evidence for the plaintiff, the testator was in the habit from time to time of buying and giving to the plaintiff as her separate property bearer bonds in order that she might have an independent income. The testator kept a notebook in which he entered up in his own hand particulars of all the bonds which he had so given to the plaintiff and which he regarded as her property and of the income derivable therefrom. The particulars were under the heading "Mrs. Stewart's capital account." The testator had written in pencil at the foot of the list, "Coming in next year £1,000," and had added this sum to the amount of the bonds already enumerated, making a total of £17,230. He had made a corresponding addition of £50 to the income. About April 1, 1906, a City of Mexico bond for £500, included in the particulars mentioned above, was drawn, and the bond was handed to the manager of the London and County Bank, Rickmansworth, for collection. The sum of £500 was received by the bank and credited to the account of the testator. Shortly before the testator's sudden death on June 2, 1906, according to the plaintiff's evidence, he called her into the dining-room, and, putting his hand into his pocket, said: "I will show you something that will interest you. You see I have this letter from my brokers, and you will see I have invested this money for you." She read the letter. He further informed her that he had instructed his brokers to purchase three £500 Buenos Aires Water and Drainage Bonds, and she understood that one of such bonds were intended to replace the City of Mexico Bond, and that the other two bonds were to supplement her holding of bonds. The broker's contract note for the three Buenos Aires bonds was dated May 23, 1906, the bonds being bought for May 31. On May 30 the testator sent to the brokers £1,545 to pay for the bonds and the purchase was completed. Soon after the testator's death the brokers handed the bonds to the defendants, and on April 25 the defendants handed to the plaintiff one of the three Buenos Aires bonds as representing the reinvestment of the £500 City of Mexico bond which had been paid off. They, however, refused to deliver to her the other two £500 Buenos Aires bonds. The plaintiff, therefore, claimed a declaration that she was entitled to the two Buenos Aires bonds and payment of all dividends and interest received by the defendants in respect thereof since the death of the testator. The defendants, besides putting in a defence, counterclaimed for the return of the bond delivered to the plaintiff and interest thereon.

Peterson, K.C. (A. à B. Terrell with him) for the plaintiff.

Jenkins, K.C. (G. Cartwright with him) for the defendants.

Cur. adv. vult.

May 28, 1908. **NEVILLE, J.**—In this case the plaintiff, Mrs. Stewart, one of the executors under her late husband's will, claims to be beneficially entitled

A to three bonds for £500 each under the following circumstances. The testator in October, 1905, being then about to go abroad with his wife, presented her with a considerable number of bonds payable to bearer, to the value of over £16,000. At that time, or at some other time during 1905, a list of these bonds was entered by the testator in a book under the heading "Mrs. Stewart's capital account." Either
B "Coming in next year £1,000," and added this sum to the amount of the bonds already enumerated, making a total of £17,230. He made, apparently at the same time, a corresponding addition of £50 to the income. One of the bonds (for £500) was drawn on July 1, 1906, and after the return of Dr. Stewart and his wife to England in April, 1906, was paid off, Dr. Stewart receiving the amount and paying it into his own banking account at Rickmansworth. Shortly afterwards Dr.
C Stewart wrote to his brokers instructing them to purchase three Argentine £500 bonds. His instructions were carried out and a letter received by him from his brokers advising him of the purchase and enclosing a bought note. Dr. Stewart paid for the bonds by a cheque for £1,545 drawn upon his account at another bank. Shortly before his death, which occurred suddenly on June 2, 1906, Dr. Stewart called his wife into the dining-room and told her that he had something to show her that would interest her. He thereupon handed her an envelope containing the broker's letter, announcing the purchase, and probably the bought note, at the same time saying to her, "I have bought these bonds for you." Dr. Stewart died without having done anything further to complete the transaction, the bonds not having been delivered by the brokers before his death and the amount paid on the drawn bonds still standing to the credit of his account at the bank. By a codicil to Dr.
D Stewart's will the plaintiff was appointed sole executrix of his will, but for some reason not quite clear to me the executors named in the will were admitted to probate, the plaintiff herself not proving the will until later on. By the codicil above referred to the balance at the Rickmansworth bank was given to the plaintiff.

The plaintiff contends that under these circumstances she is entitled to the three bonds, the imperfect gift in the testator's lifetime having been perfected by her
E appointment as executrix, under the principle which it is contended was laid down in *Strong v. Bird* (1). On the other hand, it is argued that *Strong v. Bird* (1) only applies to the release of a debt, and not to a gift, and, moreover, that it does not apply in the case of a gift where the donee is only one of several executors. It is further argued that the intention of the testator to make a gift of the three bonds to his wife was not proved, and that at all events she cannot be entitled to the three bonds and also to the proceeds of the bond paid off which passed to her
F under the gift in the codicil.

I accept the plaintiff's account of her conversation with the testator about the bonds. He had in his hands £500 or thereabouts, the proceeds of the bond paid off, which formed part of the provision he had in 1905 made for his wife. He had, I think, in his pencil note indicated his intention of adding to that provision in 1906 to the extent of £1,000. Under these circumstances he buys three £500
G bonds at a price slightly exceeding £1,500. Coupling this with the statement of the wife that he told her "I have bought these for you," I have no doubt that he intended the bonds to be her property. The intention of the testator to give the bonds being thus as I hold proved, does the fact that the wife was appointed executrix give validity to what, unless it can be supported as a declaration of
H trust, would be an imperfect and invalid gift? I think it does, the case in my opinion being within the principle of *Strong v. Bird* (1), which is a decision of SIR GEORGE JESSEL that has remained unchallenged for upwards of thirty years, and has been followed in several cases. It purports to lay down a principle of general application, and I think I am bound to apply that principle to the present case. The decision is, as I understand it, to the following effect—that where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit. The
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reasoning by which the conclusion is reached is of a double character. First, that the vesting of the property in the executor at the testator's death completes the imperfect gift made in the lifetime, and, secondly, that the intention of the testator to give the beneficial interest to the executor is sufficient to countervail the equity of beneficiaries under the will, the testator having vested the legal estate in the executor. The whole of the property in the personal estate in the eye of the law vesting in each executor, it seems to me immaterial whether the donee is the only executor or one of several; nor do I think the rule confined to cases of the release of a debt owing by the donee. The intention to give, however, must not be an intention of testamentary benefaction, although the intended donee is the executor, for in that case the rule cannot apply, the prescribed formalities for testamentary disposition not having been observed: (see *Selwin v. Brown* (2); *Re Hyslop*, *Hyslop v. Chamberlain* (3)).

The plaintiff admitted in her evidence that she understood the gift of the three bonds to be as to part in discharge of any obligation on the part of the testator as recipient of the proceeds of the bond paid off, and I have no doubt that this was the intention of the testator. On this view it was contended that the plaintiff must account to the estate for the proceeds of that bond, as otherwise she would get £2,000 instead of the £1,500 intended for her by the testator. The answer to this contention is, I think, that the gift by the codicil of the balance at the bank was wholly independent of the gift of the bonds. The plaintiff takes under the codicil whatever the balance at the bank happens to consist of at the date of death, without regard to the source from which it was derived. I think, therefore, that the plaintiff is entitled both to the three bonds and to the balance at the bank.

Solicitors: *H. S. Knight Gregson; Roy & Cartwright.*

[Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

DUNBAR v. DUNBAR

[CHANCERY DIVISION (Warrington, J.), October 21, 1909]

[Reported [1909] 2 Ch. 639; 79 L.J.Ch. 70; 101 L.T. 553;
26 T.L.R. 21]

Husband and Wife—Gift to wife—Presumption of advancement—House bought by husband and conveyed to spouses as joint tenants—Decree of nullity of marriage—Rebuttal of presumption of resulting trust.

The defendant bought a house for the joint habitation of himself and the plaintiff, then his wife, and for her to live in if she survived him, the house being conveyed to them as joint tenants in fee simple. The defendant obtained part of the purchase money by a contemporaneous mortgage of the house executed by himself and the plaintiff. The defendant later paid off that mortgage, and the house was re-conveyed to both the parties. Subsequently, the marriage was declared null and void.

Held: at the date of the purchase the house was intended to be an advancement to the wife; there was no implied condition that the marriage would continue as a valid marriage; and, therefore, there was a presumption that the purchase of the house was an advancement to the wife which rebutted the presumption of a resulting trust in favour of the defendant, and the plaintiff was entitled to be declared joint tenant of the property with him.

Notes. Referred to: *McNaught v. McNaught* (1909), 54 Sol. Jo. 135; *Dodworth v. Dale*, [1936] 2 All E.R. 440.

As to gifts between husband and wife, see 19 HALSBURY'S LAWS (3rd Edn.) 831 et seq.; and for cases see 27 DIGEST (Repl.) 150 et seq.

Case referred to:

- (1) *Thornley v. Thornley*, [1893] 2 Ch. 229; 62 L.J.Ch. 370; 68 L.T. 199; 41 W.R. 541; 9 T.L.R. 254; 3 R. 311; 27 Digest (Repl.) 106, 786.

Also referred to in argument:

Re Boddington, Boddington v. Clariat (1883), 22 Ch.D. 597; 52 L.J.Ch. 239; 48 L.T. 110; 31 W.R. 449; on appeal (1884), 25 Ch.D. 685; 53 L.J.Ch. 475; 50 L.T. 761; 32 W.R. 448, C.A.; 44 Digest 219, 441.

Soar v. Foster (1858), 4 K. & J. 152; 31 L.T.O.S. 381; 4 Jur.N.S. 406; 6 W.R. 265; 70 E.R. 64; 27 Digest (Repl.) 150, 1095.

Hubbard (otherwise Rogers) v. Hubbard, [1901] P. 157; 70 L.J.P. 34; 84 L.T. 441, C.A.; 27 Digest (Repl.) 645, 6090.

The Moorcock (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.

Anstey v. Manners (1818), Gow, 10, N.P.; 27 Digest (Repl.) 195, 1538.

Hamlyn & Co. v. Wood & Co., [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, 5266.

Action by the plaintiff for a declaration that she and the defendant, her former husband, were entitled as joint tenants to a house in Barnsbury, London, which had been conveyed to them as joint tenants, but as to which the defendant claimed there was a resulting trust in his favour.

The plaintiff, then Miss W., was married to the defendant A. Dunbar in 1896. In February, 1897, the defendant acquired a certain periodical or magazine, and the plaintiff assisted him in conducting this publication, of which she was the editor. This continued until April, 1898, when the magazine was sold at a profit. In 1897 the defendant, having some money to invest, proposed to buy a house which was situated near the house they were living in, and he told his wife that he was buying it as an investment, and for their joint habitation while they were both alive, and for the habitation of the survivor of them. The defendant had not the means of paying the whole of the purchase money, which was £654, so he borrowed £300 by a contemporaneous mortgage of the house. The deed of conveyance of the house, dated July 15, 1897, was made between the vendor of the one part and the defendant and plaintiff of the other part, and recited that the vendor had agreed to sell the property to the purchasers for £654, and, in consideration of the purchase money "now paid by the purchasers out of moneys belonging to them on a joint account to the vendor," the vendor thereby granted the property to the purchasers, their heirs and assigns, as joint tenants. By the deed of mortgage dated the same day and made between the defendant and plaintiff of the one part and a mortgagee of the other part, after reciting that the mortgagee had at the request of the mortgagors agreed to lend them the sum of £300 in consideration of that sum then paid to the mortgagors by the mortgagee, the mortgagors covenanted to pay the said sum to the mortgagee, and they conveyed the property to the mortgagee with a proviso for redemption drawn in the ordinary form for a mortgage by joint tenants. In the summer of 1898 the cohabitation of the husband and wife ceased, and the wife went to live abroad, but, though living apart, they were not on unfriendly terms, and the husband made the wife a regular allowance, which only ceased on the decree for nullity mentioned later being made. In April, 1905, the defendant paid off the moneys secured by the mortgage, and the property was reconveyed to the use of the defendant and plaintiff in fee simple by a deed drawn in the ordinary form for a reconveyance to joint tenants. In 1908 the plaintiff instituted proceedings in the Probate, Divorce, and Admiralty Division

of the High Court for a declaration of nullity of marriage, and on Oct. 19, 1908, she obtained a final decree which pronounced and declared

"the said marriage to have been and to be absolutely null and void, and that the petitioner was and is free from all bond of marriage with the respondent."

The present action was commenced shortly afterwards claiming a declaration that she was entitled as joint tenant in fee with the defendant to the house; an account of the rents and profits of the house received by the defendant; and a sale in lieu of partition. At the trial, rents and profits were claimed only from the date of the decree.

Rowden, K.C., and *T. B. Napier* for the plaintiff.

Cave, K.C., and *E. F. Ball* for the defendant.

WARRINGTON, J.—The plaintiff asks for a declaration in effect that she and the defendant are joint tenants of a certain house in Barnsbury. The defendant says that he is entitled to the house, and that, though under the terms of the conveyance he and the plaintiff are joint tenants, there is a resulting trust for himself as the person who found the purchase money for the house.

The plaintiff puts her case in two ways. She says, first, that this is the ordinary case of a purchase by the husband in the joint names of himself and his wife, and, having regard to the relationship, the presumption of resulting trust, which in the case of a purchase in the joint names of a man and a stranger would, of course, exist, is rebutted. She says, further, that even if the presumption of resulting trust is not rebutted by the mere relationship of the parties, yet in this case it is rebutted by the circumstances existing at the time of the purchase, which were that she had been doing work for the defendant, and that this purchase was in remuneration for that work. On the other hand, the defendant says that the resulting trust is not in law rebutted by the relationship, for that, having regard to the decree, the relationship did not exist, the marriage having been declared to have been and to be null and void, and that the conveyance into the joint names of the husband and wife must, in order to rebut the resulting trust, be taken to have been subject—or rather the advancement which would result from the form of conveyance to the husband and wife must be taken to have been subject—to the implied condition that the marriage would continue as a valid marriage. With regard to the issue of fact, the defendant denies that he had any intention of taking the conveyance in the form in which it was taken by way of remuneration to her for her services. I may dispose of the second point at once. It is unnecessary to decide whether or not there was a positive intention to give her the interest in the house as a reward for the work which she had done, because upon the other facts of the case, quite independent of that, I come to the conclusion that the purchase was an advancement to the wife, and that there is no resulting trust.

Supposing we had nothing more in this case than a mere conveyance to the husband and wife jointly, what in this case would in law be the result? It is quite true that when the decree has been pronounced the marriage is declared to have been void, but it is equally clear that the marriage in such a case is not a void marriage, but a voidable marriage. I will illustrate what I mean by that. It is not a void marriage in a sense in which before the Deceased Wife's Sister's Marriage Act, 1907, the marriage with a deceased wife's sister was a void marriage, that was no marriage at all, and the parties might just as well, so far as legal consequences are concerned, have lived together without going through any ceremony at all. The marriage in this case was not void in that sense, and, if no proceedings had been taken to avoid it, it would to all intents and purposes in law have been a valid marriage. It was therefore a voidable marriage, and not a void marriage. Is there any foundation for the contention that the presumption of advancement in the case of a husband and wife depends in any way upon the question whether the marriage then existing will or will not continue until the death of either of the two parties? No authority for that proposition has been advanced.

A So far as there is any authority, I think it is authority against the contention of the defendant. The authority to which I am referring is *Thornley v. Thornley* (1), before ROMER, J. In that case the conveyance, as here, had been made to the husband and the wife of property bought by the husband. The marriage had been dissolved—not declared null and void—by reason of the wife's misconduct. Notwithstanding that, the presumption of advancement was held to remain, and the wife was held to be joint tenant with her husband of the property which had been conveyed to them jointly, though bought by the husband. If any such implied condition as that which has been relied on is to be found, if there is any such implied condition, I should have thought that the necessity for it would have applied as much to the case of a marriage dissolved as to the case of a marriage declared null. The condition, if it exists at all, as counsel for the defendant put it, was that this should be property which they should enjoy jointly during their joint lives, and that the survivor should enjoy it after the death of either of them. But that condition would fail of fulfilment as much if the marriage was dissolved for misconduct as if it were declared null. In either case the husband and wife cease to reside together as husband and wife at some period earlier than the death of either of them. It seems to me that if there is any such condition it would apply equally in the case of dissolution of marriage as in the case of nullity of marriage. It seems to me, therefore, that I can find no authority for the proposition which has been put forward, and I think that if I were to decide in accordance with the defendant's contention here, I should be deciding contrary to the judgment of ROMER, J., in *Thornley v. Thornley* (1).

E But independently of authority I can see no principle on which I should annex any such condition. The doctrine of advancement depends on this, that from the relationship of the parties the court infers that such a purchase is intended for the benefit of the wife, or, it may be, of the child, for the benefit of the person in whose name the purchase is made. The court makes that inference from the relationship of the parties, and the inference is that that was the intention of the donor at the time when the gift was made. But at the time when the gift was made there was nothing in the mind of the donor as to the validity or the invalidity of the marriage. The plaintiff was at the time his wife; they were living together, and there was nothing whatever that I can see to lead the court to suppose that the presumed intention in this case was different from the presumed intention in any other case where the purchase is made in the name of the wife. It seems to me, therefore, that I must hold that the doctrine of advancement applies *prima facie* to this purchase. The presumption of resulting trust is rebutted by the presumption of advancement; but that presumption itself may be rebutted. Is there anything to rebut that second presumption? So far from there being anything to rebut it, the evidence given by the husband is in support of it, because his statement is that he did not intend this purchase to be a purchase simply for himself, but that he deliberately altered the draft in order to introduce the interests of the wife, which I now find in the conveyance as executed. It seems to me, therefore, that, so far as the deed of 1897 is concerned, the presumption is that the purchase was an advancement to the wife, and that the wife is entitled to be treated as joint tenant with her husband.

I Now comes a further point, what is she to be treated as joint tenant of? The contention on the part of the defendant is this. As I have said, £300 of the purchase money was borrowed on mortgage. In 1905, before the decree, the defendant paid off that mortgage, and took a re-conveyance of the house to himself and his wife in accordance with the proviso for redemption in the mortgage. He did not execute the re-conveyance, but, of course, that is the deed under which he takes the property. The re-conveyance contains a statement that the £300 and interest had been paid by the mortgagors—that is, by both of them; however the fact is that it was paid by the defendant himself. What he says is this; either all the wife took under the presumption of advancement is the equity of redemption, and that that is all to which she is now entitled; or, putting it in rather a different way,

that he, having paid a debt for which under the mortgage they were both liable, he is entitled to keep that debt on foot. Is either of these contentions sound? In my opinion they are both answered by this, that the circumstances show that, though the mortgage in form was a mortgage by both, the intention was that the money should be treated as borrowed by the husband, and it is for that that I refer with some emphasis to the husband's statement that he bought the house, and that he directed the alteration of the form of the conveyance so that it should be a conveyance to himself and his wife jointly. He says that she had nothing to do with it. In my opinion the true inference to be drawn from the facts is that it was he, as he says, who bought the house; that it is immaterial that a part of the purchase money was raised by the mortgage, and that in form the wife made herself liable to the mortgagees for the £300. The real substance of it was that it was a purchase by him as if he had had so many sovereigns in his pocket. The repayment of the mortgage money and the taking of the re-conveyance was nothing more than providing the rest of the purchase money, though at a subsequent date. It seems to me, therefore, that the plaintiff is entitled to be declared now joint tenant with the defendant of the house as she asks, free from incumbrances.

With regard to the account of the rents, the husband made an allowance to the wife until the decree, and the plaintiff asks for no account up to that date. There must be the declaration, therefore, asked for by the statement of claim, and an account of the rents subsequent to Oct. 19, 1908, when the decree was made absolute, and payment to plaintiff of what should appear due to her on taking that account; and then, inasmuch as they are entitled as joint tenants, it appears to me that the plaintiff, being entitled to half the property, is therefore entitled to ask for a sale in lieu of partition.

Solicitors: *G. C. Topham; Tilleards.*

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.]

Re DAVIDSON. MINTY v. BOURNE

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), June 24, 25, 1908]

[Reported [1909] 1 Ch. 567; 78 L.J.Ch. 437; 99 L.T. 222;
24 T.L.R. 760; 52 Sol. Jo. 622]

Charity—Religion—Uncertainty—Gift by will to Roman Catholic Archbishop of Westminster—Distribution by him at his discretion between "charitable, religious or other societies, institutions, persons, or objects in connection with the Roman Catholic faith."

By his will a testator directed his trustees to hold all his residuary estate "in trust for the Roman Catholic Archbishop of Westminster for the time being to be distributed and given by him at his absolute discretion between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit."

Held: (i) the fact that the archbishop, a person holding a religious office, was made trustee was not sufficient to show that all the testator's trusts and purposes were charitable in the view of the law; (ii) according to the express terms of the will, and notwithstanding the words "in connection with the

Roman Catholic faith," it was possible for the trustee to apply the residue to societies, institutions, persons, or objects which were neither charitable nor religious; the testator had not indicated any cestuis que trust who could invoke the aid of the court and compel the trustee to distribute the fund; and, therefore, the trust was void for uncertainty.

Re Delany, Conoley v. Quick (1), [1902] 2 Ch. 642; *Morice v. Bishop of Durham* (2) (1805), 10 Ves. 522; and *Hunter v. A.-G.* (3), [1899] A.C. 309, applied.

Re White, White v. White (4), [1893] 2 Ch. 41, and *Re Garrard, Gordon v. Craigie* (5), [1907] 1 Ch. 382, distinguished.

Notes. Distinguished: *Re Rees, Jones v. Evans*, [1920] All E.R.Rep. 138. Considered: *Re Bain, Public Trustee v. Ross*, [1929] All E.R.Rep. 387. Referred to: *Dunne v. Byrne*, [1911-13] All E.R.Rep. 1105; *Re Tetley, National Provincial and Union Bank of England v. Tetley*, [1923] 1 Ch. 258; *Re Ashton, Westminster Bank v. Farley*, [1938] 1 All E.R. 707; *Re Spensley's Will Trusts, Barclays Bank, Ltd. v. Staughton*, [1954] 1 All E.R. 178; *Re Rumball, Sherlock v. Allan*, [1955] 3 All E.R. 71.

As to charitable intention and obligatory application to charity, see 4 HALSBURY'S LAWS (3rd Edn.) 267 et seq.; and for cases see 8 DIGEST (Repl.) 394 et seq.

Cases referred to:

- (1) *Re Delany, Conoley v. Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 51 W.R. 27; 18 T.L.R. 741; 8 Digest (Repl.) 326, 89.
- (2) *Morice v. Bishop of Durham* (1805), 9 Ves. 399; 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 836.
- (3) *Hunter v. A.-G.*, [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 8 Digest (Repl.) 340, 227.
- (4) *Re White, White v. White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 41 W.R. 683; 37 Sol. Jo. 249; 2 R. 380, C.A.; 8 Digest (Repl.) 334, 150.
- (5) *Re Garrard, Gordon v. Craigie*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 23 T.L.R. 256; 51 Sol. Jo. 209; 8 Digest (Repl.) 391, 847.
- (6) *Cocks v. Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 331, 128.
- (7) *Thorner v. Wilson* (1855), 3 Drew. 245; 24 L.J.Ch. 667; 25 L.T.O.S. 309; 19 J.P. 675; 3 W.R. 388; 61 E.R. 897; subsequent proceedings (1858), 4 Drew. 350; 22 J.P. 769; 8 Digest (Repl.) 428, 1179.

Also referred to in argument:

- Donnellan v. O'Neill* (1870), 18 W.R. 1188; Ir.R. 5 Eq. 523; 8 Digest (Repl.) 380, *220.
- Townsend v. Carus* (1844), 3 Hare, 257; 13 L.J.Ch. 169; 8 Jur. 104; 67 E.R. 378; 8 Digest (Repl.) 331, 127.
- Bruce v. Deer Presbytery* (1867), L.R. 1 Sc. & Div. 96, H.L.; 8 Digest (Repl.) 406, 975.
- Re Freeman, Shilton v. Freeman*, [1908] 1 Ch. 720; 77 L.J.Ch. 401; 98 L.T. 429; 24 T.L.R. 300; 52 Sol. Jo. 262, C.A.; 8 Digest (Repl.) 388, 813.
- Re Sidney, Hingeston v. Sidney*, [1908] 1 Ch. 488; 77 L.J.Ch. 296; 98 L.T. 625; 52 Sol. Jo. 262, C.A.; 8 Digest (Repl.) 350, 304.
- Da Costa v. De Pas* (1754), Amb. 228; Dick. 258; 27 E.R. 150; sub nom. *De Costa v. De Paz*, 2 Swan. 487, n., L.C.; 8 Digest (Repl.) 339, 211.

Appeal from a decision of SWINFEN EADY, J., in favour of the plaintiffs.

Henry Davidson, who died on Feb. 27, 1907, by his will, dated July 14, 1903, appointed Edward Arden Minty and George Herbert Newman executors and trustees thereof, and, after making certain specific and pecuniary bequests as therein mentioned, he devised and bequeathed all the residue of his personal estate whatsoever and wheresoever and all his real estate of every tenure wheresoever situate unto and to the use of his trustees upon trust for sale and conversion, and

directed that out of the money to arise from such sale and conversion his trustees should pay his funeral and testamentary expenses and debts and legacies and the duty thereon, and subject thereto should pay the following legacies: to the Roman Catholic Archbishop of Westminster, £4,000, to be expended in such manner as he might think proper upon the altar or the ornaments of the same, or round about the altar in the chapel of the Blessed Virgin Mary in the Roman Catholic cathedral then in course of erection at Westminster; to the Home of the Sisters of Nazareth, at Hammersmith, £1,000; to the Children's Hospital, Great Ormond Street, London, £1,000. And the testator directed his trustees to hold all the residue and remainder of his person and real estate and the proceeds thereof

"in trust for the said Roman Catholic Archbishop of Westminster for the time being to be distributed and given by him at his absolute discretion between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit."

An originating summons was taken out by the executors and trustees of the will against the Right Rev. Francis Bourne (the Roman Catholic Archbishop of Westminster for the time being), Caroline Davidson, and William Davidson, asking (i) whether upon the true construction of the will the gift therein contained of the ultimate residue of the real and personal estate of the testator and of the proceeds thereof

"in trust for the Roman Catholic Archbishop of Westminster for the time being to be distributed and given by him at his absolute discretion between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit"

was a good charitable bequest, or whether the same was void for uncertainty; (ii) if the court should declare that such bequest was void for uncertainty, that an inquiry might be directed for the purpose of ascertaining who were the persons entitled to such residuary real and personal estate and the proceeds thereof, and in what shares and proportions; and (iii) that if and so far as might be necessary the real and personal estate of the testator might be administered by the court. The summons was adjourned into court and came on to be heard before SWINFEN EADY, J., on Nov. 27, 1907, when his Lordship decided that the gift of the residue was void for uncertainty; and, the plaintiffs declaring themselves satisfied as to the defendant William Davidson being the heir-at-law of the testator and the defendants William Davidson and Caroline Davidson being the next-of-kin of the testator, his Lordship made no further order except as to costs. From that decision the defendant the Right Rev. Francis Bourne appealed, asking that the judgment of SWINFEN EADY, J., might be reversed in so far as it was thereby declared that according to the true construction of the will of the testator the gift of residue therein contained was void for uncertainty; and that in lieu thereof it might be declared that such gift of residue was a good and valid charitable gift; or, in the alternative, that it might be ordered that the Attorney-General be added as a defendant to the action.

Younger, K.C., and *Hartree* for the defendant.

Asbury, K.C., and *Arthur Underhill*, for the plaintiffs, were not called upon to argue.

Sir HERBERT COZENS-HARDY, M.R.—This is an appeal from a judgment of SWINFEN EADY, J., who has held that the gift of residue contained in the will of the testator, which gift is claimed by the Roman Catholic Archbishop of Westminster, is void for uncertainty. In my opinion it is impossible for us to differ from his

decision. The will has the merit of brevity; and it is only necessary for the present purposes to refer to two clauses. There is first of all a gift to the Roman Catholic Archbishop of Westminster for the time being for purposes which are admittedly charitable; no question arises as to that. Later on there is a gift of the residue, with a direction that the trustees are to hold all the residue

"in trust for the said Roman Catholic Archbishop of Westminster for the time being [that means the Roman Catholic archbishop at the time of the testator's death] to be distributed and given by him at his absolute discretion between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit."

Stress has been laid, and properly laid—particularly by counsel for the defendant—first upon the fact that the Roman Catholic archbishop is the trustee who is to distribute and divide this fund. It is said that when you find that fact—I think it was put as part of the argument—that alone is sufficient to show that the whole purpose is charitable. I am entirely unable to accept that view. I do not doubt at all that if you find in a will words indicating that a distribution is to be made by persons in succession as holders of a particular religious or charitable position, that goes far to establish—and, it may be, goes sufficiently far to establish—the fact that the whole gift is charitable. But the mere fact that the trustee is a person holding a religious office or is the head of a charitable institution, or even an incorporated charitable institution, is not in any way sufficient to enable the court to hold that all the trusts and purposes are charitable in the view of the law. I therefore do not think that it can be sufficient for the defendant's argument to say that the Roman Catholic Archbishop of Westminster is the trustee. The case of *Re Delany, Conoley v. Quick* (1), a decision of FARWELL, J., which was pressed upon us as an authority in favour of the defendant, so far from being an authority in support of that proposition, seems to me, when carefully examined, to be a plain authority in the contrary sense.

Then it is said that the persons in whose favour the Roman Catholic Archbishop of Westminster is directed to distribute and divide this residue are persons in connection with the Roman Catholic faith in England. We are asked to hold that that is an overriding intent which ought to have effect so given to it as to modify the natural meaning of the prior words, and induce us to construe them in a sense more restricted and narrow than we otherwise should. In the first place, I do not think that the words "in connection with the Roman Catholic faith" mean anything else than in connection with the Roman Catholic Church. I do not think that the word "faith" there means anything else than in connection with the Roman Catholic Church, the Roman Catholic body, the Roman Catholic denomination, or whatever collocation of words you might use. Then it is said that, if you find "the Roman Catholic faith," you must assume that all the other words are to be so read as that if they are connected with the Roman Catholic faith they must also be charitable. It is not without regret, if I may say so, that I do not feel able to assent to that view, because in the language of this will there is an express direction that the residue may be distributed at the trustee's absolute discretion between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit. In the face of those words it does seem to me impossible to say that it is not competent to the trustee, according to the express terms of this will, to apply the residue to societies, institutions, persons, or objects which are neither charitable nor religious. If that be so, there is really an end of the case.

We are dealing here with what is very old and very well established law. I do not say the first authority—it is by no means the first authority—but the leading authority which is cited in all these cases is *Morice v. Bishop of Durham* (2). It has been upheld, and strongly upheld, in the House of Lords in *Hunter v. A.-G.*

(3), and I will read one passage only from the judgment of LORD DAVEY ([1899] A.C. at p. 324):

"As SIR WILLIAM GRANT says in *Morice v. Bishop of Durham* (2): 'The question is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it.' The answer to that question in the present case can only be that there is no such obligation. On the other hand, the other purposes to which conceivably the trustees may apply the whole fund in their discretion are not described with sufficient definiteness for the court to attach any trust upon them."

In the present case the testator has created a trust, but has not indicated any body of beneficiaries, any cestuis que trust who can invoke the aid of the court, and prevent the trustee from doing that which some trustees might do if there were no court able to call them in question—namely, put the money into their own pockets. Of course, no one would suppose that I suggest for a moment that the archbishop would do that. But one cannot have regard to the circumstances of the particular individual. The law is perfectly well established that the court cannot recognise a trust which is so uncertain as that there is no means known by which the trustee can be compelled to distribute that fund. Under these circumstances it seems to me the judgment of SWINFEN EADY, J., is perfectly correct, and this appeal must be dismissed.

FARWELL, L.J.—I agree. As LORD HALSBURY, L.C., says in *Hunter v. A.-G.* (3) ([1899] A.C. at p. 315):

"It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable, and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void. . . ."

That has been settled law for a very long time; and on the face of this will it seems to me that the words come exactly within it. The purposes are specified as "charitable, religious, or other." It is quite plain that, notwithstanding the addition of the words "in connection with the Roman Catholic faith," there may be purposes open to the archbishop which are not charitable within the definition that has been put upon it. For instance, take the illustration put by the Master of the Rolls in the course of the argument—namely, that of the Selley Oak community in *Cocks v. Manners* (6)—which was held by WICKENS, V.C., to be distinguished from the one which he held to be a charity. Reading from my own judgment in *Re Delany, Conoley v. Quick* (1), I said ([1902] 2 Ch. at p. 648):

"And he distinguishes the gift in that case to the Selley Oak community from another gift in the same will to a Dominican convent, on the ground that the sole purpose of the latter was to sanctify their own souls by prayer and contemplation without engaging in any corporal works of mercy. The Vice-Chancellor pointed out that religious services can only be charitable so far as they tend towards the edification or instruction of the public, and he held that the gift referred to above was not charitable."

It is plain that the archbishop might apply this fund or part of it to some convent or community on a footing exactly similar to that which was held by the Vice-Chancellor in the case of *Cocks v. Manners* (6) not to be charitable. Counsel for the defendant then argued that, inasmuch as there is a gift to the Roman Catholic Archbishop of Westminster for the time being, that involved a gift not to an individual, but to an office, an office which was a religious office; and that therefore it was *primâ facie* charitable. He cited in assistance of his argument the case before JOYCE, J., of *Re Garrard, Gordon v. Craigie* (5) and *Re White, White v. White* (4) before the Court of Appeal. To my mind the argument fails in its initial stage because the gift is not to the archbishop for the time being for the

A religious purposes of his archbishopric, but it is for what is actually specified immediately afterwards—that is to say, for distribution

“between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit.”

B And it appears to me that when the testator has himself distinguished between charitable and religious societies, it is impossible for this court to say that by “religious” he means only such as are charitable, and does not mean to extend the gift to the wider area which would include the convent I have just mentioned. JOYCE, J., in *Re Garrard, Gordon v. Craigie* (5), in my judgment, really proceeds on the same basis—namely, that the gift to the vicar and churchwardens for the time being of a parish “to be applied by them in such manner as they shall in their sole discretion think fit” was a charitable gift for the benefit of the parish for ecclesiastical purposes. That was immediately followed by a gift to the Kington Cottage Hospital, “to be applied by the manager thereof in the like manner”; and he held that the gift to the vicar and churchwardens was good because it was for the benefit of the parish for ecclesiastical purposes. He felt himself able under D that will to cut down the generality of the expression in such form to the form which would be appropriate to a gift for the benefit of the parish for ecclesiastical purposes—that is to say, for charitable purposes. At any rate, whether rightly or wrongly decided, that is the basis of the decision. But to my mind that does not touch a case like the present, where, as I say, the first step towards the argument does not arise at all. The case before KINDERSLEY, V.C., of *Thornber v. Wilson* (7) E really turned on similar considerations, but turned very much on the peculiar provisions of the will, which contained three separate devises and then a gift of the residue, which the Vice-Chancellor construed, treating the will as a whole, by reference to one of the others. I therefore think that this appeal fails.

KENNEDY, L.J.—I am of the same opinion.

F

Appeal dismissed.

Solicitors, *Witham, Roskell, Munster & Weld; Adam Burn & Son.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

BRITISH CASH AND PARCELS CONVEYORS, LTD. v. LAMSON STORE SERVICE CO., LTD.

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.J.J.), February 28, March 2, 16, 1908]

[Reported [1908] 1 K.B. 1006; 77 L.J.K.B. 649; 98 L.T. 875]

Maintenance of Action—Indemnity against results of breach of contract—Common interest—Trade rivals—Contract to indemnify customers.

The plaintiffs and the defendants were trade rivals, each owning an apparatus for conveying cash from one part of business premises to another part. The defendants obtained contracts from certain firms who had previously contracted with the plaintiffs. These firms thereupon ceased to use the plaintiffs' apparatus although the contracts between them and the plaintiffs had not come to an end, the defendants having agreed to indemnify the firms in question in respect of any action the plaintiffs might bring against them. In two instances under that indemnity the defendants paid damages and costs recovered by the plaintiffs against persons who had broken their contract with them.

Held: the defendants had a business and commercial interest which justified the indemnities given by them to their customers, and they were not liable for maintenance of the actions.

Notes. Distinguished: *Ford v. Radford* (1920), 36 T.L.R. 658. Applied: *Martell v. Consett Iron Co.*, [1955] 1 All E.R. 481. Referred to: *Scott v. National Society for the Prevention of Cruelty to Children and Parr* (1909), 25 T.L.R. 789; *Neville v. London "Express" Newspaper*, [1918-19] All E.R. Rep. 61; *Wiggins v. Lavy* (1928), 44 T.L.R. 721.

As to maintenance and champerty, see 1 HALSBURY'S LAWS (3rd Edn.) 39 et seq.; and for cases see 1 DIGEST (Repl.) 96 et seq.

Cases referred to :

- (1) *Findon v. Parker* (1843), 11 M. & W. 675; 12 L.J.Ex. 444; 1 L.T.O.S. 289; 7 J.P. 385; 7 Jur. 903; 152 E.R. 976; 1 Digest (Repl.) 81, 610.
- (2) *Fitzroy v. Cave*, [1905] 2 K.B. 364; 74 L.J.K.B. 829; 93 L.T. 499; 54 W.R. 17; 21 T.L.R. 612, C.A.; 1 Digest (Repl.) 92, 685.
- (3) *Holden v. Thompson*, [1907] 2 K.B. 489; 76 L.J.K.B. 889; 97 L.T. 138; 23 T.L.R. 529; 1 Digest (Repl.) 82, 616.
- (4) *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335; 77 L.J.Ch. 218; 98 L.T. 291; 24 T.L.R. 201, C.A.; 42 Digest 988, 177.
- (5) *Bradlaugh v. Newdegate* (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 31 W.R. 792; 1 Digest (Repl.) 82, 618.
- (6) *Alabaster v. Harness* (1894), 70 L.T. 375; 10 T.L.R. 233; subsequent proceedings, [1895] 1 Q.B. 339; 64 L.J.Q.B. 76; 71 L.T. 740; 43 W.R. 196; 11 T.L.R. 96; 14 R. 54, C.A.; 1 Digest (Repl.) 96, 713.
- (7) *Fischer v. Naicker* (1860), 8 Moo. Ind. App. 170; 2 L.T. 94; 8 W.R. 655; 19 E.R. 495, P.C.; 1 Digest (Repl.) 98, 737.
- (8) *Prosser v. Edmonds* (1835), 1 Y. & C.Ex. 481; 160 E.R. 196; 1 Digest (Repl.) 89, 668.
- (9) *Plating Co. v. Farquharson* (1881), 17 Ch.D. 49; 50 L.J.Ch. 406; 44 L.T. 389; 45 J.P. 568; 29 W.R. 510, C.A.; 1 Digest (Repl.) 99, 753.
- (10) *Metropolitan Bank v. Pooley* (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163; 49 J.P. 756; 33 W.R. 709, H.L.; 1 Digest (Repl.) 81, 613.

Also referred to in argument :

Flight v. Leman (1843), 4 Q.B. 883; 1 Dav. & Mer. 67; 12 L.J.Q.B. 353; 1 L.T.O.S. 287; 7 Jur. 557; 114 E.R. 1130; 1 Digest (Repl.) 81, 612.

- Cornford v. Carlton Bank*, [1900] 1 Q.B. 22; 69 L.J.Q.B. 1020; 81 L.T. 415; 16 T.L.R. 12, C.A.; 13 Digest (Repl.) 324, 1311.
- Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423; 73 L.J.P.C. 102; 90 L.T. 739; 53 W.R. 176; 20 T.L.R. 497, P.C.; 13 Digest (Repl.) 323, 1300.
- Exchange Telegraph Co., Ltd. v. Gregory & Co.*, [1896] 1 Q.B. 147; 65 L.J.Q.B. 262; 74 L.T. 83; 60 J.P. 52; 12 T.L.R. 18, C.A.; 1 Digest (Repl.) 31, 242.
- Hutley v. Hutley* (1873), L.R. 8 Q.B. 112; 42 L.J.Q.B. 52; 28 L.T. 63; 37 J.P. 518; 21 W.R. 479; 1 Digest (Repl.) 97, 721.
- Guy v. Churchill* (1888), 40 Ch.D. 481; 58 L.J.Ch. 345; 60 L.T. 473; 5 T.L.R. 149; 37 W.R. 504; 1 Digest (Repl.) 85, 646.

Application by the defendants for judgment or a new trial.

The plaintiffs in this action claimed relief under two heads. First, they alleged that the defendants had wrongfully induced certain of the plaintiffs' customers to break their contracts. The learned judge at the trial ruled that there was no case to go to the jury on this head. Secondly, they claimed relief on the ground of maintenance in three distinct actions—namely, (i) Reese and Gwillim; (ii) Whiteman; and (iii) Harper Bros. On this second head the learned judge directed a verdict for the plaintiffs, and granted an injunction.

The plaintiff company and the defendant company were trade rivals, each having a special apparatus for carrying cash from one part of business premises to another part. In the case of Reese and Gwillim, the firm had originally hired the defendants' apparatus for a term which expired in 1905. In July, 1904, the plaintiffs obtained from the firm a contract for the hire of plaintiffs' apparatus for a term of five years at a certain rental. The plaintiffs were aware that the firm were using the defendants' apparatus, and agreed to allow off the first year's rental a sum of 62s. still due to the defendants under a similar contract with the defendants. By the terms of the contract between the firm and the defendants, the firm were bound not to discontinue the use of the defendants' apparatus until the expiration of the term. The plaintiffs' apparatus proved unsatisfactory and there were many complaints by the firm. They requested the plaintiffs to remove their apparatus, and communicated with the defendant company. On Mar. 22, 1905, the defendants' manager wrote as follows:

"I will be prepared to put in our system and take risk of any action they [the plaintiffs] may bring against you."

On Mar. 26, 1905, a more formal letter to the same effect was written. On May 22, 1905, the defendants' manager wrote to the firm as follows:

"I agree to put in three or four stations of our best rapid wire cash railway at a rental of 45s. per station per annum. I also agree to take all risk of any loss by you re the cash railway you are at present using, and if any action by the B. C. and P. Co. I will stand behind you in that action and will make good any loss."

Reese and Gwillim asserted (and COZENS-HARDY, M.R., considered rightly asserted) that they were no longer bound by their contract with the plaintiffs. The plaintiffs, on the other hand, claimed four years' rent, amounting to £21, as still due to them. On Oct. 7, 1905, the plaintiffs brought an action against Reese and Gwillim, who counterclaimed. The plaintiffs on Mar. 26, 1906, discontinued their action, and paid 40s. in respect of the counterclaim.

In the case of Whiteman, he had a running contract, dated June 10, 1901, with the defendants for their apparatus, which contract did not expire before June, 1906. The plaintiffs procured from Whiteman a contract in February, 1905, for the erection of their apparatus. Disputes arose as to the removal of the defendants' apparatus, and Whiteman desired to have the defendants' apparatus instead of the plaintiffs'. Litigation was threatened by the plaintiffs against Whiteman. On

April 8, 1905, the defendants' superintendent wrote to Whiteman as follows:

"I think your solicitor's suggestion should be followed, and that you should defend any action the B. C. Co. may take, as you know in my opinion the whole business was a rush, especially as they knew you had a contract with the Lamson Co., and I am prepared to personally pay the amount of judgment and costs, whatever they may be."

A county court summons was served on April 17, the plaintiffs claiming £15 as loss of profit. Whiteman paid £5 10s. into court with a denial of liability, and counter-claimed for rescission of the agreement on the ground of misrepresentation. The plaintiffs recovered £7 damages in the action, and the counterclaim was dismissed. The defendants, pursuant to their indemnity, repaid the amount of the judgment and costs—namely, £23 8s. 11d.

In the case of Harper Bros., the defendants' traveller called upon this firm, but did not obtain an order. A day or two afterwards the plaintiffs' traveller called and obtained an order. The firm alleged that they had been deceived and thought they were giving the order to the defendants and not to the plaintiffs, and asserted that the agreement obtained by the plaintiffs' traveller was void, and declined to allow the plaintiffs to put up the apparatus. The defendants' traveller said he would personally indemnify Harper Bros., and the defendants paid the damages and costs recovered by the plaintiffs in an action in the county court brought against Harper Bros.

The action was tried before RIDLEY, J., who held that what the defendants had done in these three cases amounted to maintenance as a matter of law, and directed the jury to find a verdict for the plaintiffs. The judgment, as drawn up, gave the plaintiffs £2 damages and granted an injunction restraining the defendants

"from unlawfully upholding or maintaining any actions, suits, or other legal proceedings between the plaintiffs and any other person or persons."

Arthur Powell, K.C., and Cecil Walsh for the defendants.

Shearman, K.C., and Herbert Jacobs for the plaintiffs.

Cur. adv. vult.

March 16, 1908. The following judgments were read.

Sir HERBERT COZENS-HARDY, M.R., stated the facts and continued.—I may observe that in each of the above three cases the indemnity or guarantee was given to a customer. It was scarcely attempted to support the injunction, and I think it is plain that it cannot be supported. No threat or intent to maintain in future litigation is even alleged, and there may be actions between the plaintiffs and other persons in which the defendants have such an interest as would clearly justify them in supporting such persons to defend those actions.

Apart from the injunction, we have had a very learned argument in support of the view that the conduct of the defendants in the three instances I have described gave the plaintiffs a common law action for maintenance. I am unable to accept this contention. Beyond all doubt there was a time when what the defendants did would have been regarded as criminal. But there is little use in citing ancient text-books on this branch of law. The law has been modified in accordance with modern ideas of propriety. The language of LORD ABINGER in *Findon v. Parker* (1) is explicit (1 M. & W. at p. 682):

"The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make."

And in the sixty-five years which have elapsed since *Findon v. Parker* (1) this principle has been carried even further. I may refer also to *Fitzroy v. Cave* (2).

It is common knowledge that contracts of indemnity are recognised and unquestionably valid, and none the less because they may involve and indeed contemplate the institution or the defence of an action. The whole business of marine insurance depends upon this. And perhaps the familiar insurances against claims under the Workmen's Compensation Act, 1906, are a still better example. In my opinion all that was done by the defendants falls under and is protected by this principle. The defendants had a business interest, a commercial interest, which fully justified the indemnities or guarantees which they gave. And on this short ground I think the appeal must be allowed, and judgment entered for the defendants. In the view which I take, it is not necessary to consider whether there are other grounds on which the appellants ought to succeed. I refer especially to the arguments that an action for maintenance cannot be supported against a corporation, and that no such action can be supported without proof of special damage. On each of these points I desire to keep an open mind.

FLETCHER MOULTON, L.J.—In this case we have listened to a long argument on behalf of the defendants on the question of what constitutes maintenance in the eye of the law. This is a difficult question on which, in my opinion, the authorities are far from being in harmony. The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago, and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete. As pointed out by COZENS-HARDY, L.J., in *Fitzroy v. Cave* (2), the purchase of a chose in action amounted to maintenance in the olden times, and, therefore, was not only a civil wrong, but a crime. Yet for hundreds of years such transactions have been held valid and the rights arising out of them enforced by the courts of equity, and are now enforceable in all the courts of the realm. Similarly in olden times it was maintenance to give evidence without being subpœnaed so to do. To-day it is looked upon as part of the duty of citizens to be ready and willing to assist the administration of justice by giving evidence when they can do so usefully. In the presence of changes such as these, it appears to me to be idle to look upon the courts as administering the old common law as to maintenance. The present legal doctrine of maintenance is due to an attempt on the part of the courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy. The position of the courts in this respect is not unlike that which may be observed in their treatment of contracts in restraint of trade, though the change of view with regard to maintenance is far more complete. Speaking for myself, I doubt whether any of the attempts at giving definitions of what constitutes maintenance in the present day are either successful or useful. They suffer from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day, and these old definitions are sought to be made serviceable by strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive. These exceptions only indicate such cases as have suggested themselves to the mind of the court, and it is impossible to be certain that there are not many other exceptions which have equal validity.

A good example of this is given in *Holden v. Thompson* (3), in which PHILLIMORE and BRAY, JJ., rightly in my opinion, accepted the interest arising from community of religion as adequate justification for a man assisting a co-religionist in a dispute relating to religious matters, although such an exception is not made, so far as I know, in any of the attempted definitions of maintenance. That there is still such a thing as maintenance in the eye of the law and that it constitutes a civil wrong and perhaps a crime is undoubted, and the general character of the

mischief against which it is directed is familiar to us all. It is directed against wanton and officious inter-meddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse. But in my opinion it is far easier to say what is not maintenance than to say what is maintenance. One point is clear. No transaction can constitute maintenance which the court treats as valid and enforces obligations under it. Maintenance is certainly a *turpis causa*, and therefore a contract of maintenance is incapable of being enforced, and if, as in the present case, it is clear from the settled practice of the courts that contracts are valid and enforceable, we may feel satisfied that they do not infringe the law against maintenance.

Before dealing specifically with the facts, I would wish to make a few general remarks about contracts of indemnity. Such contracts are well known to the law and in no way offensive to it. They are of the most varied kinds. Sometimes, as in the case of fire insurance or the ordinary forms of marine insurance, the indemnity is against the accidents of life. But frequently the insurance is against claims which may be made by third parties. The whole of the insurance of employers against claims by employees under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1906, are of this kind, and, so far from such contracts being illegal or tainted with any invalidity, the courts are continually engaged in giving effect to them by deciding actions admittedly brought or defended by the insurance companies in the names of the insured. Marine insurances against claims arising out of collisions furnish another example. Contracts of reinsurance afford another example. These instances by no means exhaust the types of contracts of indemnity against claims made by third persons. Nothing is more common than that contractors putting up machinery or carrying out engineering works should indemnify the persons employing them against claims for nuisance or trespass in connection therewith. Indemnities against leases or claims arising out of the misbehaviour of servants or employees form a recognised branch of business. Indeed, it would be idle to attempt a complete enumeration of all the varied types of contracts of indemnity against claims by third persons, and, unless there is something improper in the nature of such a contract arising out of the circumstances attending its origin, the courts have never shown any disapprobation of such contracts or any disinclination to enforce them. The present case arises from the defendants having entered into three such contracts of indemnity under circumstances which I shall now proceed to consider.

[His LORDSHIP then stated the facts with reference to the case of Reese and Gwillim, and continued:] The apprehension of a claim on the part of the plaintiffs naturally operated as a deterrent to Reese and Gwillim from exercising their right to give a contract to the defendants, and when at length they decided to do so they made it a term of the contract that the defendants should indemnify them against any claim for breach of contract which the plaintiffs might make. In requiring such an indemnity Reese and Gwillim acted with commendable prudence, and in giving it the defendants were only doing that which was advisable from the point of view of their own business interests. Neither the one party nor the other in so doing was entering into any engagement to which any valid legal objection could possibly be raised. To say that a tradesman is to submit to the loss of a customer because of threats by a rival of bringing unfounded claims against that customer, and that he may not legitimately extend his business by indemnifying the customer who is desirous to employ him against such claims, is to my mind ridiculous. I am therefore of opinion that this contract of indemnity was properly entered into by the defendants and binding upon them. The sequel of these events was as follows. The plaintiffs brought an action against Reese and Gwillim for breach of contract, and carried it on almost up to trial and then abandoned it. In that action Reese and Gwillim raised a counterclaim against the plaintiffs on account of their failure to perform their contract and recovered £5. It is therefore clear that the claims of the plaintiffs to have a right to object to the

defendants setting up their apparatus on Reese and Gwillim's premises were unfounded.

[HIS LORDSHIP then stated the facts in the case of Whiteman, and continued:] There seems to me to be no doubt that the plaintiffs were aware of the terms of the lease from the defendants, and that they were consciously inducing Whiteman to commit a breach of that contract. The circumstances were, however, such that it is probable that neither party could have enforced specific performance against Whiteman, and the defendants, therefore, in order to prevent the commercial injury which they would have suffered had their system been removed by Whiteman in breach of the existing contract, undertook that, if Whiteman would continue to use it as they had contracted to do, the defendants would indemnify Whiteman against any claim that the plaintiffs might have against them by reason of the subsequent and conflicting contract into which they had been induced to enter. I can see no objection to such a proceeding on the part of either the defendants or Whiteman. In the legitimate defence of their own business interests the defendants were entitled to give such an indemnity, and the letters show that if the plaintiffs had not been unreasonable no action need have ensued. A liberal offer was made to settle any claim they might have under the circumstances, but it was refused, and an action was brought in the county court against Whiteman in which Whiteman counterclaimed on the ground that the contract had been induced by the plaintiffs' misrepresentation. In the result the plaintiffs succeeded in recovering a sum of £7 (which was less than had been offered to them before the action), and the counterclaim raised by Whiteman was dismissed by reason of the learned judge adopting an interpretation of the contract with the defendants which I cannot follow, but which is unnecessary to discuss here.

The third case referred to in the appeal related to the premises of Harper Bros. [HIS LORDSHIP stated the facts, and continued:] In this case also I can see no possible objection to the defendants giving such an indemnity. Whether the plaintiffs would have succeeded in establishing their claim had the action been fought out we have no means of judging, nor is it material. The defendants undertook to satisfy the claim, and probably thought it wiser to pay something rather than incur the costs of fighting the action. In all these cases, therefore, we find a proper contract of indemnity entered into by the defendants, not wantonly or officiously, but in the reasonable defence of their own trade interests. As I have said, such contracts of indemnity are in nowise contrary to law or tainted with invalidity. They do not necessarily involve any action, for a claim may be settled by an adequate offer being made and accepted; and an action becomes necessary only in case the parties do not agree, a state of things which may be due to the unreasonable conduct of the one or the other party, or of mistaken views of law or fact on their part which prevent an agreement being arrived at. But so soon as one has come to the conclusion that the contracts of indemnity were not improperly given, and were therefore valid and binding on the defendants, all question of maintenance vanishes, because under those valid contracts the defendants had a direct personal and pecuniary interest in the defence of the action, and indeed could have been made quasi parties to those actions by the third-party procedure which is specially framed to meet such cases. To support the charge of maintenance it is necessary for the plaintiffs to establish that these contracts of indemnity against possible claims were invalid and unenforceable. The sole ground for suggesting that these contracts were invalid is that in the absence of agreement claims must be enforced by actions, and that consequently an indemnity against claims by a third party may compel the party giving the indemnity to bear the costs of such action—an argument which, if sound, would render invalid every contract of indemnity against claims by third parties.

The course taken by the judge at the trial was a most unusual one. The trial was by a judge and a special jury, and, on the defendants' case being closed, the learned judge directed judgment, to be entered for the plaintiffs for 40s., and

granted an injunction which is in the following form :

"And that the defendants . . . their agents and servants be and they are hereby restrained from unlawfully upholding and maintaining any actions, suits, or other legal proceedings between the plaintiffs and any other person or persons."

It is due to the counsel for the plaintiffs to say that before this court they did not attempt to defend the injunction as thus drawn up. But I can see no justification for any portion of the judgment directed by the learned judge. For the reasons I have above given there was, in my opinion, no evidence whatever of maintenance by the defendants, and, even if there had been any such evidence, the judge clearly had no authority to withdraw the case from the jury and direct judgment for the plaintiffs, either for 40s. or for any other sum. Moreover, there was no pretence of any evidence that the defendants threatened or intended to commit any unlawful acts in the future. The three cases of alleged maintenance were isolated cases, each occurring under different circumstances, and not indicating any practice, or any intention, or probability, of the defendants doing the like in the future under circumstances which would entitle the plaintiffs to any relief. And, even if the judge thought there was some evidence of the kind, the defendants were, at all events, entitled to have the opinion of the jury as to whether it was proved that they threatened and intended to do unlawful acts before the injunction could be granted. I am therefore of opinion that the verdict and judgment should be set aside and that the action should be dismissed.

BUCKLEY, L.J.—The plaintiffs brought their action alleging, first, that the defendants maliciously and wrongfully, and with intent to injure the plaintiffs, induced persons who had contracted with the plaintiffs to refuse to perform their contracts, and that the defendants conspired for those purposes, and claiming special damages; and alleging, secondly, that the defendants were guilty of maintenance, and claiming damages and an injunction under that head. On the first of those two heads the plaintiffs made no case. The trial went on upon the second head alone—namely, that of maintenance—with the result that the learned judge directed the jury to give nominal damages, and awarded an injunction in the terms which have been read by the Master of the Rolls. Nobody contends that the injunction can be supported in that form.

The question that has been argued before us has been whether the defendants were guilty of maintenance, and, if so, whether the plaintiffs are entitled to any and what relief. The plaintiffs' counsel have sought to argue the general question whether, if it had been shown that the defendants had sought to make what is commonly called a corner, that they had unfairly attempted to obtain a monopoly in the trade, and with that view had by improper means procured contractors with the plaintiffs to break their contracts, and as part of that scheme had bound themselves to indemnify the contractors from any consequences resulting to them from so doing, there would have been a right to relief. This court in *National Phonograph Co., Ltd. v. Edison Bell Consolidated Phonograph Co., Ltd.* (4) recently held that under such circumstances there is a right to relief by way of injunction to restrain a defendant from procuring a person who has contracted with a plaintiff to break his contract. If such a case were made out, it does not follow from anything which I am saying in this case that there might not be also a remedy in respect of maintenance if maintenance were proved. But I do say that no such question arises in this case. The first head above stated broke down; no damage under that head in the facts of this case is or can be claimed. The only question for decision is whether an indemnity against the consequences of an action, given under such circumstances as are here proved, is maintenance.

The question as to what constitutes maintenance is so fully discussed in *Bradlaugh v. Newdegate* (5) and *Alabaster v. Harness* (6) that it is unnecessary to do more than refer to those judgments, and to collect for the purposes of what I have to say the definitions which have by different authorities been given of that which

constitutes maintenance. BLACKSTONE (BLACKSTONE'S COMMENTARIES, bk. 4, ch. 10, s. 12) calls it

"an officious intermeddling in a suit which no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it."

LORD COKE says (Co. Litt. 368b):

"Maintenance signifieth in law a taking in hand, bearing up or upholding of a quarrel or side, to the disturbance or hindrance of common right."

The definition in RASTELL'S LES TERMS DE LA LEY is

"Maintenance is, where any man gives or delivers to another, that is plaintiff or defendant in any action, any sum of money or other thing, to maintain his plea, or takes great pains for him when he hath nothing therewith to do."

CHANCELLOR KENT says (KENT ON AMERICAN LAW, pt. 6, lect. 67) that it is

"a principle common to the laws of all well-governed countries, that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce."

While STORY (STORY ON CONTRACTS (4th Edn.) ch. 19, s. 578) says:

"Maintenance is the officious assistance by money or otherwise, proposed by a third person to either party to a suit in which he himself has no legal interest, to enable them to prosecute or defend it."

All these are quoted by LORD COLERIDGE, J., in *Bradlaugh v. Newdegate* (5). SIR JOHN COLERIDGE in the Privy Council in *Fischer v. Naicker* (7) says (8 Moo. Ind. App. at p. 187) that maintenance

"must be something against good policy and justice, something tending to promote unnecessary litigation, and something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary."

There are two quotations which may be given from LORD ABINGER—the one in *Prosser v. Edmonds* (8) (1 Y. & C. Ex. at p. 497):

"All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce";

and the other in *Findon v. Parker* (1) where he says (11 M. & W. at p. 682):

"The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make."

The cases, I think, divide themselves into two classes, the one where the person accused of maintenance has a common interest with the party to the litigation (an instance of which is *Plating Co. v. Farquharson* (9)), and the other where the party charged with maintenance has no such interest, in which case he is guilty of maintenance unless his case falls within certain exceptions which have from early times been specifically allowed. The plaintiffs' counsel pressed us with an argument which I think was fallacious, that the party accused of maintenance is guilty of an offence unless he falls within some one of these exceptions, relying for that purpose upon the judgment of LORD ESHER in *Alabaster v. Harness* (6). The point in *Alabaster v. Harness* (6) was that the action as to which the question arose was an action for libel, and LORD ESHER commenced his judgment by pointing out that that was a personal action which in point of law concerns only the person who brings it. In other words, it was one of the class of cases in which there was no common interest, and in which maintenance was established if the case did not fall within one of the specific exceptions. That does not in any way

affect the proposition, which I think is true, that it is not maintenance to uphold a party in litigation in whose result the party accused of maintenance has a real and bona fide interest. A

I do not think it necessary to go in detail into the facts of the present case. The substance of them is that the defendants, being rivals in trade of the plaintiffs, obtained by legitimate means orders from certain persons, accepting the responsibility of litigation if litigation should ensue by reason of the plaintiffs setting up that the order given to the defendants created some right of action by the plaintiffs against the party who gave the defendants their order. The first head of complaint which I indicated at the commencement of this judgment having failed, the plaintiffs cannot say that the defendants had not a bona fide legitimate interest in the protection of their customers in the matter, and that being so, there was in my judgment no maintenance. Under these circumstances it is unnecessary to deal with either, first, a contention (a bold contention I think) on the part of the defendants that it is not maintenance to uphold a defendant; or, secondly, a contention, based upon LORD SELBORNE's words in *Metropolitan Bank v. Pooley* (10), to the effect that a corporation cannot be guilty of maintenance. Without resorting to either of those contentions, it seems to me that, in the facts of this case, maintenance is not established, and consequently the injunction was wrong, and that the order must be discharged and the action be dismissed with costs. B

Solicitors: *W. H. Court*; *W. H. Newton*. C

[*Reported by W. C. Briss, Esq., Barrister-at-Law.*] D

Re COPE. CROSS v. CROSS E

[COURT OF APPEAL (Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), May 7, 14, 1908] F

[*Reported* [1908] 2 Ch. 1; 77 L.J.Ch. 558; 99 L.T. 374] G

Will—Children—Substitutionary gift to issue of children dying in testator's lifetime—Exclusion of issue of child dead at date of will. H

A testator gave his residuary estate to trustees upon trust for his wife (who predeceased him) for life, and after her death in trust for all his children who attained the age of twenty-one years in equal shares, "provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive me, and being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age, or marry under that age, then, and in every such case, the last mentioned child or children shall take (and if more than one equally between them) the share which his, her, or their parent would have taken of and in the residuary trust funds if such parent or parents had survived me (subject, nevertheless, to the proviso hereinafter contained) provided always that if any child of mine shall die in the lifetime of my said wife leaving a husband or wife who shall survive her, then I declare that on the decease of my said wife the income of the share of any deceased child of mine shall go and be payable to such husband or wife of such deceased child of mine during his or her life." I

Held: on a true construction of the proviso, "child" of the testator was limited to a child living at the date of the will, and, therefore, the children of a child of the testator who was dead at the date of the will did not take a share

A of the residue, nor did the surviving husband or wife of such a child of the testator take a life interest in any share.

B Per COZENS-HARDY, M.R.: Our duty is to ascertain the testator's intention from the language of his will. In approaching this task, we must recognise that words are not always used with strict accuracy, and that a context may suffice to give an enlarged meaning or that such enlarged meaning may be inferred from a consideration of the will as a whole.

Notes. Distinguished: *Re Metcalfe, Metcalfe v. Earle*, [1909] 1 Ch. 424; *Re Williams, Metcalf v. Williams*, [1914] 1 Ch. 219. Followed: *Re Walker, Walker v. Walker*, [1930] All E.R.Rep. 392. Referred to: *Re Kirk, Wethey v. Kirk* (1915), 85 L.J.Ch. 182; *Mackintosh or Miller v. Gerrard*, [1947] A.C. 461; *Re Brooke's Will Trusts, Jubber v. Brooke*, [1953] 1 All E.R. 668.

C As to class gifts, see 34 HALSBURY'S LAWS (2nd Edn.) 287 et seq.; and for cases see 44 DIGEST 792 et seq.

Cases referred to:

- (1) *Loring v. Thomas* (1861), 1 Drew. & Sm. 497; 30 L.J.Ch. 789; 5 L.T. 269; 7 Jur.N.S. 1116; 9 W.R. 919; 62 E.R. 469; 44 Digest 795, 6528.
- D (2) *Barraclough v. Cooper* (1905), [1908] 2 Ch. 121, n.; 77 L.J.Ch. 555, n.; 98 L.T. 852, H.L.; 44 Digest 532, 3483.
- (3) *Gorringe v. Mahlstedt*, [1907] A.C. 225; 76 L.J.Ch. 527; 97 L.T. 111; sub nom. *Re Gorringe, Gorringe v. Mahlstedt*, 51 Sol. Jo. 497, H.L.; 44 Digest 796, 6525.

Also referred to in argument:

- E *Re Musther, Groves v. Musther* (1890), 43 Ch.D. 569; 59 L.J.Ch. 296, C.A.; 44 Digest 795, 6521.
- Re Lambert, Corns v. Harrison*, [1908] 2 Ch. 117; 77 L.J.Ch. 553; 98 L.T. 851; 44 Digest 798, 6537.

Appeal from a decision of SWINFEN EADY, J.

F By his will dated June 17, 1901, the Rev. Francis Haden Cope gave his residuary estate to trustees upon trust for his wife for life, and after her decease:

G "In trust for all my children who being sons or daughters have attained the age of twenty-one years in equal shares. Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive me, and being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age, or marry under that age, then, and in every such case, the last mentioned child or children shall take (and if more than one equally between them) the share which his, her, or their parent would have taken of, and in the residuary trust funds if such parent or parents had survived me (subject nevertheless to the proviso hereinafter contained)."

H Provided always that if any child of mine shall die in the lifetime of my said wife leaving a husband or wife who shall survive her, then I declare that on the decease of my said wife the income of the share of any deceased child of mine shall go and be payable to such husband or wife of such deceased child of mine during his or her life without power of anticipation."

I The testator died on Feb. 26, 1906, his wife having died in 1902. There were seven children of the marriage, all of whom attained the age of twenty-one. Two of them, Katherine and Francis, were dead at the date of the testator's will. They had both been married, the issue of the marriage in each case being one child only, a daughter. These female children were now living, and were infants. The other five children of the testator were also all living. An originating summons was taken out by the two infant granddaughters of the testator for the determination of the question whether upon the true construction of the will, and in the events which had happened they would, on attaining twenty-one, or marrying, respectively become absolutely entitled to the shares in the residuary estate which their

deceased parents would have taken had they survived, and also whether their respective surviving parents took life interests in such shares respectively. SWINFEN EADY, J., was of opinion that the case was governed by *Loring v. Thomas* (1), and answered both questions in the affirmative. The testator's surviving children appealed.

Micklem, K.C., and *Earle* for the testator's surviving children.

Younger, K.C., and *Northcote* for the testator's two grandchildren.

F. L. Wright for the surviving parents of the grandchildren.

Cur. adv. vult.

May 14, 1908.—The following judgments were read.

Sir HERBERT COZENS-HARDY, M.R.—This appeal raises the question whether grandchildren living at the testator's death, whose parents were dead at the date of his will, take a share of residue, and a further question whether the surviving husband and wife of such parents also take benefits under the will.

The only safe course in construing a will of this nature is to adhere to the natural and grammatical meaning of the words used, and I doubt whether much advantage can be gained by referring to authorities dealing with other wills in which similar language is used. Our duty is to ascertain the testator's intention from the language of his will. In approaching this task, we must recognise that words are not always used with strict accuracy, and that a context may suffice to give an enlarged meaning or that such enlarged meaning may be inferred from a consideration of the will as a whole. The judgment of that very learned judge, *KINDERSLEY, V.C.*, in *Loring v. Thomas* (1), is a well-known illustration of this rule. Thus words which import futurity, such as "shall die," may be read as equivalent to "shall be dead," if there is sufficient to justify this upon the fair construction of the will as a whole. But, subject to this qualification, the natural meaning of the words ought to be adhered to without regard to consequences.

The testator gave his residuary estate to the trustees upon trust for his wife for life. She predeceased him. After her death he gave it

"in trust for all my children who being sons or daughters have attained the age of twenty-one years in equal shares."

It seems to me that no importance can be attached to the words "have attained." They only mean this, that no child can claim a share who cannot prove that he has attained that age. The clause which I have read plainly does not contemplate deceased children. But then follow two provisos upon which the difficulties arise, the first dealing with some grandchildren, and the second dealing with some husbands and wives. In form each is a proviso—something to qualify a prior clause as distinct from a separate and independent gift. The first proviso is as follows:

"Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last-mentioned child or children shall take (and if more than one equally between them) the share which his, her, or their parent would have taken of and in the residuary trust funds if such parent or parents had survived me (subject nevertheless to the proviso next hereinafter contained)."

Every word of that proviso is satisfied by confining it to the case of a child living at the date of the will, but dying subsequently before the testator leaving issue who survive the testator. Such a child was within the contemplation of the prior trust, and was only prevented from taking by reason of not having survived the testator. This is the primary and natural meaning of the words used. To hold that it applies to grandchildren whose parents never could have taken under the prior trusts is to strain the language.

A The second proviso is as follows :

"Provided always that if any child of mine shall die in the lifetime of my said wife, leaving a husband or wife who shall survive her, then I declare that on the decease of my said wife the income of the share of any deceased child of mine shall go to and be payable to such husband or wife of such deceased child of mine during his or her life without power of anticipation."

B I feel great difficulty in understanding how this proviso can be tacked on to, or have any bearing upon, the first proviso. Yet I think it shows some light upon the rest of the will. It contemplates, and it only contemplates the death of the child in the lifetime of the wife, and it is scarcely possible to suppose that the death so contemplated was not a death subsequent to the date at which the will was executed. I cannot hold that the testator, who must be presumed to know which of his grandchildren were living, intended by these words to include a child whom he knew to be dead. On this ground I think the order of SWINFEN EADY, J., was wrong in so far as it declared that the surviving husband and wife of these children take life interests. This conclusion helps me greatly in construing the first proviso. For it is reasonably clear that the grandchildren are only to take subject to the life interests of their surviving parents, and the two must stand or fall together. On the whole, I think the view of the learned judge was wrong on both points, and that this appeal must be allowed.

Our attention was very properly called to *Barracrough v. Cooper* (2), which was greatly relied on by counsel for the testator's grandchildren. I have had an opportunity of reading the testator's will in that case and the judgments of KEKEWICH, J., **E** ROMER, L.J., LORD HALSBURY, LORD MACNAGHTEN, and LORD LINDLEY. It seems to me to be a reasonably plain case, and one which does not really assist us. The testator had several children living at the date of his will and named in his will, and also a granddaughter, Mary Cooper, whose mother died before the date of his will. He made certain specific dispositions in favour of each of his named children and Mary Cooper. The ultimate residue was given "upon trust for my children in equal shares," the share of each daughter being settled and the income made **F** payable to her during her life, with remainder to her children at twenty-one or marriage. This plainly contemplated only children living at the date of the will. Then followed this clause :

G "I declare that if any child of mine shall die in my lifetime and any issue of such child shall be living at my decease, then the shares as well accruing as original to which the child so dying would if living at my decease have been entitled of and in my residuary real and personal estate directed to be sold and converted as aforesaid shall be held by my trustees upon such trusts and subject to such provisions as the same would have been held if such child had died immediately after my decease."

H The effect of this was to enlarge the class of persons to take by adding Mary Cooper, and the gift was original and not by way of substitution. In the language of ROMER, L.J. ([1908] 2 Ch. at p. 123), whose judgment was approved in the House of Lords,

I "the original gift in the will in question is to a class of persons to be ascertained at the death of the testator, while the subsequent provision in favour of issue is not properly speaking a substitutional gift, but makes an addition to the class of persons taking under the original gift by reference to the issue of what I may call certain hypothetical persons."

And there were other parts of the will which made it clear that the testator did not intend to cut out Mary Cooper (see LORD LINDLEY's judgment). There is nothing in *Barracrough v. Cooper* (2) which prevents me from giving effect to that which for the reasons I have given seems to me to be the proper construction of the will in the present case. And, although I prefer not to rely upon authorities in a case

of this nature, I think my view is supported by the subsequent decision of the House of Lords in *Gorringe v. Mahlstedt* (3).

BUCKLEY, L.J.—When the testator on June 17, 1901, made his will he had five children living, and two children—Katherine and Francis—had previously died, each leaving a child who was then living. These two children are the plaintiffs in the action. The question is whether they, being issue of children who were dead at the date of the will, take under the disposition in the will. Subject to a gift to his widow for her life, the testator disposed of his property in favour of his children who being sons or daughters, have attained twenty-one, in equal shares, subject to two provisos. The first proviso is to take effect if a child shall die in the testator's lifetime leaving children who shall survive him, etc. The second proviso is to take effect if any child of the testator shall die in the lifetime of his wife leaving a husband or wife who shall survive her. The first proviso is to have effect "subject nevertheless to the second proviso." From this it follows that the second proviso must include the cases which fall under the first proviso. The second proviso speaks of "the share of any deceased child," but, inasmuch as the second proviso is to have effect in the events mentioned in the first proviso, it must have effect where the child has died in the testator's lifetime, and therefore can take no share. The result is that the words "the share of any deceased child of mine" in the second proviso must include the share which a child would have taken if the child had survived the testator. The first proviso takes effect only if the child dies leaving children. The second proviso is not controlled by that contingency. The second proviso is not "if any child of mine shall so die," but "if any child of mine shall die," etc. The second proviso, I think, includes, but is not restricted to, the cases which fall within the first proviso.

Having made these preliminary observations, I come to the only question which we have to decide—viz., whether the grandchildren of the testator, being children of a child of his who was dead at the date of the will, take. In my opinion they do not. I am able to give full effect to every word of this will, if I read it in its correct and primary meaning. The first gift is to children. This cannot include children who were dead at the date of the will. That is followed by a proviso which *prima facie* operates to qualify that which precedes. I must, no doubt, look at the language and see whether it is so expressed as that I must take it as a mere qualification of the previous gift or whether its true effect is to operate as a new gift. I must see whether it is a substitutional or whether it is an original gift. I can give full effect to it if I take it to express that which for words plainly convey—viz., a substitution for the children living at the date of the will, who by reason of death in the testator's lifetime fail to take, of a defined class of children of that child. The same is true of the second proviso. If I substitute in the second proviso, as I think I must, the words "share which the child would have taken if he had survived me" for "share of the deceased child," I am in no further difficulty than if I read the words in their strict sense and understood them to mean the share of a child who survived the testator and subsequently died in the wife's lifetime.

We are pressed with the decision in *Loring v. Thomas* (1). I may point out (although not as controlling my view upon this will) that we have not here, as in *Loring v. Thomas* (1), any such words as that the grandchild shall represent and stand in the place of the child. In my judgment, however, it would be erroneous or misleading to deal with this case by reading first the will in *Loring v. Thomas* (1) and then seeing how this will differs from that will. I must read this will, and, reading it, I find plain provisions for the testator's children, which must mean such of them as can take, excluding, therefore, necessarily children who at the date of the will were already dead; and I can give full effect to the provisos by saying that they are addressed to the case of children of persons, being sons or daughters of the testator, who, being alive at the date of the will, might have taken, but, by reason of death before the testator, may have failed to take. Under these

A circumstances it would be doing violence to the language to substitute for the words "shall die" the words "shall have died." Counsel for the two grandchildren of the testator seeks to read the will as if it were, "Provided always that in the case of any child of mine dead in my lifetime," etc. These are not the words. The words "shall die" in this will, I think, are apt words of futurity expressive of the event of the death in the testator's lifetime of some member of the class—namely, his

B children—who at the date of his will were competent to take because they were then alive, but who might fail to take by reason of death in his lifetime, but do not extend to the case of children who, at the date of the will, could not take, because their lives already had dropped. For these reasons I think that Katherine and Francis were not, for the purposes of this will, children of the testator in favour of whose children, or of whose surviving husband or wife, the testator has

C disposed of his estate.

KENNEDY, L.J.—In my opinion the judgment of the learned judge in the court below must be reversed. In construing wills, as in construing other documents of legal import, we are bound not to assign a non-natural meaning to words or phrases, unless either the context or the undoubted meaning of other parts of the

D document compel us to do so in order fairly to give sense and coherence to the whole. Here the words "if any child of mine shall die in my lifetime" naturally import futurity, and do not naturally refer to the event of a child's death in the past. I cannot find in the context, or elsewhere in the terms of the will, any support such as *KINDERSLEY, V.C.*, found in the language of the will which was the subject of the judgment in *Loring v. Thomas* (1) upon which counsel for the two

E grandchildren so much relied, for the preference of a non-natural interpretation, so as to make the testator's reference include the case of a child whose death had preceded the making of the will. On the contrary, as the Master of the Rolls has pointed out, the words in the second and next following proviso—"If any child of mine shall die in the lifetime of my said wife"—tend to confirm the correctness of the contention of the testator's surviving children. Clearly in those later words

F the testator is contemplating the possible survival of his wife, and, in reference to that possibility, is dealing with the case of the death of a child during that future period. It would be strange if he should treat as a possible future event the death of a child which, as he well knew, had already died in the lifetime of both himself and his wife. There appears to be no good ground for supposing that in the reference to "any child" in the one proviso the testator was intending to

G denote a different category from that which he intended to denote in the other proviso.

Solicitors: *Gibson & Weldon*, for *G. & R. Hill*, Malvern; *Field, Roscoe & Co.*, for *Henry Greenall*, Warrington.

[Reported by *W. C. Biss, Esq., Barrister-at-Law.*]

PARKINSON v. GARSTANG AND KNOTT END RAIL. CO.

[KING'S BENCH DIVISION (Phillimore and Bucknill, JJ.), February 11, 1910]

[Reported [1910] 1 K.B. 615; 79 L.J.K.B. 380; 102 L.T. 234;
74 J.P. 204; 26 T.L.R. 290]

*Railway—Level crossing—Defective gate—Injury to straying horse—Railways
Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), ss. 47, 61, 68.*

A horse, without any negligence on the part of its owner, the plaintiff, strayed on to a public footpath which crossed the railway by a level crossing. The fastening of the gate of the crossing being defective, the horse passed through it on to the railway line and was killed by a passing train. In an action by the plaintiff against the railway company for the value of the horse,

Held: there had been a failure to maintain a good and sufficient gate as required by the Railways Clauses Consolidation Act, 1845, s. 61, and, therefore, the plaintiff was entitled to succeed.

Notes. Considered: *Knapp v. Railway Executive*, [1949] 2 All E.R. 508. Referred to: *Swain v. Southern Rail. Co.*, [1939] 2 All E.R. 794.

As to level crossings across railways, see 31 HALSBURY'S LAWS (3rd Edn.) 593-601; and for cases see 38 DIGEST (Repl.) 350 et seq. For Railways Clauses Consolidation Act, 1845, ss. 47, 61, 68, see 19 HALSBURY'S STATUTES (2nd Edn.) 617, 624, 628.

Cases referred to in argument:

Ellis v. London and South-Western Rail. Co. (1857), 2 H. & N. 424; 26 L.J.Ex. 349; 29 L.T.O.S. 389; 21 J.P. 791; 5 W.R. 682; 157 E.R. 175; sub nom. *Ellis v. South-Western Rail. Co.*, 3 Jur.N.S. 1008; 38 Digest (Repl.) 328, 246.

Dickinson v. London and North-Western Rail. Co. (1866), Har. & Ruth. 399; 38 Digest (Repl.) 354, 367.

Charman v. South-Eastern Rail. Co. (1888), 21 Q.B.D. 524; 57 L.J.Q.B. 597; 53 J.P. 86; 37 W.R. 8; 4 T.L.R. 720, C.A.; 38 Digest (Repl.) 354, 368.

Williams v. Great Western Rail. Co. (1874), L.R. 9 Exch. 157; 43 L.J.Ex. 105; 31 L.T. 124; 22 W.R. 531; 38 Digest (Repl.) 354, 371.

Cooke v. Midland Great Western Railway of Ireland, ante p. 16; [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, 590.

Appeal from a decision of His Honour JUDGE HAMILTON, sitting at Blackpool County Court.

The plaintiff was the owner of a horse which was kept in a field belonging to him. The field was situated about 400 yards from a level crossing over the defendants' railway but was not adjacent thereto. Between the field and the level crossing ran an accommodation road used as a public road for foot passengers. On the night of Sept. 19, 1908, the plaintiff's horse escaped from the field, the gate of which had been left open, and strayed along the footpath until it reached the level crossing over the railway. The gate erected by the railway company would not fasten in consequence of a defect in its construction. The horse passed through it on to the line and was killed by a passing train. In an action by the plaintiff against the railway company for the value of the horse the plaintiff admitted he was aware that the defendants' gates were sometimes open and sometimes closed; he knew there was a risk, but never thought that the horse would get from his field on to the railway. The learned judge found that the road along which the horse proceeded was a highway for foot-passengers; that the railway gates were not sufficient at the time of the accident; and that the plaintiff's horse was straying on the public footpath. He also found that the plaintiff's horse strayed in conse-

A quence of the insufficiency of the plaintiff's gate to keep the horse in his field where it was grazing. On these facts he held that there was no obligation upon the defendants to fence their line against a horse straying on a public footpath and gave judgment in their favour. The plaintiff appealed.

The Railway Clauses Consolidation Act, 1845, s. 61, provides that

B "If the railway shall cross any highway other than a public carriage-way on the level, the company shall at their own expense make and at all times maintain convenient ascents and descents and other convenient approaches, with hand-rails or other fences, and shall, if such highway be a bridle-way, erect and at all times maintain good and sufficient gates, and if the same shall be a footway, good and sufficient gates or stiles on each side of the railway where the highway shall communicate therewith."

C *Watt* for the plaintiff.

A. B. Shaw for the defendants.

D **PHILLIMORE, J.**—The first question we have to consider in this case is, supposing there was a negligence on the part of the defendants, and a breach of their statutory duty, was there contributory negligence on the part of the plaintiff which would disentitle him to recover.

E If the plaintiff knew, or ought to have known, that the railway gate was probably open, and, knowing that, he was also careless about his own gate so that he negligently allowed his cattle to go into a lane which he ought to have known would eventually lead to a source of danger that would be a case of contributory negligence. But in order to establish that, both these propositions must be proved and the burden of proof would be upon the person alleging contributory negligence. Although in the present case questions were put to the plaintiff and his son in cross-examination, and although the judge found that there had been contributory negligence on the part of the plaintiff there is no indication in his judgment that he thought that the plaintiff had such knowledge of the neglected condition of the railway gate as to make it negligent in him to run any risks in regard to it, and F not having found this we must suppose that he did not intend to do so. The evidence before him would not compel him to come to that conclusion. The judge has found that the plaintiff was careless in respect of his own gate, but that is not sufficient to establish contributory negligence, because he has not found that the plaintiff at the same time knew that his carelessness was likely to result in the horse getting into the lane and being destroyed in consequence of the defective G condition of the defendant's gate. There was therefore no contributory negligence on the part of the plaintiff.

Now we come to the more important question. Was there any statutory duty on the railway company to the plaintiff as a member of the public or otherwise? It has been clearly shown to us by counsel for the defendants that s. 68 of the Railway Clauses Consolidation Act, 1845, will not help the plaintiff. That section does H not impose a duty on the company in regard to any member of the public, but only to persons who are the owners of land adjoining a railway. The section provides that

I "the company shall make and thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway. . . . Sufficient posts, rails, hedges, ditches, mounds, or other fences separating the land taken for the use of the railway from the adjoining lands not taken and protecting such lands from trespass or the cattle of the owners or occupiers thereof from straying thereout. . . ."

In order to be able to take advantage of the provisions of that section the person must be the owner or occupier of adjoining land. Therefore if farmer A. has no land which adjoins a railway, but has land which adjoins that of farmer B., whose land in turn adjoins a railway, if A.'s cattle without B.'s licence get into B.'s field, then A. would not be entitled to maintain an action against the railway

company if damage were done to his cattle in consequence of a breach by the company of the duties imposed upon them by s. 68, because he is not an owner of adjoining land. For this reason the cases under s. 68 do not apply to the present case, and the rights under s. 68 do not arise. In the same way the rights dealt with in s. 47 do not arise. That section provides that

"if the railway cross any turnpike road or public carriage road on a level the company shall erect, and at all times maintain good and sufficient gates across such road on each side of the railway where the same shall communicate therewith and shall employ proper persons to open and shut such gates, and such gates shall be kept constantly closed."

Under that section the obligation upon the railway company is not merely to maintain gates and keep them in repair, but also to keep them closed, and the cases under the section show that this is a duty to the public at large and, therefore, damage to a straying animal or a child resulting from a breach of the company's obligations might be recovered because the duty is one owed to the public and, consequently, any member of the public may take advantage of the provisions of the section.

When we come to s. 61 we find that it deals with roads which are not so likely to be used by animals and not more likely at any rate to be used by children of tender years and the obligations imposed on the railway company is not quite so heavy as that under s. 47. Under s. 61

"if the railway shall cross any highway other than a public carriage-way on the level the company shall, at their own expense . . . if such highway be a bridle-way, erect and at all times maintain good and sufficient gates, and if the same shall be a footway, good and sufficient gates or stiles on each side of the railway. . . ."

Under this section there is no obligation upon the railway company to keep their gates closed, but the duty imposed upon them is not one which is limited like that under s. 68 to a particular class of persons but it is a duty to all the world exactly like the duty imposed by s. 47. The difference between this section and s. 47 is that the duty is not so heavy but the considerations are exactly the same and there is reason for it. The reason why the company are bound under s. 47 to keep a gate across a carriage-way and keep it always closed is because people may be driving hastily along in a carriage or driving flocks of animals before them and they may not be able to pull up the carriage, or make the animals stop in time. Or it may be that animals may escape from their masters or drivers, and so it is necessary to protect the owners of animals against the wilfulness, or carelessness, or impetuosity, or wildness of the animals themselves. That is the reason for it. Another reason is because public carriage-ways sometimes pass through fields which are not fenced and need not be fenced as against the carriage-way, and it may very well be that a casual passenger on horse or on foot, or the driver of a vehicle passing through one of these gates does not trouble to shut it. Highways of this kind were once common. The lands through which they ran were perfectly open and the only way in which cattle upon them were kept from going off was by a gate across the highway. Those are the class of considerations why s. 47 was necessary.

Now we come to s. 61. There is, perhaps, a bridleway or footway which crosses various fields and finally reaches the railway. It crosses a field belonging to A. getting into it by one gate and getting out of it by another into a field belonging to B. After going through B.'s field it reaches the railway. A careless passenger going over A.'s land leaves the gate open and the cattle on A.'s land without any fault on the part of A. or his servants get on to B.'s land. They would be safe there if there was a good and sufficient gate between B.'s land and the railway and if the gate were closed. If a careless person left the railway company's gate open they would not be liable for any damage which might be done to the cattle because

- A** there is no obligation upon them to close the gate. But if the gate is in bad order then it is not the carelessness of the passenger which led to the cattle getting on to the railway. It is indeed the carelessness of the passenger that has let the cattle get on to the land next the railway, but it is the fault of the railway company that they get on to the line and there is reason and good sense in holding them liable. Substantially the illustration I have put is what occurred in the present case.
- B** The duty of the defendants was a general duty to the public and any member of the public may take advantage of it. That being so, the railway company are liable and this appeal must be allowed.

- BUCKNILL, J.**—I am of the same opinion. With regard to the first point as to contributory negligence I agree with PHILLIMORE, J., that the plea raised by the defendant fails. The only other question is this: Is the railway company responsible for the horse getting upon their line through the insufficiency of their gate and so being killed? I am of opinion that they are responsible. Their liability is not limited to the foot passengers merely using that footpath, but they are responsible for a horse belonging to a third person which has got there without any negligence on the part of the third person, and solely owing to the negligence of the railway company has passed over the footpath, which footpath should have been guarded and kept closed not only as against foot passengers, but against horses and other animals. That being my view they are responsible in this action and the judgment of the learned county court judge was wrong.

Appeal allowed.

- E** Solicitors: *Francis White & Needham*, for *Forshaw & Parker*, Preston; *R. H. Bentley*, for *C. C. & D. Forrester Addie*, Fleetwood.

[*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.*]

F

G CUTHBERT v. ROBARTS, LUBBOCK & CO.

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), April 22, 30, May 1, 3, 20, 1909]

[*Reported* [1909] 2 Ch. 226; 78 L.J.Ch. 529; 100 L.T. 796; 25 T.L.R. 583; 53 Sol. Jo. 559]

- H** *Bank—Banker's lien—Security for overdraft—Deposit by broker of client's securities.*

- I** The plaintiff sent to her stockbroker a certificate for shares which she held, together with a transfer of the shares executed by her in blank, to enable him to raise money with which to purchase for her certain other shares. She also signed a general letter of authority in his favour "to borrow money upon" her shares. The broker deposited the certificate, transfer, and letter with the defendant bank, who thus had notice that the shares did not belong to him. He carried over the purchase of the shares which the plaintiff wished to acquire, and borrowed from the bank the money which had become payable for differences, the bank opening a loan account with him. The purchase of the shares was never completed. The bank allowed the broker largely to overdraw his account, and, the broker having been declared a defaulter on the Stock Exchange and afterwards adjudicated bankrupt, the bank claimed to

retain the shares deposited with them as security in respect of the broker's overdraft. A

Held: the deposited authority being only "to borrow money upon" the plaintiff's shares and not to deposit those shares as security for the broker's personal overdraft, the claim of the defendant bank was not maintainable.

Notes. Considered: *Potts' Executors v. I.R.Comrs.*, [1949] 2 All E.R. 555.

As to the banker's lien, see 2 HALSBURY'S LAWS (3rd Edn.) 210-213; and for cases see 3 DIGEST (Repl.) 321 et seq.; as to advances by bankers, see 2 HALSBURY'S LAWS (3rd Edn.) 227-229; and for cases see 3 DIGEST (Repl.) 292-300. B

Cases referred to:

- (1) *Hambro v. Burnand*, [1904] 2 K.B. 10; 73 L.J.K.B. 669; 90 L.T. 803; 52 W.R. 583; 20 T.L.R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251, C.A.; 26 Digest (Repl.) 51, 348. C

Also referred to in argument:

London Joint Stock Bank v. Simmons, [1892] A.C. 201; 61 L.J.Ch. 723; 66 L.T. 625; 56 J.P. 644; 41 W.R. 108; 8 T.L.R. 478; 36 Sol. Jo. 394, H.L.; 3 Digest (Repl.) 304, 950.

Brocklesby v. Temperance Building Society, [1895] A.C. 173; 64 L.J.Ch. 433; 72 L.T. 477; 59 J.P. 676; 43 W.R. 606; 11 T.L.R. 297; 11 R. 159, H.L.; 1 Digest (Repl.) 368, 402. D

Robinson v. Montgomeryshire Brewery Co., Ltd., [1896] 2 Ch. 841; 65 L.J.Ch. 915; 3 Mans. 279; 1 Digest (Repl.) 368, 403.

Brandao v. Barnett (1846), 3 C.B. 519; 12 Cl. & Fin. 787; 7 L.T.O.S. 525; 136 E.R. 207, H.L.; 3 Digest (Repl.) 326, 1017. E

Mutton v. Peat, [1900] 2 Ch. 79; 69 L.J.Ch. 484; 82 L.T. 440; 48 W.R. 486; 44 Sol. Jo. 427, C.A.; 3 Digest (Repl.) 305, 955.

Re European Bank, Agra Bank Claim (1872), 8 Ch. App. 41; 27 L.T. 732; 21 W.R. 45, L.J.J.; 3 Digest (Repl.) 180, 314.

Bank of Bengal v. Fagan (1849), 7 Moo.P.C.C. 61; 5 Moo. Ind. App. 27; 18 E.R. 804; 1 Digest (Repl.) 349, 288. F

Rouse v. Bradford Banking Co., Ltd., [1894] A.C. 586; 63 L.J.Ch. 890; 71 L.T. 522; 43 W.R. 78; 7 R. 127, H.L.; 3 Digest (Repl.) 239, 625.

Earl of Sheffield v. London Joint Stock Bank, Ltd. (1888), 13 App. Cas. 333; 57 L.J.Ch. 986; 58 L.T. 735; 37 W.R. 33; 4 T.L.R. 389, H.L.; 3 Digest (Repl.) 306, 961.

Bryant, Powis and Bryant v. La Banque du Peuple, Same v. Quebec Bank, [1893] A.C. 170; 62 L.J.P.C. 68; 68 L.T. 546; 41 W.R. 600; 9 T.L.R. 322; 1 R. 336, P.C.; 1 Digest (Repl.) 350, 297. G

Cole v. North Western Bank (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex. Ch.; 1 Digest (Repl.) 385, 501.

Appeal by the defendant bank from a decision of JOYCE, J. II

Hughes, K.C., and *Dighton Pollock* for the defendant bank.

Younger, K.C., and *P. F. Wheeler* for the plaintiff.

Cur. adv. vult.

May 20, 1909.—The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—The question in this appeal is as to the extent to which the defendants are entitled to a charge on certain shares of the plaintiff to secure a balance or part of a balance due to them from Cancellor, who was a broker employed by the plaintiff and a customer of the defendants. I

The material facts may be shortly stated. The plaintiff wished to put £1,000 in some American shares, and asked Cancellor if he could arrange to borrow the money for her, and added that she could send a certificate of 100 Provident Clerks shares worth £14 7s. each. Cancellor saw the manager of the bank. The result

A of the interview, as appears from a memorandum by the manager, was as follows:

"F. Cancellor can have up to £1,350 for three months at bank rate minimum 5 per cent. against Americans worth about £1,350 and transfer certificate (with letter of authority) of 100 shares Provident Clerks."

B The bank, therefore, had notice that the shares did not belong to Cancellor, but that they were to be placed at his disposal by means of a written authority from the unknown owner. On Sept. 20, 1907, Cancellor informed the plaintiff that he had arranged to get a loan from his bank on her 100 Provident Clerks shares, and that he had bought for her fifty American shares. The plaintiff executed a blank transfer and also a letter, dated Sept. 23, in the following terms:

C "I hereby authorise you to borrow money upon the 100 Provident Clerks shares, Nos. 6166 to 6265, for which I have handed you certificate and transfer signed by me."

D Cancellor took the transfer, the certificate, and the authority to the bank. On Oct. 15 Cancellor wrote to the bank asking them to credit his account with £250—"in respect of the security for, say, £1,400 I left with you last week." This was done, £250 being placed to Cancellor's debit on a loan account and to his credit on his current account. Cancellor, without any instructions from the plaintiff, carried over the stock until the end of October account, by which time Americans had fallen considerably. On the settling day (Oct. 30) many cheques drawn by Cancellor were presented, with the result that it was reported to the manager that Cancellor was £500 out. The manager thereupon told the cashier that the amount E was covered by security. The cheques were honoured, and through a mistake further cheques to a very large amount beyond the value of the shares were also honoured. Cancellor was "hammered" the next morning.

In these circumstances the plaintiff has tendered £250, but no more, though she does not admit that, in point of law, the bankers have any valid charge. The bankers claim a charge for the full value of the shares, or alternatively for F the £500. JOYCE, J., has decided in favour of the plaintiff. I feel no doubt that the plaintiff is wrong in so far as it is contended that the bankers were under any obligation to see that the purpose for which the money was to be borrowed was duly fulfilled, and in so far as it is contended that the bankers were not authorised to lend on the security of the 100 Provident Clerks shares alone without the Americans which were to be purchased, and in so far as it is contended that the bankers G cannot be said to have relied upon the letter of authority which the manager never saw. I am satisfied that the bank got a good charge for the £250, which was not applied in the purchase of shares. There was a request to advance on the security and a compliance with the request, and it is wholly unimportant that the documents deposited were not opened or seen by the manager. But there is ground upon which the plaintiff is entitled to succeed. The bankers cannot claim a general H bankers' lien except upon the customer's own property. The transaction between the manager and Cancellor was not a deposit to secure the balance from time to time due on his current account. The deposited authority was only "to borrow money upon" the shares. If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money. But it I does not follow that such a simple transaction is a borrowing upon a security not belonging to the customer and known to the bankers to be deposited for a special purpose. The mere drawing a cheque by Cancellor, without reference to the security, was not a borrowing upon the plaintiff's shares. It was not intended by him to be an act done in pursuance of the authority, and the bankers could not, by their own mere volition, treat it as an act done by Cancellor in pursuance of the authority. For this reason, which is substantially that adopted by JOYCE, J., the appeal fails and must be dismissed with costs. I may add that, in any point of

view, the bank could not claim more than the £500, for they did not intend to honour cheques beyond that amount on the faith of the deposit. A

BUCKLEY, L.J.—In my judgment, the decision of *JOYCE, J.*, is right. I do not find that the case raises any new or difficult question of law. The whole matter turns upon that which took place between Cancellor and Faulks, the defendants' head manager, at 15 Lombard Street, on Sept. 20. To ascertain what was then arranged it is not necessary to travel outside the evidence of Mr. Faulks himself. The whole arrangement was made, completed, and ended on Sept. 20. There was no subsequent arrangement. Mr. Faulks tells us so himself in his evidence. The substance of what took place on Sept. 20 I think is this. Cancellor in substance said to Faulks, "These 100 Provident Clerks shares are not mine; I am authorised by their owner to pledge them to raise money for the purpose of buying some American shares; the shares so bought will not be mine, but will be the property of a client. If you will make me an advance for this purpose, I will give you as security both the Provident Clerks shares and the American shares which are to be bought with the loan." The memorandum is quite plain. The Provident Clerks shares were worth, say, £1,400. The defendants were agreeing to advance £1,350, and as security for that advance they were to have, not the Provident Clerks shares only, but the American shares also. The memorandum says so, and Mr. Faulks has said so quite plainly in his evidence. As regards the probabilities of the case, the bank would, of course, not have lent £1,350 with no greater margin than was afforded by the value of the Provident Clerks shares—say, £1,400. Mr. Faulks' evidence upon this point is in no degree shaken by what he said in re-examination. Answers given in re-examination to leading questions expressed in terms which conflict with what the witness has said in cross-examination are no guide in arriving at the truth. It is quite plain upon Mr. Faulks' evidence that the loan was asked for and granted for a specific purpose—viz., to take up the American shares; that the bank knew that neither the Provident Clerks shares nor the American shares were Cancellor's property, but that Cancellor was buying and giving security upon someone else's property for money to be advanced to him for a specific purpose—namely, the purchase of the American shares. The bank required a letter of authority. Cancellor lodged with the bank an authority signed by the plaintiff which is in its terms not limited to borrowing for a purpose, but it is a general authority to borrow. The bank never knew the contents of that letter of authority. They, therefore, did not act upon it in any way. In that which they did in October, the bank acted upon the facts which I have stated, and upon the footing that the authority was not a general but a limited authority. B C D E F G

The decision in *Hambro v. Burnand* (1) would have been applicable if Cancellor had purported to borrow on his own behalf, and if the bank had not known from the conversation of Sept. 20 that, as the fact was, his authority as between himself and the owner of the shares was not a general authority to borrow for a purpose. He by his letter to Mrs. Cuthbert of Sept. 21 described the authority of Sept. 23 as being an authority authorising him to raise a loan on Mrs. Cuthbert's behalf. And as between those two persons there is no question but that the authority of Sept. 23, though general in its terms, was given in order to enable him to borrow, not on his own, but wholly on her behalf. Under these circumstances *Hambro v. Burnand* (1) is not an authority upon which the bankers can rely. These being the facts, the case is that, the bankers having agreed to make Cancellor an advance for a purpose, claim in this action to avail themselves of the security in respect of moneys which he never asked them to advance, and which they never in fact advanced for that purpose. Overdraft is borrowing; but overdraft by Cancellor on his general account was not such a borrowing as entitled the bank to security under the arrangement made on Sept. 20. When he wrote on Oct. 15 asking for the credit of £250 in respect of this security, it may be that the bank would have been entitled to hold the security for that sum whether he had or had not applied it for Mrs. Cuthbert's benefit. It is not necessary to decide this, for the plaintiff H I

- A** does not make any claim as regards the £250. But mere overdraft on his general account was no request by him to lend on this security. Under the arrangement of Sept. 20 the £250 was placed, and rightly placed, to the debit of a loan account, and to the credit of his current account. Any further sum for which security could be claimed ought in the same way to have gone to the debit of the loan account and credit of the current account. But there was no right to debit this loan
- B** account in respect of moneys borrowed by way of overdraft on his general account. The plaintiff is entitled to succeed upon these grounds: First, that at the date of the arrangement of Sept. 20 the bank had notice that Cancellor was not entitled to borrow for his general purposes, and that they cannot rely upon the authority of Sept. 23 as an authority to borrow in general terms; and, secondly, on the ground that, although overdraft in general is borrowing, yet overdraft by Cancellor
- C** on his general account was not borrowing within the memorandum and of the arrangement made on Sept. 20. Upon these grounds the decision under appeal was right, and this appeal ought to be dismissed with costs.

KENNEDY, L.J.—In no event could the defendants be justified in making the security of the plaintiff's deposited share certificates available for more than £500

- D** of Cancellor's overdraft of Oct. 30, 1907. It was only to the extent that the bank manager on that day authorised an overdraft in reliance upon the security. The question whether or not to this extent the defendants' appeal ought to succeed depends upon the answer which ought to be given upon a single point. Were the defendants legally entitled to treat Cancellor's overdrawn cheques on Oct. 30 as requests on his part to exercise his right to borrow against the deposited security?
- E** If the plaintiff's case could find support only upon the basis of some of the contentions which were put before us for the plaintiff in the course of the hearing, I should feel great difficulty in dismissing this appeal. I could not myself hold that the bank might not properly rely upon the security which it held, because, as between Cancellor and the bank, it was by agreement entitled to receive, as security for the borrowed money, not merely the certificates of the Provident Clerks shares,
- F** but also, when they had been purchased, the American shares. As between the plaintiff and the bank, by the terms of her written authority of Oct. 15, the plaintiff acknowledged to the bank that Cancellor was authorised to borrow money upon the Provident Clerks shares. There is no evidence upon the point, one way or the other, but it might be possible that the seller of the American shares might not insist upon cash before delivery, but might accept Cancellor's cheque; and in
- G** this event the bank might get a deposit of the American shares from Cancellor before honouring his cheque in payment for them. But, as a matter of business the true meaning of the agreement between the bank and Cancellor, as the terms of her written authority show the plaintiff herself intended, and as the subsequent drawing of £250 and its acceptance by the bank shows that Cancellor and the bank also intended, was that an advance against the Provident Clerks shares should be
- H** made by the bank to Cancellor in order to pay for the American shares, with an obligation as part of the agreement on Cancellor's part that the American shares whenever obtained by him should be lodged with the bank as a further security. It was intended by the parties that the bank, after receiving the Provident Clerks share certificates, should refuse to advance to Cancellor money to pay for the American shares, unless he first lodged them with the bank.
- I** Nor, again, can I accept an argument that the bank could not be held entitled to rely upon the security merely because Cancellor's cheques were not in fact drawn by him for the special purpose of this transaction—i.e., to pay for the American shares bought on account of the plaintiff. The bankers' rights in respect of the deposited security could not be affected in the circumstances of this case by any misapplication by the broker of any moneys which had been advanced by the bank to him strictly in compliance with the agreement for the advance. And it is further immaterial that the bank manager cannot say that he himself saw the actual letter of authority until after Oct. 30. But what is fatal to the

defendants' case is that the agreement made between them and Cancellor was an agreement for a special borrowing by Cancellor from the defendants for a particular stated purpose, with a security therefor in the shape of the Provident Clerks shares against which he was to draw specifically, and was not an agreement for a secured overdraft on Cancellor's current account. The transaction of Oct. 15 in regard to the £250 indicates plainly what both parties understood to be the proper way of using the agreement. Having so agreed, and knowing that the Provident Clerks shares did not belong to their customer, the defendants as against the owner of the shares were not entitled to treat cheques drawn by Cancellor, apparently upon his current account, as instruments of borrowing upon the special secured account, and so to get for them the advantage of its covering security. To the extent of the £250 the claim of the bank is not disputed. Having had the opportunity of reading the judgment prepared by the Master of the Rolls, which states the material matters of fact, and in whose reasoning and conclusions I concur, I desire only to add that as I understand the judgment of my brother JOYCE it is, in substance, based upon the same grounds as those which I have briefly stated, and in my opinion it ought to be affirmed.

Appeal dismissed.

Solicitors: *Golding, Hargrove & Golding; Leighton & Savory.*

[*Reprinted by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.*]

Re SIR ROBERT PEEL'S SETTLED ESTATES

[CHANCERY DIVISION (Warrington, J.), January 13, 14, 1910]

[Reported [1910] 1 Ch. 389; 79 L.J.Ch. 233; 102 L.T. 67;
26 T.L.R. 227; 54 Sol. Jo. 214]

Settled Land—Tenant for life—Sale under statutory powers—Mortgage of life estate—Costs of mortgages' assents to conveyance.

A tenant for life of settled estates, who had encumbered his life interest, sold a portion of the estates by auction in lots under the Settled Land Acts, and the purchase money was paid to the trustees of the settlement. The encumbrancers, not being parties to the conveyances, had given their assent by separate instruments. The tenant for life directed the trustees to pay the costs of the encumbrancers, and also of assignees in whom the life estate had become vested, out of the purchase moneys.

Held: as a general rule such costs were not to be paid out of the purchase moneys whether these were in the hands of the trustees or in court.

Cardigan v. Curzon-Howe (1) (1889), 41 Ch.D. 375, applied.

Settled Land—Tenant for life—Costs—Sale under statutory powers—Notice by solicitors of tenant for life of special charges.

Previous to the sale of settled land the solicitors of the tenant for life gave him the necessary notice under the Solicitors Remuneration Act, 1881, of their intention to charge the ordinary detailed charges and not the scale fee in the case of sales under a certain amount and to treat the sale of each lot as a separate transaction.

- A** **Held:** there was no objection in principle to this arrangement, and the charges of the solicitors on this basis might be allowed on taxation.
Observations upon the duty of trustees as to costs directed by the tenant for life to be paid by them.
- Settlement—Capital or income—Proceeds of sale of land under statutory powers—Investment in joint stock companies—Dividends declared, but not paid.*
- B** The trustees under the direction of the tenant for life had invested part of purchase moneys received on the sale of settled land in the purchase of stocks on which, at the date of purchase, dividends had been earned and declared but not paid,
Held: the dividends were capital money, and did not belong to the tenant for life as income.
- C** **Notes.** The Solicitors Remuneration Act, 1881, has been repealed; for remuneration of solicitors see now the Solicitors Act, 1957, ss. 56 et seq., 37 HALSBURY'S STATUTES (2nd Edn.) 1097 et seq. The Settled Land Act, 1882, ss. 21, 22 (2), 53, have been repealed; see now the Settled Land Act, 1925, ss. 73, 75 (2), 107 (1) respectively, 23 HALSBURY'S STATUTES (2nd Edn.) 161, 173, 229.
- D** Referred to: *Vestey's Executors v. I.R. Comrs.*, *Vestey's Executors v. Colquhoun*, [1949] 1 All E.R. 1108.
As to powers in respect of capital money under a settlement, see 34 HALSBURY'S LAWS (3rd Edn.) 540 et seq.; and for cases see 40 DIGEST (Repl.) 818 et seq., 842–845.
Cases referred to to:
- E** (1) *Cardigan v. Curzon-Howe* (1889), 41 Ch.D. 375; 58 L.J.Ch. 436; 60 L.T. 723; 37 W.R. 521; 5 T.L.R. 412, C.A.; 40 Digest (Repl.) 844, 3211.
(2) *Re Hotham, Hotham v. Doughty*, [1902] 2 Ch. 575; 71 L.J.Ch. 789; 87 L.T. 112; 50 W.R. 692; 46 Sol. Jo. 685, C.A.; 40 Digest (Repl.) 818, 2955.
(3) *Bulkeley v. Stephens*, [1896] 2 Ch. 241; 65 L.J.Ch. 597; 74 L.T. 409; 44 W.R. 490; 12 T.L.R. 350; 40 Sol. Jo. 458; 40 Digest (Repl.) 738, 2263.
- F** (4) *Scholefield v. Redfern* (1863), 2 Drew & Sm. 173; 1 New Rep. 465; 32 L.J.Ch. 627; 8 L.T. 487; 9 Jur. N.S. 485; 11 W.R. 453; 62 E.R. 587; 40 Digest (Repl.) 738, 2261.
(5) *Freeman v. Whitbread* (1865), L.R. 1 Eq. 266; sub nom. *Freeman v. Whitbread*, 35 L.J.Ch. 137; 13 L.T. 550; 14 W.R. 188; 40 Digest (Repl.) 738, 2262.
- G** Also referred to in argument:
Sebright v. Thornton, [1885] W.N. 176; 40 Digest (Repl.) 234, 1965.
Re Hunt's Settled Estates, Bulteel v. Lawdeshayne, [1906] 2 Ch. 11; 75 L.J.Ch. 496; 94 L.T. 747, C.A.; 40 Digest (Repl.) 819, 2961.
Re Clarke, Barker v. Perowne (1881), 18 Ch.D. 160; 50 L.J.Ch. 733; 44 L.T. 736; 29 W.R. 730; 40 Digest (Repl.) 739, 2271.
- H** **Adjourned Summons** taken out by trustees for the sanction of the court to payment of costs incidental to a sale of settled land.
Under a will and certain other instruments certain lands, commonly called Sir Robert Peel's settled estates, were settled, subject to an annual jointure rent-charge and to certain other charges and encumbrances upon the fee simple, upon
- I** Sir R. Peel, the fourth baronet, for life, with divers remainders over. The life estate of the fourth baronet had become vested, subject to certain encumbrances, in the trustees of a settlement dated Oct. 26, 1895, under which power was reserved to the trustees thereof to concur with the baronet in the exercise of the power conferred upon tenants for life by the Settled Land Acts, 1882 to 1890. By an order made in 1904, trustees were appointed of the compound settlement effected by the will and other instruments above referred to under which the estates were settled. In November, 1908, a portion of the settled estates was put up for sale by auction by Sir R. Peel, selling as tenant for life. The encumbrancers upon the

fee simple of the estates and the trustees of the settlement of Oct. 26, 1895, concurred in and were parties to the conveyances to the purchasers and those upon the life estate of the baronet gave their assent to the sale by separate instruments. Claims for the payment of costs out of the moneys realised by the sale had been sent in to the trustees of the compound settlement, who though not in terms appointed by the order, trustees for the purposes of the Settled Land Acts, had always been treated as if they had been so appointed. As the title of Sir R. Peel was very lengthy, notice was given to Sir R. Peel on behalf of his solicitors prior to the sale that in cases where the purchase money was less than £1,000 they could not afford to work under the scale fixed by Part 1 of sched. 1 of the General Order under the Solicitors Remuneration Act, 1881, and would have to charge for work as provided by sched. 2 of the order. Sir R. Peel agreed to this, reserving his power to tax their costs. The trustees of the compound settlement did not feel justified in paying the costs of the assignees and the encumbrancers of the life estate without the sanction of the court, and took out this summons for an order that they might pay these costs and the others which were claimed as incidental to the sale, and for directions as to how the costs should be taxed, and as to the principles upon which they should act in respect of the costs of future sales.

A further question was also asked by the summons, which arose as follows. At the wish of Sir R. Peel the trustees on July 29, 1909, purchased certain railway stocks out of moneys arising from sales of portions of the settled estates. By the usage of the Stock Exchange, these purchases carried with them the right to receive from the vendor the amount of the dividends already declared for the half-year ending June 30, 1909. These dividends were in due course collected from the sellers by the brokers on behalf of the trustees and claimed by Sir R. Peel as tenant for life. The applicants asked the court whether these dividends belonged to the tenant for life or were capital moneys in their hands. This question was not argued until after judgment had been given on the former ones.

Wurtzburg for the applicants.

E. J. Elgood for the tenant for life.

John Henderson for the infant tenant in tail in remainder.

WARRINGTON, J.—The question in this case is what the trustees for the purposes of the Settled Land Acts who have received moneys arising from a sale of a part of the settled estates ought to do in reference to claims for costs which have been made upon them by the tenant for life and by certain persons. I may take it for the present purpose that the tenant for life has given the direction with regard to these costs required by s. 22 (2), of the Settled Land Act, 1882, and the real question is whether the trustees are bound to comply with that direction, and to pay all these costs, or whether they can in any and what way look into the propriety of the costs, and refuse to pay such of them as they regard as improper.

In the first place, it is necessary to ascertain what is the real meaning of the Act in this matter. Section 21 is the first section which is material, and it provides that capital money arising under the Act when received shall be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of certain modes. Among the modes of application in which capital money may be applied is the payment of costs, charges, and expenses of or incidental to the exercise of any of the powers or the execution of any of the provisions of the Act. Section 22 deals with the position of the trustees who have received money which is so to be invested or applied, and it provides thus (sub-s. (1))

“Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court,”

and, if paid to the trustees, shall be applied by the trustees accordingly. Then

A comes sub-s. (2), which is a most important provision.

"The investment or other application by the trustees [now payment of costs, of course, is an application or an investment] shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees."

B I need not read the rest of the subsection. Then s. 53 is as follows :

"A tenant for life shall in exercising any power under this Act have regard to the interests of all parties entitled under the settlement, and shall in relation to the exercise thereof by him be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

C One of the powers which the tenant for life has under the Act is that of directing, among other things, the application of the purchase money in the hands of the trustees in payment of costs. Therefore, in giving that direction, the Act provides that he shall act as a trustee.

I now come to the real concrete question which I have to decide under this provision. The proceeds of sale have been received by the trustees of the compound settlement. The tenant for life has directed them to pay, first, a bill of costs of his own solicitor, as solicitor for him as vendor; secondly, the costs of certain encumbrancers on the fee; and, thirdly, the costs of certain assignees and mortgagees of the life estate. With regard to the tenant for life's own costs, the costs of his own solicitor as vendor, there are two questions—one of general interest, and one which is applicable to this particular case. The question of general interest

E is this: When a demand for payment of costs is made on the trustees of the settlement for the purposes of the Act, what is their duty? In the first place, it is plain that they are entitled, if they so desire it, to have those costs taxed, because they are persons who, although not the party chargeable under the bill, are liable to pay those costs by the very express provisions of the Act itself.

F Therefore they would be entitled to have the costs taxed under the Solicitors Act, as other persons are entitled who are liable to pay costs though not the party chargeable. Are they bound to insist on such taxation? I do not think that they are. They are entitled to look into the bills, and if, either from experience

which they have themselves or being advised by competent persons they come to the conclusion that the bills are reasonable in amount, I see no reason why they should be compelled to apply for an order for taxation, but they are plainly entitled

G to have an opportunity of seeing whether those bills are or are not fair in amount, and of considering whether they should require them to be submitted to taxation. In many cases it would be a reasonable course, and one which the trustees would be justified in taking, either to pay the amount of the bill, if it was not a very large one, subject to repayment of the same on taxation, if any part should be disallowed, or to make a payment on account. The trustees would be justified in

H that course. I cannot give any abstract direction as to what the trustees should do in such a case; all I can say is that that would be a reasonable and proper course for the trustees to take rather than to refuse to pay the whole of the bill.

There is another question of principle which is applicable to this particular case in reference to these costs of the vendor's own solicitors. This was a sale by

I auction in a number of different lots, and a considerable time before any business was done in reference to the sale of any of the lots, the solicitors for the tenant for life had given him notice—stating it shortly—that in all sales for amounts less than £1,000 they would not act under the scale, but would make the ordinary charges. Some of the lots were sold for sums less than the limit, and the vendor's solicitors have accordingly made their detailed charges. It is said on behalf of the infant tenant in tail that the sale cannot be divided up in this way, so as to treat the sales of the separate lots as sales for the amount for which each lot was sold. I do not think that that is so. When a solicitor acts as a solicitor for a vendor

where there is a sale by auction in a number of lots, the vendor is vendor in relation to each of the contracts into which he eventually enters. That is quite plain when one comes to look at the schedule to the order and the scale of remuneration. It regards the vendor as a vendor in relation to the particular contract which is then in question, and so it is here. Here the solicitors were entitled, before they entered into this particular business, to say as regards such contracts as are under a certain amount: "We as solicitors for the vendor will not be bound by the scale, but as regards the other contracts for larger amounts we will be bound by the scale." It seems that there is no objection in principle that I can find to the notice which the solicitors have given in reference to this matter; and that, therefore, the taxing master, because the vendor's solicitors are willing to submit the matter to taxation, when he looks into the matter may quite properly deal with the smaller contracts by allowing the detailed charges so far as regards the charges to the vendor's own solicitors.

The next question which is raised is with regard to the charges made by the solicitors for incumbrancers on the life estate whose concurrence in the sale was necessary. Are the trustees bound to pay these costs? That matter was discussed in *Cardigan v. Curzon-Howe* (1) in reference to a case in which the purchase money had been paid into court; and the decision in that case was that, except under special circumstances, the costs paid by the tenant for life to mortgagees in respect of their concurrence ought not to be allowed. COTTON, L.J., said this (41 Ch.D. at p. 380):

"As a general rule, in my opinion, costs of obtaining on a sale under the Act the concurrences of mortgagees of the life estate ought not to be allowed out of capital, and that will be a rule for trustees to act upon when the capital money is not in court, and they have to deal with it."

At first sight I thought that that was to some extent inconsistent with what appears to have been the decision, although there is no judgment on the matter, in *Re Hotham, Hotham v. Doughty* (2); but I do not now think that it is. The question really resolves itself into this: In paying those costs, as in exercising any of the other powers under the Settled Land Acts, is the tenant for life doing his duty as a trustee? If the trustees of the settlement have information that the tenant for life is not doing his duty duly, as, for example, in *Re Hotham, Hotham v. Doughty* (2), if they have information that the tenant for life is directing a mortgage when there has been no proper investigation of title, they are not bound to comply with his direction. So here in this matter of the payment of these costs, if the trustees are of opinion that in directing payment of them the tenant for life is not properly doing his duty as a trustee, then they would be justified in refusing to pay them. When one looks at the earlier part of the judgment of COTTON, L.J., which precedes the portion I have read, the conclusion to be drawn from it is that the learned lord justice there was clearly of opinion that a tenant for life, except under special circumstances—he guards himself as to that—cannot direct the payment out of capital of costs of obtaining the concurrence of mortgagees whose incumbrances he has himself created. The learned lord justice there did mean to lay down a general rule, and not one applicable merely to cases in which the money was in court, and he meant to say that in such cases the tenant for life was not duly executing his duty as a trustee, and the trustees of the settlement were not bound to comply with his direction. So in this case it seems to me there are no special circumstances, and, if I were to allow the costs of the concurrence of the encumbrancers here, in future cases of sales of this very estate such costs might be a serious charge on the purchase money realised by these sales. It seems, therefore, that, so far as that particular demand on the part of the tenant for life is concerned, I ought to direct the trustees that they ought not to pay the costs of the encumbrancers on the life estate. There will be an order for taxing the several bills. The costs of the mortgagees on the fee will, of course, be allowed out of the capital.

A The next question as to the dividends on the stock purchased after they were payable, but before they were paid, was now argued.

Wurtzburg for the applicants.

E. J. Elgood for the tenant for life.

John Henderson for the tenant in tail in remainder.

B **WARRINGTON, J.**—The question in this case is whether the tenant for life is entitled to receive certain dividends which have been paid in respect of moneys forming part of the capital moneys arising under the Settled Land Act, 1882, and invested under the circumstances which I am about to state. [His LORDSHIP then stated the facts as to these dividends, and continued:] The dividends, therefore, at the date of the contract were not only earned, but the amount had been actually ascertained, although the date for payment was postponed, in the one case to Aug. 14, and in the other case to Aug. 11. There is here, of course, no question of apportionment. Treating the dividend as accruing *de diem in diem*, the whole of the dividend had been earned and had accrued before the purchase in question. The tenant for life relies on the three cases of *Bulkeley v. Stephens* (3), *Scholefield v. Redfern* (4), and *Fremantle v. Whitbread* (5). All those cases have to do with the purchase or sale, as the case may be, during a half-year—that is to say, during a dividend-earning period—and I think that it appears from the judgment in *Scholefield v. Redfern* (4), which is referred to at some length by STIRLING, J., in *Bulkeley v. Stephens* (3), that the reason why the court has in the case of a purchase under those circumstances declined to apportion the dividend as against the tenant for life, and has in the case of a sale declined to apportion the dividend in favour of the tenant for life, has always been the difficulty there is under such circumstances in arriving at the true sum—that is, at that part of the purchase money which is to be treated as representing the dividend for that purpose. In this case no such difficulty arises. The dividend had been earned at the time of this contract, and the real state of things is simple—for convenience the vendor is to receive the dividend so earned, but he has to pay it over again to the purchaser. The purchaser in fact pays to the vendor the amount of such dividend: the vendor holds that in his hands until he receives the dividend, and then he pays the dividend to the purchaser. In that case, where the dividend, as here, has been entirely earned before the investment was made by the trustees, it seems that the dividend forms part of the capital. The best way is to say not “forms part of the capital,” but “the tenant for life is not entitled to be paid by the trustees the amount of the dividend so received by the purchaser.”

Solicitors: *Bircham & Co.*; *Dangerfield & Blythe*; *Brackenridge & Edwards*.

[Reported by N. TEBBUTT, ESQ., Barrister-at-Law.]

THORMAN v. DOWGATE STEAMSHIP CO., LTD.

[KING'S BENCH DIVISION (Hamilton, J.), December 10, 11, 1909]

[Reported [1910] 1 K.B. 410; 79 L.J.K.B. 287; 102 L.T. 242;
11 Asp.M.L.C. 481; 15 Com. Cas. 67]

Shipping—Demurrage—Exception clause—Detention of vessel by strikes, lock-outs, storms, accidents, delay in supply of cargo "or any other cause beyond [charterer's] control"—Delay through loading of other vessels already in dock—Applicability of ejusdem generis rule.

A ship was chartered to proceed to Hull and to load there in 120 hours a cargo of coal on conditions of usual colliery guarantee, which excepted from the loading time Sundays, Bank Holidays, time occupied by strikes, frosts or storms, delays caused by stormy weather, accidents stopping the working, leading, or shipping of the cargo, restrictions or suspensions of labour, lock-outs, delay on the part of the railway either in supplying the waggons or loading the coals, or any other causes beyond the charterer's control. On July 23, 1907, the ship arrived at the dock and gave notice of readiness to load, but, owing to the presence of other vessels which had arrived before her and were waiting in turn, she did not come under a loading tip until Aug. 1. On a claim by the owners against the charterers for demurrage:

Held: the lay days commenced to run on the day of the ship's arrival in dock; the words "any other cause beyond [charterer's] control" must be construed ejusdem generis with the foregoing exceptions; and, as the cause of the delay was not a matter ejusdem generis with those exceptions, the charterer was not protected by the exceptions clause, but was liable for demurrage.

Monsen v. Macfarlane (1), [1895] 2 Q.B. 562 and *Re Richardsons and M. Samuel & Co.* (2), [1898] 1 Q.B. 261, applied.

Larsen v. Sylvester (3), [1908] A.C. 295, distinguished.

Notes. Considered: *France, Fenwick & Co., Ltd. v. Spackman*, [1911-13] All E.R.Rep. 355. Applied: *Jenkins v. L. Walford* (London), Ltd. (1917), 87 L.J.K.B. 136. Considered: *S.S. Magnhild v. McIntyre*, [1920] 3 K.B. 321; *United States Shipping Board v. Strick*, [1926] A.C. 545. Referred to: *Atk. Frank v. Namaqua Copper Co., Ltd.* (1920), 90 L.J.K.B. 36; *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730; *Beaumont-Thomas v. Blue Star Line, Ltd.*, [1939] 3 All E.R. 127; *Chandris v. Isbrandtsen-Moller Co. Inc.*, [1950] 1 All E.R. 768.

As to the construction of charterparties, see 35 HALSBURY'S LAWS (3rd Edn.) 255-261; and for cases see 41 DIGEST 304-314. As to exceptions relieving the charterer, see 35 HALSBURY'S LAWS (3rd Edn.) 317-322; and for cases see 41 DIGEST 407 et seq. As to the provision of a cargo, see 35 HALSBURY'S LAWS (3rd Edn.) 377-384; and for cases see 41 DIGEST 453 et seq.

Cases referred to:

- (1) *Monsen v. Macfarlane & Co.*, [1895] 2 Q.B. 562; 65 L.J.Q.B. 57; 73 L.T. 548; 11 T.L.R. 561; 8 Asp.M.L.C. 93; 1 Com. Cas. 51, C.A.; 41 Digest 571, 3951.
- (2) *Re Richardsons and M. Samuel & Co.*, [1898] 1 Q.B. 261; 66 L.J.Q.B. 868; 77 L.T. 479; 14 T.L.R. 5; 8 Asp.M.L.C. 330; 3 Com. Cas. 79, C.A.; 41 Digest 306, 1680.
- (3) *Larsen v. Sylvester & Co.* (1908), 24 T.L.R. 488, C.A.; affirmed, post p. 247; [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 24 T.L.R. 640; 11 Asp.M.L.C. 78; 13 Com. Cas. 328, H.L.; 41 Digest 306, 1682.
- (4) *Shamrock Steamship Co. v. Storey & Co.* (1899), 81 L.T. 413; 16 T.L.R. 6; 8 Asp.M.L.C. 590; 5 Com. Cas. 21, C.A.; 41 Digest 570, 3946.

- A (5) *Tillmans & Co. v. S.S. Knutsford, Ltd.*, [1908] 2 K.B. 385; 77 L.J.K.B. 778; 99 L.T. 454, C.A.; affirmed sub nom. *SS. Knutsford, Ltd. v. Tillmanns & Co.*, post p. 549; [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 24 T.L.R. 786; 11 Asp.M.L.C. 105; sub nom. *Tillmanns v. S.S. Knutsford*, 13 Com. Cas. 334, H.L.; 41 Digest 522, 3504.
- B (6) *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; 36 W.R. 337; 3 T.L.R. 764; 6 Asp.M.L.C. 200, H.L.; 29 Digest 197, 1575.
- (7) *Cullen v. Butler* (1816), 5 M. & S. 461; 105 E.R. 119; 29 Digest 224, 1815.

Action in the Commercial List tried by HAMILTON, J., sitting without a jury.

The steamship *Aldgate* arrived at Hull, was admitted to the Alexandra Dock, and had been given the necessary notice by 9 a.m. on July 23, 1907. She was not allowed, because of other vessels who had arrived before her and were waiting their turn, to go under the coal loading spout, until midnight on Aug. 1. She was thereafter loaded and got away on Aug. 7.

The plaintiff claimed £177 14s. 4d. moneys disbursed and commission earned by him while acting for and on behalf of the defendants. The defendants admitted indebtedness to the extent of £176 13s. 4d. subject to a counterclaim for a like amount in respect of demurrage. The charterparty, dated July 19, 1907, provided that:

“The *Aldgate* . . . now at Rotterdam . . . shall, with all convenient speed, proceed to Hull (Alexandra Dock) as ordered by charterer, and there take on board as tendered in the usual manner, according to the custom of the place, as per colliery guarantee, which the owner agrees to accept, a full and complete cargo of coal not exceeding 5,200 tons. . . Demurrage after the rate of 16s. 8d. per hour. . . Steamer to be loaded in 120 hours on conditions of usual colliery guarantee.”

The colliery guarantee contained (inter alia) the following terms:

“I guarantee to load the steamship *Aldgate* with about tons (cargo only) of coals in hours (Sundays, Bank Holidays, cavilling days, and colliery holidays excepted). Time not to count until after the said steamer is wholly unballasted and ready in dock to receive her entire cargo. Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, leading, or shipping of the said cargo, also restrictions or suspensions of labour, lock-outs, delay on the part of the railway either in supplying waggons or leading the coals, or any other cause beyond my control, such stoppage occurring any time between the present date and actual completion of loading, always excepted. . . . Time to count from 6 a.m. following the receipt of notice (in writing) of readiness by Robert Thorman, if the steamer is actually ready as above stipulated, and not before. . . . Should the colliery be off work through any cause whatever, time not to count.”

Bailhache, K.C., and *Noad* for the defendants.

Scrutton, K.C., and *Roche* for the plaintiff.

HAMILTON, J.—This is an action brought by Mr. Robert Thorman, who carries on business in various places—Glasgow, Newcastle, Sunderland, as well as Hull—for £177 14s. 4d. commission and moneys disbursed in respect of the defendants' vessel the *Aldgate* at Hull, the fact having been that Mr. Kirk, who is the agent for Mr. Thorman at Hull, as his agent, had the defendants' vessel consigned to him at the time in question. The defence admits £176 13s. 4d., subject to a claim which is set up for a like sum for demurrage, which it is said the plaintiff is liable for under a charterparty dated July 19, 1907. As regards the one guinea difference between these two sums no evidence has been given, and that part of the claim has not been proceeded with; and the question, therefore, arises whether the defendants

make out or not their claim for demurrage against Mr. Thorman in respect of their vessel, the *Aldgate*. A

The contract is contained, first of all, in a charter dated at Newcastle, effected with Mr. Thorman by Messrs. Stephens, Sutton, and Stephens, agents for the owners of the vessel. It is effected on a charterparty form of Mr. Thorman's own. It contains, among other terms, this clause: "Steamer to be loaded in 120 hours on condition of usual colliery guarantee, handed." The word "handed" in the printed form is deleted under circumstances which appear in a letter dated Aug. 29, 1907, of Messrs. Stephens, Sutton, and Stephens, to Mr. Dillon, the managing owner of the vessel. In that they say: "When we fixed your vessel we asked Mr. Thorman for a colliery guarantee, and he stated he had no Hull guarantee, but would agree to the usual colliery guarantee in use on the Tyne, to which we replied that it must be clearly understood that the conditions must be nothing worse than the usual Tyne guarantee; knowing the terms of this we let the matter rest where it was, and Thorman did not make out a guarantee for your vessel." And as a matter of fact, although a form of guarantee was in the possession of Messrs. Stephens, Sutton, and Stephens on Aug. 29, that was after the dispute and the matters in question had arisen. It is clear from that that the parties contemplated that in the first instance Mr. Thorman should put forward the colliery guarantee. It is impossible to infer from that letter that anything passed when the charter was entered into that can be treated as, either a contract supplemental to the charterparty in the nature of a warranty that the colliery guarantee should not be anything worse than the usual Tyne guarantee, or any arrangement which in itself bound the parties. In fact, Mr. Thorman had a printed form of guarantee bearing his name not specially applicable to any particular port, and he not only handed this to Messrs. Stephens, Sutton, and Stephens, but when, after the dispute had arisen, he was asked by Messrs. Charles Taylor & Co., the managers of the association in which the ship was entered, to forward a copy of the guarantee which they understood he intended to rely upon, he did, in fact, forward on Aug. 30, a pro forma copy of the usual coasting guarantee; and being asked on the 31st if it was the actual form used in the case of the *Aldgate*, he replied that it was "the usual colliery guarantee, and same taken in conjunction with the charterparty gives the conditions of the loading of this steamer," and that was accepted by Messrs. Taylor & Co., representing, for this purpose, the defendants. This charterparty contemplates that the parties may designate what the conditions of the usual guarantee may be. Had they not done so it would have been a question of evidence, and then the question would have been: What terms are usual, because this is not the usual colliery guarantee, but simply on condition of usual guarantee? But I have come to the conclusion that the parties have designated the condition of colliery guarantee for themselves, and by mutual accord at the instance of Mr. Thorman, and with the assent of those representing the defendants they have designated Mr. Thorman's form as the one which contains the terms which are to be incorporated into the charterparty. B C D E F G H

The charterparty provides that the vessel which was then at Rotterdam at the date of the charter,

"shall with all convenient speed proceed to Hull (Alexandra Dock) as ordered by charterer and there take on board as tendered in the usual manner, according to the custom of the place as per colliery guarantee, which owner agrees to accept, a full and complete cargo of coal, not exceeding 5,200 tons." I

No point is now taken as to the performance of conditions precedent to the vessel's right to treat herself as ready to load, namely, the giving of telegraphic advice and the actual being ready at the time when she gives the notice which she is obliged by the terms of the charter to give. In point of fact the vessel was arrived at Hull, admitted to the Alexandra Dock, and had given a notice by July 23, 1907, at 9 a.m. In fact, she was not allowed by the ordinary regulations of the dock to go under the loading spout, where alone coal could be loaded, until midnight of the

A night between Aug. 1 and 2. She was thereafter loaded, not without some delay and stoppage, but relatively small, and got away on Aug. 7. The effect of those dates is, that if the vessel was entitled to claim that her lay days or lay hours commenced on July 23, at 9 a.m., she was on demurrage before she got under the spout and could be loaded at all; whereas, on the other hand, if her laying time did not commence until she got under the spout, then having regard to the interposition of sundry excepted days, namely, Sunday and Bank Holiday, she would not have got upon demurrage. The circumstances under which she came to the port appear to have been that Hull was at that time busy with coal. Mr. Thorman says that there were a good many ships, but not more than the railway and dock could have dealt with if properly organised; Hull could have dealt with much more coal. Then Mr. Parkinson, agent at Hull for the Denaby and Cadeby Main Colliery, which was the colliery whose coals were designated for the ship's cargo, describes the course of business, and says that at this time there were difficulties arising from the condition of traffic on the railway. The course of business seems to have been that the colliery was turning out sufficient coal for the daily loading of such ships as could be loaded; that the colliery had difficulty in leading the coal down from the colliery to Hull; that the difficulty arose, as it is described, from D being short of engine power. There was a suggestion that there had been an accident to some engine, but there is no evidence to connect that in any way with the difficulties arising in this case; and the fact that the railway was short of engine power, due to some extent to engines requiring repairs, and constituting, in the language of Mr. Parkinson, the crux of the whole situation to some extent, is one of those things that happens to railways from time to time when their business E is flourishing, and the provision of engine power has not been kept up in advance so as to deal with the traffic coming in. When the coal was consigned from the collieries it was consigned to the collieries agent's office at Hull, not ticketed or labelled or consigned to any particular ship, but consigned to Mr. Parkinson generally, so that he could direct it to be tipped into whatever ship happened to be under the tip at the time. The regulations of the dock, as at many other docks, almost F necessarily require that ships which have to be loaded under a particular appliance shall be loaded in their turn of arrival, and no difference is made by the fact that in this case the Denaby and Cadeby Main had a preference at two of the hoists of the tips in the dock as well as the right to supply coals in their turn at the other tips.

It is said in terms, by Mr. Parkinson, if the *Aldgate* had got under the tip earlier G she would then have got the coal which came down earlier. There was coal at the tip subject to casual delays there; there was coal coming down by the railway to the tip adequate for the supply of the vessels that got to the tip in their turn, and the conclusion of fact, therefore, at which I arrive upon that evidence is that what prevented the vessel from getting to the tip any earlier than the night of Aug. 1 and 2 was the fact that there were other vessels in turn of arrival before her at Hull, H and I accept also the evidence of Mr. Thorman, that although there were many ships there were not more than the railway and dock could have dealt with if they had been properly organised. Therefore, the conclusion is that in the ordinary course of the business at the Hull Dock, the vessel took her turn, and, there happening to be other vessels in turn before her, she was thereby and not otherwise prevented from getting to the tip where she had to take her cargo any earlier I than she did. In that state of the facts, how did the obligations under this contract arise? It is contended by the defendants that their vessel was what is called an arrived vessel on July 23 at 9 a.m., that her lay hours ran out before any coal was put on board, that after that she was loaded while she was on demurrage, that no exceptions in the contract prevent or suspend the running of the lay hours from July 23, at 9 a.m., and that if any matters within those exceptions arose after the loading began, as the vessel was already on demurrage, those exceptions do not avail to protect the charterer. On the other hand, the charterer says, first of all, she was not an arrived vessel until she got under the tip, and the risk of delay

between arrival in dock and arrival under the tip is, under these two instruments, upon the ship; and, secondly, it is said that the delay which occurred after the vessel arrived in dock is within the exceptions which prevent the lay hours from running, and, therefore, the running is suspended, and the charterer is not liable during that time, and that when she did begin to load she was then loaded with dispatch and within her own time; and that, furthermore, there were some delays, comparatively small which would be in themselves excepted under the same exceptions in the charterparty. A
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Take first the question: When was she an arrived vessel? The charterparty provides that she is to proceed to Hull, Alexandra Dock, as ordered by charterer; and the charterer selected Denaby and Cadeby Colliery as the one whose coals were to be loaded. The colliery guarantee says:

"Time not to count until after the said steamer is wholly unballasted and ready in dock to receive her entire cargo or any other cause beyond my control always excepted." C

Then:

"Time to count from 6 a.m. following the receipt of notice (in writing) of readiness by Robert Thorman if the steamer is actually ready as above stipulated, and not before." D

The effect of those provisions must be, as a matter of construction, that the time is to count when the vessel is wholly unballasted, and ready in dock to receive her entire cargo, subject to the other stipulations as to notice in writing of readiness, and so forth. The charterparty itself is a charter to proceed to a named dock in a named port, and, unless the words "as ordered by charterer" alter it, under the ordinary rule applicable to charterparties, she would be arrived at her destination when she was in the dock; but even if the words "as ordered by charterer," which are only in the printed form, are to be treated as though they bound the vessel to tender herself at the spot alone ordered by the charterer—even if that were so the words in the guarantee fixing when time is to count, and fixing it negatively by a provision as to what is to happen before time is to count, would cause the time to run from the moment when she was wholly unballasted and ready in dock. That point is covered by *Monsen v. Macfarlane & Co.* (1), although I think the same conclusion would be justly drawn from the expressed terms of the instrument. In *Monsen v. Macfarlane & Co.* (1) the point turned upon a charterparty and a colliery guarantee incorporated with it indistinguishable on this point from the present case, except that there the designation of the spot to be selected by the charterer in the dock is much more distinct; and it was held that the time began to run as per colliery guarantee after the said ship is wholly unballasted and ready in dock at Grimsby, although the charterparty had only stipulated that she was to proceed to a customary loading place in the Royal Dock, Grimsby, as required by charterers. It seems, therefore, that that case, which is stronger than the present one, would show that effect must be given to the direct words of the colliery guarantee. E
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The contention was advanced, however, that there was authority for saying that upon the construction of the charterparty itself the ship was not an arrived ship until she got under the tip, and the authority for that proposition is the decision of BIGHAM, J., in *Shamrock Steamship Co. v. Storey & Co.* (4), in which BIGHAM, J., held in 1898 that, having regard to the words in the charter, to load in the usual manner according to the custom of the place, and to load from such colliery or collieries as charterers may direct, showed that the time for loading is not to be deemed to run until the vessel is under the tip. It appears to be evident from the learned judge's observation I

"Whether my reading of the charterparty, without the words as to the guarantee, be right or wrong, the defendants are entitled to succeed,"

that that view of his was, and was intended to be, an obiter dictum, and as a

- A matter of fact the terms of the usual guarantee are not set out in the report; the only guide to that is the learned judge's finding on the evidence that the usual guarantee form provides that the time for loading is not to begin to run until after the vessel is under the tip. If that were so, the decision that the time would only begin to run after the vessel was under the tip would govern the case, and would decide the matter in a way different from the present case; and, therefore, the
- B *Shamrock Case* (4) is no authority touching the present case at all.

The next point made by the charterer is: Assuming the time begins to run, as I am now assuming it does, when the ship was wholly unballasted and ready in dock, that provision that time is so to count is subject to the exception of a number of matters set out in the guarantee in the following terms:

- C "Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, leading, or shipping of the said cargo, also restrictions or suspensions of labour, lock-outs, delay on the part of the railway company either in supplying waggons or leading the coals, or any other cause beyond my control, such stoppage occurring any time between the present date and actual completion of loading,"
- D prevented the time from running, and, therefore, were effectual to relieve the charterer in the present case. Reading that clause as a matter of construction, it is obvious that one has to ask oneself first of all whether it is subject to the application of the canon of construction which is known as the *ejusdem generis* rule, and, if so, how is it to be construed, or whether there is anything in it which prevents the application of that canon of construction. One must bear in mind that it is a
- E canon of construction only. The object is to find out the intention of the parties. The instrument, the nature of the transaction, and the language, must all have due regard given to them, and the intention of the parties is to be ascertained by the consideration of their language in accordance with its ordinary and natural meaning. It is important to bear in mind first of all that this is a clause of a kind very familiar in ordinary contracts of carriage or contracts connected with the carriage
- F of cargoes; secondly, to remember that this is a charter which is of that class where the lay days are fixed lay days, or calculable as distinguished from the class where the obligation is to load in a reasonable time under the circumstances, using due diligence to obtain dispatch; and although, if the parties use language appropriate to the purpose, it is perfectly open to them to contract for that provision and to take a charter which provides for fixed lay days and convert it by other language
- G in this connection into a charter to load in a reasonable time, still when you are considering what the instrument is it has to be borne in mind that the charter is of the type which is favourable to the ship, by fixing the lay days; and that the interpretation of these exceptions upon that provision for fixed lay days as allowing any cause beyond the charterer's control to excuse him would eventually convert it into a charter of the opposite type which is favourable to the charterer and less
- H favourable to the ship. Apart from authority it seems to me that the mere consideration that so many matters have been carefully enumerated, unless you restrict the subsequent words "any other cause beyond my control," would lead one to construe that clause according to the *ejusdem generis* rule, and to say that it was intended by the parties that the time should not count only if various matters specifically enumerated, or if any other cause similar to them and beyond the charterer's control, interfered with the loading.
- I

This point, the defendants say, is not a mere matter of construction, but is covered by authority, the authority being *Re Richardsons and M. Samuel & Co.* (2). That is a decision of the Court of Appeal. It has been cited in the more recent cases, and apart from the conclusion which I have arrived at according to the construction of the words, the authority of this is binding because it is said ([1898] 1 Q.B. at p. 267) in the first judgment of A. L. SMITH, L.J., and in no way qualified or departed from in the subsequent judgments, that,

"The contention that because the delay arose from the loading of the ships in

the port in the order of their arrival the charterer is exempt cannot prevail, for it is impossible to treat delay arising from such a cause as due to accident to the railway, or as coming within the term 'other causes beyond charterer's control.' "

This dictum was necessary for determining an argument which it was proper for the court to determine, and as both the subsequent judgments begin by saying that they agree alike in the conclusion and reasoning of the first judgment, I must treat that as a decision of the court. It is true that it is a decision upon words and also on facts to some extent different from the present case, but it is as close to the present case as one could expect the language of a different instrument to be, and to decide that where there are some accidental matters followed by the words "other causes beyond charterer's control excepted," the other causes beyond the charterer's control must be construed in a limited sense with reference to the particular matter specified before, and that being so the mere loading of the ship in the port in the order of its arrival, and, therefore, of necessity waiting its turn, although no doubt beyond the charterer's control, cannot be said to be within those words in the contract itself.

The argument which has been advanced by counsel for the plaintiff is that two subsequent cases—both of them decisions of the House of Lords—*Larsen v. Sylvester & Co.* (3) and *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (5), both govern this case in favour of his client, and have in fact altered the state of the mercantile law with regard to the construction of mercantile instruments according to the canon of ejusdem generis, and it is said these words in the present clause are not for any useful purpose distinguishable from *Larsen v. Sylvester & Co.* (3), and that a rule was laid down in *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (5) for the interpretation of such a clause as this, which requires the discovery of some all-embracing genus that will take in all the matters specifically enumerated under one category as a condition of the general words at the end being construed as referring only to such category or such genus; and that unless you can form one common category of all the preceding specific matters and introduce the general words into them, the general words must be treated as detached from the previous specific matters, and be of a generality limited only by the actual language of the general words themselves. Those are the two ways in which *Larsen v. Sylvester & Co.* (3) and *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (5) are sought to be applied. It is true that *Larsen v. Sylvester & Co.* (3) is like in its circumstances both as to date, and as cargo, and as to locality, to the present case; but the resemblance must turn upon the interpretation put upon the words of the particular instrument. It is noticeable in *Larsen v. Sylvester & Co.* (3) that LORD ROBERTSON having been careful to state what no other member of the House had in any way expressly thrown doubt upon, that the ejusdem generis doctrine of construction was both sound and valuable, and must be maintained, at the conclusion of the judgment the Lord Chancellor was also quoted as stating his concurrence in what LORD ROBERTSON had said; and, therefore, it is quite clear that the principle upon which the House of Lords proceeded, following in that respect the decision below in *Larsen v. Sylvester & Co.* (3), was that they sought to make no change in the accepted rule of construction—they sought to cast no doubt upon either its utility or its application; but they desired to recall that, contrary perhaps to what had been argued in that case and some others, the rule of construction is subject to the real meaning of the parties, and not to the meaning of the parties subject to some rule of construction; that is to say, that the canon of construction is not the instrument for getting at the meaning of the parties, and that the parties, if they use language intimating such intention, may exclude the operation of this or, I suppose, any other canon of construction; and they found in the words which existed in that case, "Any other unavoidable accidents or hindrances of what kind soever," an attempt as strenuous as language could make it to indicate that the

A ejusdem generis rule, with which I dare say the parties were familiar, was not to be applied in that case.

It may well be that the result of that was that there were two or three lines of surplusage in the charterparty, but the House of Lords came to the conclusion that when the parties said that "any other unavoidable accidents or hindrances of what kind soever beyond their control" were to be excepted, it was impossible to suppose that they had meant that some unavoidable accident or hindrances, although beyond their control, should still impose liability. The only question, therefore, in applying *Larsen v. Sylvestre & Co.* (3) to the present case is to inquire whether there is any language in Mr. Thorman's guarantee of such length and effect as that, and I think there is not. Lower down in his guarantee there is the expression, "Should the colliery be off work for any cause whatever, time not to count."

C In the form of guarantee which I understand is generally used, at any rate on the Tyne, and as provided by the North of England United Coal Trade Association, the word "whatever" is imported into a clause corresponding with the clause in question, and it is quite reasonable to suppose that the parties entering into this guarantee were fully aware, having a command of the English language, that they might carry the matter considerably further if they used the word "whatever," and if they chose to use the expression in *Larsen v. Sylvestre & Co.* (3) apart altogether from the decision in that case which had not then taken place, as "of what kind soever," it would pass the wit of man to find any language more express or emphatic to indicate the utmost possible generality; but when they confine themselves to words of specific enumeration, like "any other cause beyond my control," I see nothing inserted here to derogate from the ordinary canon of construction that those words are subject to a limitation—namely, that of the genus or category which the previous words have indicated.

The other case is *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (5). As to that, it is to be observed that, after a long and careful discussion as to how the ejusdem generis rule is to apply to various classes of instruments, the court did come to the conclusion that there was quite a sufficient category contained in cl. 4 of the bill of lading in question, and a common element applying to all the specific matters enumerated to enable the words "any other cause" to be brought within that category, although whether you call it a category, as FARWELL, L.J., called it, or a genus, as the other lords justices called it, no doubt it was a category or a genus lacking in scientific precision, but they found a common element in the references to "ice, blockade, interdict, war, disturbances," and so forth, sufficient to enable them to construe the words "any other cause" as referable to the category so expressed. Considerable discussion arose there as to whether the presumption of law is that general words are general until they can be shown to be particular, or whether general words are ejusdem generis with the particular words until they can be shown to be general without any limitation. It is not in the least necessary to embark upon that discussion. It was a discussion that arose from the citation of a case relating to an ante-nuptial settlement. When the case was taken to the House of Lords I find that LORD MACNAGHTEN says ([1908] A.C. at p. 409) that

"the rule of ejusdem generis applies as laid down in *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (6), and I prefer to take the rule on a point of that sort from a case which did deal with bills of lading and shipping documents, rather than from cases that dealt with real property and settlements,"

I and in effect the rule referred to is stated in *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (6), in the judgment of LORD HALSBURY (12 App. Cas. at p. 490):

"Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words however general may be limited with respect to the subject-matter in relation to which they are used [that, of course, covers the observations which I ventured to make that

this is a charterparty with fixed lay days] the other is that general words may be restricted to the same genus as the specific words that precede them."

The third construction is that

"where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense."

As to that, I may observe that *Re Richardsons and M. Samuel & Co.* (2) is a case which is long known to shipping lawyers, and that in my experience the mercantile gentlemen who prepare these documents have a very confident knowledge of what the decisions of the courts have been in recent years. In the same case, LORD MACNAGHTEN says (12 App. Cas. at p. 501):

"According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were, no doubt, inserted in order to prevent disputes founded on nice distinctions."

That object of the insertion of such words I am afraid has not been always successfully maintained.

"Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated. . . . If, on the other hand, that expression is to receive a limited construction, as apparently it did in *Cullen v. Butler* (7), and loss by perils of the seas is to be confined to loss *ex marinæ tempestatis* discriminate, the general words become most important. But still, ever since the case of *Cullen v. Butler* (7), when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases 'akin to,' or 'resembling,' or 'of the same kind,' as those specially mentioned."

Following those observations, bearing in mind that when you are dealing with bills of lading and shipping documents it is better to apply cases upon bills of lading and shipping documents, and that, although you may refer to a case of an ante-nuptial settlement for a definition, doctrine is better derived from cases on charterparties, it seems there is nothing in *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (5) to raise any difficulty in the present case, except this—that one has now to look to see, if there be a genus, what that genus is. Here counsel for the plaintiff says it must be a genus which is inclusive, and into which all the previous specifically enumerated matters will enter, and suggested that the expression of COLLINS, L.J., in *Richardson's Case* (2) at the end of his judgment had been modified in consequence of the decision in *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (5). The expression in question is at the end of the judgment on p. 268. It does not appear that that is necessarily so. I do not understand that anything is laid down in *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (5) which determines that in all instruments and under all circumstances the general words are referable to one category into which all the previously enumerated words must enter as component species, and I see no reason why either the nature of the instrument or the language used, or any other proof of the intention of the parties, might not cause the specific matters to be read *eiusdem generis*, so that the general words might be attracted either to them individually or to them in groups according to the intention of the parties; but it does not appear to be a matter of great difficulty to find a common category which will cover all the matters specifically inserted in the present case.

Counsel for the defendant offered as the distinction which would constitute a common category, but, as I stated before, it is not necessary that this genus and differentia should be of extreme scientific precision, that the clause referred to hindrances on the landward side and not on the seaward side. That test is attractive because it is terse and pointed, but counsel for the plaintiff pointed out with justice that, although it might be relatively unlikely in fact, hindrances which would come within this clause might arise on the seaward side, as, for example,

- A** if frosts or storms obstructed the passage of the ship from the dock to the tip, or if a strike of dock employees prevented the sluices or dock gates from being worked which had to be worked; or if an accident occurred, say the sinking of a vessel at the tip, stopped the shipping of the cargo that was there. But it appears that the common category which covers all this is to be found in the circumstance that they clearly all refer to something extraordinary—something in the nature of a casualty, something accidental or abnormal; not in the ordinary course of a flourishing business, but detrimental to the ordinary course of business; a common feature quite as precise as the common feature which sufficed in *Tillmanns Case* (5); a common feature, of an effective business object; and a common feature which excludes the cause of the detention of this vessel upon the evidence of Mr. Thorman himself, because what prevented the vessel from getting to the tip was that she had to wait her turn. What obliged her to wait her turn was that other vessels had come in before her, and that other vessels had come in before her in the ordinary course of the trade of the port, not that there were not more vessels coming in that summer than usual, but it was in the ordinary course of the trade of a port which must have its fluctuations, and which was at that time in an exceptional and flourishing condition; that the other vessels had come in in the ordinary course of trade, and would have been dealt with without delay in the ordinary course of trade if the railway and the dock, which means the railway lines and appliances coming down to the tip, had been properly organised and managed, and although there was congestion and delay on the part of the railway company during this period, that was not the cause of the vessel not getting to the tip, because if it had not been that there had been other vessels in turn before her she would have got straight to the tip, and then would have found coal available for her, the railway congestion notwithstanding.

It seems, therefore, that reliance cannot be placed in aid of the charterer upon the exceptions in the colliery guarantee, and, that being so, I do not think it necessary to consider the length of time during which it is said that after loading began there was delay on the part of the railway company in supplying waggons or loading the coal, because those times could be easily ascertained from the log, which is the best, although not very clear, record of the length of time of stoppage; and it does not appear that they are of any significance, the conclusion having been arrived at that the vessel was already on demurrage before any coal was put on board at all. The result of that is that there must be judgment for the defendants upon the counterclaim.

- G** Solicitors: *Maples, Teesdale & Co.*, for *Bramwell, Bell & Clayton*, Newcastle-on-Tyne; *William A. Crump & Son*, for *A. M. Jackson & Co.*, Hull.

[Reported by L. C. THOMAS, Esq., Barrister-at-Law.]

HUGGETT v. MIERS

A

[COURT OF APPEAL (Sir Gorell Barnes, P., Fletcher Moulton and Farwell, L.JJ.),
April 29, 1908]

[Reported [1908] 2 K.B. 278; 77 L.J.K.B. 710; 99 L.T. 326;
24 T.L.R. 582; 52 Sol. Jo. 481]

B

*Landlord and Tenant—Negligence—Landlord—Servant of tenant injured by
reason of staircase being unlit—Duty of landlord to provide lighting.*

The defendant was the owner of a building the different floors of which were let by him as separate tenements to different tenants as business offices. Means of access to such offices was provided by a common staircase of which the defendant was in possession and control. The agreements for letting the offices contained no provision with regard to the lighting of the staircase. The defendant supplied no light for the staircase. There were brackets for gas light on the landings outside the entrances to the various offices, and these brackets were supplied with gas by the tenants from their own meters and not by the defendant. It was the practice for each tenant when he left his office for the night to turn off his own staircase light. The plaintiff, who was employed by tenants on the second floor, left the office after dark and descended the staircase after all the lights had been put out. In the darkness he failed to find the street door, went down further steps, and fell through a door opening on to a courtyard, sustaining injuries. In an action by him against the defendant for damages for personal injuries,

C

D

Held: as the tenants had undertaken to light the staircase themselves, the defendant owed no duty, express or implied, to them to keep the staircase lighted; there could not be a greater duty owed to the plaintiff, a person who had come on to the premises at the invitation of a tenant; and, therefore, the action failed.

E

Per Curiam: There is a distinction between a case like this and a case of non-repair of a staircase.

F

Miller v. Hancock (1), [1893] 2 Q.B. 177, distinguished.

Notes. Section 4 (1) of the Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 837) now provides that when premises are occupied by any person under a tenancy which places upon the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time lawfully be on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, just as if he were an occupier of the premises and the persons or their goods were there by his invitation or permission.

G

Considered: *Lewis v. Ronald*, post p. 782. Applied: *Powell v. Thorndike* (1910), 102 L.T. 600; *Lucy v. Bawden*, [1914] 2 K.B. 318. Considered: *Dobson v. Horsley*, [1915] 1 K.B. 634; *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74. Applied: *Rochman v. Hall, Ltd.*, [1947] 1 All E.R. 895. Considered: *Devine v. London Housing Society, Ltd.*, [1950] 2 All E.R. 1173. Referred to: *Hart v. Rogers*, [1916] 1 K.B. 646; *Dunster v. Hollis*, [1918-19] All E.R.Rep. 949; *Murphy v. Hurly*, [1922] All E.R.Rep. 169; *Hawkins v. Coulsdon and Purley U.D.C.*, [1953] 2 All E.R. 364; *Sleafer v. Lambeth Metropolitan Borough Council*, [1959] 3 All E.R. 378.

H

I

As to a landlord's liability to persons injured on the demised premises, see 23 HALSBURY'S LAWS (3rd Edn.) 572 et seq.; and for cases see 31 DIGEST (Repl.) 97.

Cases referred to:

(1) *Miller v. Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 41 W.R. 578; 9 T.L.R. 512; 37 Sol. Jo. 558; 4 R. 478, C.A.; 31 Digest (Repl.) 100, 2471.

- A (2) *Taylor v. Whitehead* (1781), 2 Doug. K.B. 745; 99 E.R. 475; 19 Digest 116, 765.
- (3) *Smith v. London and St. Katherine Docks Co.* (1868), L.R. 3 C.P. 326; 37 L.J.C.P. 217; 18 L.T. 403; 16 W.R. 728; 3 Mar.L.C. 66; 36 Digest (Repl.) 48, 253.

B **Application** for judgment or a new trial in an action brought by the plaintiff against the defendant for damages for personal injuries, and tried by CHANNELL, J., with a jury at Leeds Assizes.

At the trial the jury gave a general verdict for the defendant, and the learned judge directed judgment to be entered accordingly. The plaintiff now applied for a new trial, on the ground (*inter alia*) that the learned judge had misdirected the jury by directing them that there was no duty on the defendant to light or provide for the proper lighting of the common staircase, and that the defendant had complied with any legal obligation on him with respect to the lighting of the staircase by leaving it to the tenants to light or not at their pleasure.

Tindal Atkinson, K.C., and *H. S. Cautley* for the plaintiff.

Waugh, K.C., and *J. A. Compston* for the defendant.

D **SIR GORELL BARNES, P.**—This is an application by the plaintiff for a new trial on the ground of an alleged misdirection on the part of the learned judge in summing up the case to the jury. The facts of the case are very simple. The defendant was the owner of premises at No. 3A, New Briggate, Leeds, the different floors of which he let to different tenants as business offices. There was a common staircase leading from the bottom of the building, near the street door, by means of which access was obtained to the different offices. This staircase remained in possession and control of the landlord. Among the tenants was a firm of Messrs. A. and G. Taylor, who occupied a set of offices on the second floor. The plaintiff, who was acting as a canvasser for that firm, went to their offices on the evening of Mar. 9, where he remained until 8.15 p.m., when he left. The staircase was then in a state of complete darkness. He descended the staircase, following a course which led from the second floor to the ground floor, but when he reached the ground floor he did not go out of the front door, but descended some further steps, and, opening a door which he found, he stepped forward and fell into a courtyard below, thereby sustaining serious injuries. The only other fact of importance is that the lights on each of the landings of the staircase were not supplied by the landlord, but the tenants had their own lights on their respective landings, and that they supplied the gas from their own meters. On leaving the premises each tenant put out his own light, and the last light was put out by the last person to leave. On the evening in question all had left the premises except the plaintiff, who left in the dark as before mentioned. A witness who left Messrs. A. and G. Taylor's premises before the plaintiff said she had turned out the light on the landing when she left. CHANNELL, J., left the case to the jury, and indicated to them that there was no duty towards the plaintiff imposed on the landlord to light the staircase. He asked the jury specific questions, but they returned a general verdict for the defendant. The plaintiff complains of the direction of the learned judge. In support of the appeal it is said that there is to be found a duty on the part of the landlord towards the plaintiff to light the premises, which duty was broken, and that it is the breach of that duty which has led to the disastrous accident which happened to the plaintiff. It is also said that the door through which the plaintiff passed before he fell ought to have been kept shut and locked by the defendant. There does not seem to be much substance in that point. The real point is as to the duty to light the staircase.

The case as presented is based on the footing of *Miller v. Hancock* (1), which is said to govern this case. In my opinion that case is not an authority which governs the present case. I approach the consideration of the case from this point of view. It is clear that, as a general rule, the grant of an easement imposes

no obligation on the owner of the servient tenement to do anything in the nature of repair, and that the only obligation is on the owner of the dominant tenement. That is practically what was said by BOWEN, L.J., in *Miller v. Hancock* (1), and it was based on the dictum of LORD MANSFIELD in *Taylor v. Whitehead* (2) (2 Doug.K.B. at p. 749) to the effect "that, by common law, he who has the use of a thing ought to repair it."

Therefore, in the present case, unless there is something to control this, I think the tenants are the persons who ought to repair this staircase. It may, however, be that, although that is the starting point from which to approach the consideration of the question, there may be cases either of express contract or of implied contract on the part of the landlord of premises, let as these premises were let, to keep the staircase in repair, and, it might be, to do something more than repairs; but it seems to me that, unless such a contract can be made out, there is no duty cast on the landlord in such a case to keep the staircase in repair. If there is no such duty on the part of the landlord towards a tenant, I cannot see how there could possibly be a greater duty towards an outsider who comes on to the premises at the invitation of a tenant.

Does the decision in *Miller v. Hancock* (1) show any ground for an implication that in such a case as this the landlord has undertaken the duty of lighting the staircase? In my opinion it does not. I think the decision in that case was entirely confined to the particular facts of that case. The judges refer expressly to the "circumstances" and the "peculiar circumstances" of the case. It was there held that there was an implication that the defendant had agreed with the tenants to keep the staircase in repair, and, as he knew that the premises would be of no use to the tenants unless those who supplied or dealt with the tenants, such as tradesmen or others having business with them, had access to the premises, there was also an implied obligation on the part of the landlord to the tenants that he was bound to keep the staircase in a reasonably safe condition of repair. I think that means a duty to keep in repair structurally. It may well be that anyone going up this staircase would be entitled to suppose that it was reasonably safe to go up, and that it was not in a defective state of repair; but that is very different from the contention in this case. It is said that the defendant was bound to keep the staircase lighted, and, as far as I can understand, to keep it lighted all night long. To my mind, no reasonable implication can be raised in favour of the plaintiff of any obligation on the part of the defendant to keep this staircase lighted. The practical difference between the two cases is obvious. A person going up or down such a staircase may well assume that it is safe and in a proper state of repair; but, if the staircase is in darkness, it is reasonable that he should refrain from going until he can provide himself with a light. In this case the facts negative the implication of any duty on the part of the landlord towards the tenants to light the staircase, as the tenants have undertaken to do the lighting themselves. And persons who come on the staircase by the invitation of a tenant cannot be in a better position than the tenant himself. In my opinion *Miller v. Hancock* (1) does not govern the present case. It was an exceptional case, and does not warrant the court in extending the implication which was held to arise there so as to cover circumstances such as those with which we have to deal here. On these grounds I think the application must be dismissed.

FLETCHER MOULTON, L.J.—I am of the same opinion. The only question in this case is, Is there any obligation imposed on the landlord of a building like this to light the staircase? The plaintiff's counsel puts the obligation as high as requiring the staircase to be lighted both day and night. I cannot myself find a spark of authority in favour of this contention, or see any reason for it. In the present case the landlord let the different tenements to different people; but the tenants never understood that there was any obligation on the part of the landlord, either express or implied, to light the staircase. As a matter of fact, it was never intended that the landlord should light the staircase. It is suggested, whatever

A the arrangements as to lighting between the landlord and the tenants may be, that, if not exactly by common law, yet by something between common law and contract, the landlord is in such a case under an obligation towards persons having business with the tenants and using the staircase to keep it reasonably safe by night and day, and, if necessary, to provide a light. I cannot see how such a duty can be supposed to arise. In the course of the argument I suggested the case of

B a house which is let at the end of a private lane. Would it be the duty of the landlord to keep the lane lighted all night? I know of no authority at common law which would compel a landlord to provide light in such a case. There is a very broad distinction between a case like this and a case of non-repair of a staircase. If a staircase is dark, a person using it must obviously realise that it is dark; but if a person uses a staircase which is out of repair, as in *Miller v. Hancock* (1), it

C may be that the person does not know that it is so. With regard to *Miller v. Hancock* (1), that case stands by itself, and I am not myself quite clear upon which grounds it was decided. My private opinion is that the judges, when they came to their conclusion, thought that there was, owing to the arrangements between the landlord and tenants, an obligation cast on the landlord to keep the staircase in a reasonably safe state of repair, and that by letting the different

D offices to the tenants he had authorised the tenants to invite other persons to come to such tenements and to use the staircase, which the landlord was therefore obliged to keep in repair. The court ascribed that invitation to the landlord himself, and said that it was he who invited the public to use the staircase. If that is so, it can have no bearing on the present case. We could not infer here that the landlord authorised the tenants to invite the public to use the staircase at all hours

E of the night when it was in a state of darkness.

FARWELL, L.J.—I agree. As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything—the burden of repair falls upon the owner of the dominant tenement (*GALE ON EASEMENTS* (8th Edn.), p. 475). As **LORD MANSFIELD** said in *Taylor v. Whitehead* (2) (2 Doug.K.B. at p. 749):

“By common law, he who has the use of a thing ought to repair it.”

In *Miller v. Hancock* (1) the Court of Appeal came to the conclusion that the landlord was bound by necessary implication to do the repairs himself. **BOWEN, L.J.**, said in that case ([1893] 2 Q.B. at p. 181):

G “It was contended by the defendant’s counsel that, according to the common law, the person in enjoyment of an easement is bound to do the necessary repairs himself. That may be true with regard to easements in general, but it is subject to the qualification that the grantor of the easement may undertake to do the repairs either in express terms or by necessary implication. This is not the mere case of a grant of an easement without special circumstances.”

H The decision in that case rested on the conclusion of fact that the court found that there was a contract on the part of the landlord to keep the staircase in repair. We are asked to come to a similar finding here with reference to the lighting of the staircase. It is not a question of the general law, but merely of the particular contract. Each case must depend on its own circumstances. We are asked here to infer that the landlord has contracted to keep the staircase lighted at all necessary hours, and apparently for the whole of the night. In my opinion there are no

I facts to support that implication; the facts that have been proved are directly contrary to it, as the staircase is lit by gas jets which are put there by the tenants themselves and are supplied with gas from their own meters. Under these circumstances to hold that there is a contract on the part of the landlord to light the staircase would be to infer something in direct contravention of the facts of the case.

There only remains this question which has been raised by the plaintiff—namely, that members of the public who use the staircase for the purpose of going to or

from the offices of the tenants have a greater right than the tenant himself. *Miller v. Hancock* (1) was relied on to support this proposition; but the judgments in that case were based on the implication of a contract. The Court of Appeal seem to have arrived at their conclusions by the somewhat subtle reasoning by which they treated the landlord, who had undertaken the duty of keeping the staircase in repair, as having authorised the tenants to invite members of the public to use the staircase on his behalf so as to bind him. They seem to have arrived at their conclusions on the principles laid down in *Smith v. London and St. Katherine's Docks Co.* (3). To my mind, that is quite a different case, because it was the dock company itself which carried on the business for the purposes of which they invited persons to use the gangway. I agree with the view taken by my brother FLETCHER MOULTON as to the reasoning on which *Miller v. Hancock* (1) depends, but I entirely dissent from the argument that a member of the public using the staircase has a greater right, when claiming through the tenant, than the tenant himself. In my opinion this application fails.

Application dismissed.

Solicitors: *Rollit, Sons & Burroughs*, for *A. R. Lake*, Wakefield; *Jaques & Co.*, for *Scott & Turnbull*, Leeds.

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

DEWAR v. GOODMAN

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Robertson and Lord Collins), October 27, 29, December 3, 1908]

[Reported [1909] A.C. 72; 78 L.J.K.B. 209; 100 L.T. 2; 25 T.L.R. 737; 53 Sol. Jo. 116]

Landlord and Tenant—Covenant—Covenant running with the land—Touching and concerning land demised—Covenant in underlease to observe covenants in lease of land not included in underlease.

There is no authority for saying that a covenant to do an act, not in respect of the demised premises, but one which will protect from forfeiture the estate of the lessee in the demised premises, is a covenant which runs with the land.

Under a lease for 99 years of a parcel of land the lessee was under covenant to keep 211 houses built thereon in repair. The lessee demised part of this land together with two of the houses to an underlessee and covenanted for himself and his assigns with the underlessee and his assigns (i) for quiet enjoyment, (ii) for the performance of his covenants in the head lease so far as they related to or affected the other 209 houses, and (iii) to indemnify the underlessee and his assigns against breaches of the covenants. Subsequently, the respondent, an assignee of the lessee failed to perform the covenant to repair in the head-lease and an order for possession on these grounds was made against him in favour of those entitled to the reversion. In consequence of this order, the appellant, an assignee of the under-lessee, was ejected from his parcel of land and the two houses thereon, and he claimed damages from the respondent for breach of covenant.

A **Held:** the covenant did not touch or concern the thing demised, namely, the land contained in the lease, for it concerned repairs on totally different land; it was, therefore, collateral, and the appellant's claim failed.

B Per LORD COLLINS: No doubt privity of estate must exist between the assignee of the reversion and the assignee of the land demised, but privity of estate between the same parties is not vital in respect of the land on which the covenant is to be performed; therefore, the covenant was collateral and did not run with the land.

C **Notes.** Considered: *Ricketts v. Enfield*, [1909] 1 Ch. 544; *Griffith v. Pelton*, [1957] 3 All E.R. 75. Referred to: *County Hotel and Wine Co. v. London and North Western Rail. Co.*, [1918] 2 K.B. 251; *Grant v. Edmondson*, [1931] 1 Ch. 1; *Re Hunter's Lease*, *Giles v. Hutchings*, [1942] 1 All E.R. 27; *Lewin v. American and Colonial Distributors, Ltd.*, [1945] 1 All E.R. 592; *Re No. 1, Albermarle Street, W.1.*, [1959] 1 All E.R. 250.

As to covenants running with the land, see 23 HALSBURY'S LAWS (3rd Edn.) 644 et seq.; and for cases see 31 DIGEST (Repl.) 153 et seq.

Cases referred to:

- D** (1) *Spencer's Case* (1588), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, 2907.
- (2) *Doughty v. Bowman* (1848), 11 Q.B. 444; 17 L.J.Q.B. 111; 12 Jur. 182; 116 E.R. 543; 31 Digest (Repl.) 150, 2890.
- (3) *Sampson v. Easterby* (1829), 9 B. & C. 505; affirmed sub nom. *Easterby v. Sampson* (1830), 6 Bing. 644; 1 Cr. & J. 105; 4 Moo. & P. 601; 130 E.R. 1429, Ex. Ch.; 31 Digest (Repl.) 154, 2920.
- E** (4) *Vyvyan v. Arthur* (1823), 1 B. & C. 410; 2 Dow. & Ry.K.B. 670; 107 E.R. 152; sub nom. *Vioyan v. Arthur*, 1 L.J.O.S.K.B. 138; 31 Digest (Repl.) 239, 3726.

Also referred to in argument:

- F** *Bally v. Wells* (1769), Wilm. 341; 3 Wils. 25; 97 E.R. 130; 31 Digest (Repl.) 154, 2919.
- Campbell v. Lewis* (1820), 3 B. & Ald. 392; 106 E.R. 706; 31 Digest (Repl.) 136, 2747.
- Vernon v. Smith* (1821), 5 B. & Ald. 1; 106 E.R. 1094; 31 Digest (Repl.) 400, 5295.
- G** *Hooper v. Clark* (1867), L.R. 2 Q.B. 200; 8 B. & S. 150; 36 L.J.Q.B. 79; 31 J.P. 228; 15 W.R. 347; sub nom. *Hooper v. Lane*, 16 L.T. 152; 31 Digest (Repl.) 153, 2912.
- White v. Southend Hotel Co.*, [1897] 1 Ch. 767; 66 L.J.Ch. 387; 76 L.T. 273; 45 W.R. 434; 13 T.L.R. 310; 41 Sol. Jo. 384, C.A.; 31 Digest (Repl.) 115, 2556.
- Clegg v. Hands* (1890), 44 Ch.D. 503; 59 L.J.Ch. 477; 62 L.T. 502; 55 J.P. 180; 38 W.R. 433; 6 T.L.R. 233, C.A.; 31 Digest (Repl.) 113, 2544.
- H** *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; 70 L.J.Ch. 814; 82 L.T. 347; 16 T.L.R. 299; 31 Digest (Repl.) 114, 2547.
- Chapman v. Smith*, [1907] 2 Ch. 97; 76 L.J.Ch. 394; 96 L.T. 662; 51 Sol. Jo. 428; 31 Digest (Repl.) 155, 2922.
- Congleton Corp. v. Pattison* (1808), 10 East, 130; 103 E.R. 725; 31 Digest (Repl.) 152, 2903.
- I** *Stevens v. Copp* (1868), L.R. 4 Exch. 20; 38 L.J.Ex. 31; 19 L.T. 454; 33 J.P. 87; 17 W.R. 166; 25 Digest 359, 95.
- Thomas v. Hayward* (1869), L.R. 4 Exch. 311; 38 L.J.Ex. 175; 20 L.T. 814; 31 Digest (Repl.) 165, 3007.
- Gower v. Postmaster-General* (1887), 57 L.T. 527; 4 T.L.R. 5; 31 Digest (Repl.) 151, 2900.
- Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 54 W.R. 7; 21 T.L.R. 581, C.A.; 30 Digest (Repl.) 495, 1395.

- Edge v. Boileau* (1885), 16 Q.B.D. 117; 55 L.J.Q.B. 90; 53 L.T. 907; 34 W.R. 103; 2 T.L.R. 100, D.C.; 31 Digest (Repl.) 131, 2693.
- Keppell v. Bailey* (1834), 2 My. & K. 517; Coop. temp. Brough. 298; 39 E.R. 1042, L.C.; 31 Digest (Repl.) 240, 3746.
- Mayor v. Steward* (1769), 4 Burr. 2439; 98 E.R. 279; 4 Digest (Repl.) 288, 2634.
- Grey v. Friar* (1854), 4 H.L.Cas. 565; 2 C.L.R. 434; 23 L.T.O.S. 334; 18 Jur. 1036; 10 E.R. 583, H.L.; 31 Digest (Repl.) 598, 7159.
- Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, 2769.
- Webb v. Russell* (1789), 3 Term Rep. 393; 100 E.R. 639; 31 Digest (Repl.) 240, 3744.
- Boone v. Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320 c; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, 3526.
- Bastin v. Bidwell* (1881), 18 Ch.D. 238; 44 L.T. 742; 31 Digest (Repl.) 74, 2289.

Appeal from an order of the Court of Appeal ([1908] 1 K.B. 94) (LORD ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ.), affirming a judgment of JELF, J. ([1907] 1 K.B. 612), in favour of the defendant, in an action brought by the plaintiff for damages of £154 11s. 6d. for breach of covenant in an underlease. The following facts were agreed.

By a lease, dated May 6, 1820, Lord Pomfret and others demised to William Whitehead for a term of 89 years a parcel of land in Chelsea upon which 211 houses were subsequently built. The lease contained a covenant by the lessee to keep the houses in repair. One Barns, in whom the lease had become vested on July 13, 1886, granted an underlease to Humphrey of part of the land together with two of the houses thereon for a term of 22½ years less three days. The underlessee covenanted to keep the two houses in repair, and the underlessor covenanted for himself and his assigns with the underlessee and his assigns: (i) for quiet enjoyment, (ii) for the performance of his covenants in the head lease so far as they related to or affected the other 209 houses, and (iii) to indemnify the underlessee and his assigns against breaches of the covenants.

At some date subsequently the lease became vested in Willett. On Feb. 16, 1903, the underlease was assigned to the appellant. The Chelsea Development Co., Ltd., acquired the reversion expectant on the determination of the term created by the lease of 1820, on Sept. 27, 1904, and two days later served upon Willett a notice and schedule of dilapidations in respect of all the 211 houses. The company notified the appellant of the service and this was acknowledged by him by letter dated Dec. 12, 1904. Willett assigned the lease to the respondent on Feb. 10, 1905, and three days later the company commenced proceedings against the respondent claiming possession of the whole parcel of land demised by the lease of 1820 and all 211 houses by reason of forfeiture incurred through breach of covenant to repair. The appellant who had notice of the proceedings took no part in them and did not ask for relief from forfeiture in respect of his two houses. On Dec. 7, 1905, the company obtained judgment against the respondent for possession of the parcel of land and 211 houses and under this judgment the appellant was evicted from the two houses.

W. Copping for the appellant.

Atherley-Jones, K.C., and *S. Goodman* for the respondent.

Their Lordships took time for consideration.

Dec. 3, 1908. The following opinions were read.

LORD LOREBURN, L.C.—I am of opinion that the judgment appealed from should be affirmed, and the appeal dismissed. I do not propose to review the authorities, which have been long followed, in regard to covenants running with the land. The words which describe them as "touching or concerning the thing demised" are familiar and no nearer approach to certainty is attainable, though in

- A their application difficulty may at times arise. I cannot say that I think that there is any difficulty in the present case. Counsel for the appellant, in his able argument, really asked your Lordships to say that the rule is different from that which has been hitherto observed. It is manifest that this covenant does not touch or concern the thing demised—namely, the land contained in the lease—for it concerns repairs on totally different land. But he, in effect, argues that it
- B touches and concerns the estate created by the lease, for that estate may come to an end if the covenant is broken. BUCKLEY, L.J., seems to me to summarise accurately the contention to which the appellant is driven. To prevail, he must contend that “a covenant to do an act not in respect of the demised premises, but one which will protect from forfeiture the estate of the lessee in the demised premises, is a covenant which runs with the land.” There is no authority for this.
- C The lord justice disposes of the suggested precedents. If we were at this date entitled to make a precedent, I can see directions in which it might prove fatal. But the principle is well settled. An ingenious argument was used to the effect that in some way the construction of the covenant for quiet enjoyment was extended by reason of the presence of the other covenant to which I have already referred, and that thus there has been a breach of the covenant for quiet enjoyment.
- D It is not contended that except in this enlarged sense the covenant for quiet enjoyment has been broken, and I am quite unable to accept the doctrine of expansion. There is no authority for that either. Each covenant speaks for itself. This disposes of the appeal. It may be a hard case on the plaintiff, but, like JELF, J., “I do not feel at liberty to decide the case upon the ground of expediency or morality,” even if I were quite sure in which direction I should
- E be impelled by either.

LORD ROBERTSON concurred.

LORD COLLINS.—I am of opinion that the decision of the Court of Appeal is right and ought to be affirmed. Indeed, the point is expressly covered by the illustration given by LORD COKE under the second resolution in *Spencer's Case* (1). He there says:

“As, if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise . . . it shall not bind the assignee because it is merely collateral and in no manner touches or concerns the thing that was demised or that is assigned over, and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.”

Substitute repair for build and the instance is identical with the case before us. Therefore, the main covenant relied on by the appellant is in itself collateral, and can only be contended in any sense to touch the land demised by importing the possibility that its non-performance might bring about a forfeiture at the instance of the head landlord, which has in fact occurred, and in respect of which the plaintiff is seeking to recover damages under the covenant of indemnity in this action. But it was held in *Doughty v. Bowman* (2) that a covenant by a sub-lessee to indemnify against breaches of covenant in the head lease is merely personal, and does not bind his assignee.

How, then, can the presence in the sub-lease of another collateral covenant equally ineffective to bind assignees convert the first covenant into one running with the land? The reasoning in *Doughty v. Bowman* (2) is strongly against such a suggestion, and no authority has been adduced in support of it. The covenant for quiet enjoyment, restricted as it is, has not been broken, as JELF, J., points out, and the appellant, therefore, fails in showing any liability in the respondent to make good the damage which he has sustained. I think that counsel for the respondent perhaps relied too much on the contention that privity of estate was not established between the plaintiff and the defendant in the action in respect

of the land on which the covenant of the sub-lessee was to be performed. No doubt privity of estate must exist between the assignee of the reversion and the assignee of the land demised, but privity of estate between the same parties is not vital in respect of the land on which the covenant is to be performed. The reason why the covenant to do something on land other than that demised presumably does not run is not because there is no privity of estate in the land on which the covenant is to be performed, but because such a covenant is *prima facie* collateral—i.e., does not touch or concern the land demised. But instances may be imagined of covenants to do things on land other than that demised which touch and concern so nearly the land demised as to run with it. Of this *Sampson v. Easterby* (3) is an instance, if it be assumed, as it seems to have been, that no demise was to be implied of the site on the waste where the mill was to be built. *Vyvyan v. Arthur* (4) is another instance where there was no privity of estate in the land on which the covenant was to be performed, but on special grounds the covenant was held to run. I agree with the Court of Appeal that *Sampson v. Easterby* (3) is no authority for the running of the covenant in this case. It does decide that a covenant may run, although there is no privity of estate in the land on which the covenant is to be performed, but it in no way supports the contention that the covenants in this case were other than collateral.

Appeal dismissed.

Solicitors: *Harold Edwards & Cohn; Nash, Field & Co.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

GORDON v. METROPOLITAN POLICE CHIEF COMMISSIONER

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Buckley, L.JJ.), June 3, July 23, 1910]

[Reported [1910] 2 K.B. 1080; 79 L.J.K.B. 957; 103 L.T. 338; 74 J.P. 437; 26 T.L.R. 645; 54 Sol. Jo. 719]

Gaming—Street betting—Search of bookmaker's premises—Seizure of money received in street betting—Retention by police—Right of bookmaker to recover.

During the search of a house under s. 11 of the Betting Act, 1853 [repealed], the police seized certain money which the plaintiff claimed as his property. The plaintiff was acquitted in proceedings taken against him and other persons for using the house as a betting-house, on the ground that there was no evidence of his having taken bets in the house, but the money in question was admittedly the proceeds of street betting contrary to the provisions of the Street Betting Act, 1906, s. 1. In an action by the plaintiff against the police to recover the money thus seized.

Held: there being no provision in the Street Betting Act, 1906, for the forfeiture of money received as a result of a transaction in contravention of the provisions of s. 1 of the Act, and the property in the money having been voluntarily transferred by the payer or payers to the plaintiff, the property in the money was in the plaintiff; accordingly (VAUGHAN WILLIAMS, L.J., dissenting) the plaintiff's claim to the money did not arise out of a transaction which was illegal under the Act of 1906; and, therefore, he was simply in the

- A** position of a man suing for money belonging to him which was being detained by a person who had no right to it, and he was entitled to recover.

Notes. Referred to: *Alexander v. Rayson*, [1935] All E.R. 185; *Sockalingam Chettiar v. Ramanayake*, [1937] 1 All E.R. 196; *Berg v. Sadler and Moore*, [1937] 1 All E.R. 637; *Cakebread v. Hopping Bros. (Whetstone), Ltd.*, [1947] 1 All E.R. 389; *Marples v. Philip Trant & Sons, Ltd.*, [1953] 1 All E.R. 651.

- B** As to street betting, see 18 HALSBURY'S LAWS (3rd Edn.) 196, 197, and cases there cited. For Street Betting Act, 1906, see 10 HALSBURY'S STATUTES (2nd Edn.) 778.

Cases referred to:

- C** (1) *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, 2404.
- (2) *Scott v. Brown, Doeing, McNab & Co., Slaughter and May v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698; 4 R. 42, C.A.; 12 Digest (Repl.) 267, 2060.
- D** (3) *Taylor v. Chester* (1869), L.R. 4 Q.B. 309; 38 L.J.Q.B. 225; 21 L.T. 359; 33 J.P. 709; 3 Digest (Repl.) 116, 367.
- (4) *Feret v. Hill* (1854), 15 C.B. 207; 23 L.J.C.P. 185; 23 L.T.O.S. 158; 18 Jur. 1014; 2 W.R. 493; 2 C.L.R. 1366; 139 E.R. 400; 12 Digest (Repl.) 325, 2509.
- (5) *Taylor v. Bowers* (1876), 1 Q.B.D. 291; 46 L.J.Q.B. 39; 34 L.T. 938; 24 W.R. 499, C.A.; 25 Digest 210, 446.
- E** (6) *Kearley v. Thomson* (1890), 24 Q.B.D. 742; 59 L.J.Q.B. 288; 63 L.T. 150; 54 J.P. 804; 38 W.R. 614; 6 T.L.R. 267, C.A.; 12 Digest (Repl.) 318, 2453.
- (7) *Tenant v. Elliott* (1797), 1 Bos. & P. 3; 126 E.R. 744; 29 Digest 294, 2396.
- (8) *Farmer v. Russell* (1798), 1 Bos. & P. 296; 126 E.R. 913; 1 Digest (Repl.) 512, 1474.
- F** (9) *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 60 L.T. 220; 56 J.P. 180; 40 W.R. 230, C.A.; 1 Digest (Repl.) 46, 347.

Also referred to in argument:

- Sykes v. Beadon* (1879), 11 Ch.D. 170; 48 L.J.Ch. 522; 40 L.T. 243; 27 W.R. 464; 25 Digest 453, 430.
- G** *Bousfield v. Wilson* (1846), 16 M. & W. 185; 4 Ry. & Can. Cas. 687; 16 L.J.Ex. 44; 8 L.T.O.S. 194; 153 E.R. 1153; 12 Digest (Repl.) 637, 4926.
- Bice v. Jarvis* (1885), 49 J.P. 264; sub nom. *Re Jervis*, 1 T.L.R. 306, D.C.; 21 Digest 621, 2084.

- H** **Appeal** by the plaintiff from a decision of WARRINGTON, J. (sitting as an additional judge of the King's Bench Division).

Turrell and A. R. Stephens for the plaintiff.

J. Eldon Bankes, K.C., and *G. A. Scott* for the defendant.

Cur. adv. vult.

- I** July 23, 1910. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—The statement of claim in this case is as follows;

“(1) The defendant on or about the 28th day of November, 1908, wrongfully seized and took possession of certain money, the property of the plaintiff, amounting to the sum of £107 6s. 8d., and has since the said 28th day of November, 1908, wrongfully detained the said sum of £107 6s. 8d. the property of the plaintiff, whereby the plaintiff has lost the use and possession of the said sum of £107 6s. 8d., and has suffered damage. (2) Alternatively, the

plaintiff says that the defendant received the said sum of £107 6s. 8d. to the use of the plaintiff. Particulars—Nov. 28, 1908. The defendant took possession of the said sum of £107 6s. 8d., and has since retained possession of the same, wherefore the plaintiff says the said sum of £107 6s. 8d. was received by the defendant to his use. The plaintiff claims (1) return of the said sum of £107 6s. 8d. and damages for its detention; (2) alternatively, the sum of £107 6s. 8d. as money had and received."

The facts found by WARRINGTON, J., may be summarised thus. First, the plaintiff is a man who with the assistance of three servants, Arthur Jones, Charles Gordon, and Daniel Turner, was in the month of November, 1908, conducting street betting operations in the neighbourhood of No. 19, Grove Street, Deptford. Secondly, the plaintiff on Nov. 28 received either himself or through his paid servants the sum of money sought to be recovered in this action, and, according to the usual practice, placed this sum (that is, these actual coins) thus received by him, the plaintiff, in the course of this street betting in one of the rooms of No. 19, Grove Street, Deptford. This money was the result of the street betting which I have described above—that is, was the result of a transaction prohibited by the Street Betting Act, 1906. Thirdly, the house, No. 19, Grove Street, was used by the plaintiff not as a betting-house, but as a refuge in case the police came along the street. Fourthly, on the authority of a warrant issued under s. 11 of the Betting Act, 1853, the police raided the house, No. 19, Grove Street, and seized not only betting slips and documents, but also the money in question in this action. The warrant issued under s. 11 does not authorise the seizure of money, but WARRINGTON, J., for the purpose of this case, finds that the detention of the money was lawful as being required for the purposes of the trial—that is, the trial under the indictment for keeping a betting-house. Fifthly, proceedings were taken against the plaintiff, Arthur Jones, the occupier of No. 19, Grove Street, and Charles Gordon and Daniel Turner for using the house as a betting-house. The plaintiff was acquitted, and the others were convicted. Sixthly, there was a suggestion made that the money in question in this action was forfeited under s. 48 of the Metropolitan Police Act, 1839, but WARRINGTON, J., held that no forfeiture had taken place, s. 48 being a penal section the provisions of which had not been strictly carried out. WARRINGTON, J., on the basis of the facts and rulings which I have set forth, says:

"Now, the plaintiff sues the Chief Commissioner of Police for the return of the £107 6s. 8d. In order to establish his title to the money, which is put in issue, he has proved that the money was the result of an unlawful act on his part, and one prohibited by statute; and the defendant relies on this—that, since the plaintiff in proving his title to recover has proved that the money was the result of an illegal transaction, the court has no right to lend him its assistance, and ought to dismiss the action on that ground."

He then cites *Holman v. Johnson* (1) and quotes from the judgment of LINDLEY, L.J., in *Scott v. Brown, Doeing, McNab & Co.* (2) ([1892] 2 Q.B. at p. 728) a passage which runs thus:

"Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him."

A WARRINGTON, J., goes on to say:

"In this case the fact of the mode in which the money is alleged to have become the property of the plaintiff is brought to the notice of the court by the plaintiff himself, and the plaintiff has himself proved that he was engaged in that illegal transaction. In these circumstances I think that I should be departing from the principles which have been laid down if I held that the plaintiff was entitled to recover. It is said that the principle is only applicable where the plaintiff is seeking to enforce a right arising out of contract or quasi-contract, and that it does not extend to a right of property, but I can find no such limitation. . . . Where the illegality is a necessary fact, the principle applies whether the right arises out of contract or in some other way."

C The questions which seem to arise on this judgment are: (i) Does the principle of the maxim *ex turpi causa non oritur actio* apply where the plaintiff is seeking to enforce a right other than a right arising out of contract. (ii) What is the effect of the finding of WARRINGTON, J., as to the plaintiff's property? As to the first question, I do not think that the application of the maxim *ex turpi causa non oritur actio* is limited to cases in which a plaintiff is seeking the assistance of a court of justice for the purpose of enforcing an illegal contract or a contract springing out of an illegal transaction. The maxim clearly is not limited to actions to enforce contracts which by their terms bind the parties to do that which is prohibited and illegal. It extends to actions which *ex facie* are not illegal but which arise out of an illegal transaction. In other words, it applies not only where the contract is on its face illegal, but also where the contract is opposed to public policy as arising out of an illegal transaction. It follows, then, that money won at playing an illegal game cannot be recovered. The action, however, in such a case is an action for a breach of contract arising out of an illegal transaction. The rule of law upon which courts of law refuse their assistance is stated thus in BROOM'S LEGAL MAXIMS (2nd Edn.), p. 578:

F "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has a right to be assisted."

In *Taylor v. Chester* (3) which was a case decided not upon the maxim *ex turpi causa non oritur actio*, but upon the cognate maxim *in pari delicto potior est conditio possidentis*, the plaintiff having deposited the half of a £50 note by way of pledge to secure the payment of money due to the defendant for wine supplied in a brothel to be consumed by prostitutes for the purpose of inciting debauchery, brought an action to recover the half of the £50 banknote, and declared upon a bailment of half of a £50 Bank of England note to be re-delivered upon request, alleging a refusal to re-deliver such half-note, and, secondly, in detinue for the same half-note. The defendant pleaded a pledge to secure money lent which was still due. The plaintiff replied, setting up that the money was lent for the purpose of being expended in the brothel in debauchery and immoral conduct. Judgment was given for the defendant on the ground that the plaintiff could not recover without showing the true character of the deposit, and, that being upon an illegal consideration to which he himself was a party, he was precluded from obtaining the assistance of the law to recover it back. In *Taylor v. Chester* (3) the plaintiff was seeking to recover by the count in detinue his property, and failed because he could only defeat the defendant's plea through the medium and by the aid of an illegal transaction to which he was himself a party, and which was the basis of the replication set up in answer to the plea. In the case now before the court, whether or not it was impossible for the plaintiff in the present case to recover the £107 6s. 8d. without disclosing that it was received by him in the shape of payments or deposits received in the street when he was occupied in the street in street betting contrary to the Street Betting Act, 1906, it is plain that the

plaintiff himself brought this fact to the notice of the court in the statement of his case as plaintiff in the action. *Taylor v. Chester* (3) seems to affirm the proposition that even in a case where the plaintiff is seeking to recover property he may be defeated if to a plea setting up a right to detain the property as security for money lent the plaintiff has to rely by way of replication upon the immoral consideration for the contract. A

There are several cases reported in which the action was for recovery of property, in which the court, although it allowed the plaintiff to recover, yet indirectly affirms the proposition that even an action for right of property may be defeated on the ground *ex turpi causa non oritur actio*. Thus in *Feret v. Hill* (4), which was an action of ejectment, the court allowed the plaintiff to recover notwithstanding the fact that the plaintiff used the premises for immoral purposes and intended to do so at the time he became tenant of the premises; but the decision of the court was based upon the proposition that the estate having passed by the lease could not be divested by a collateral fraud or by the immoral intention of the plaintiff at the time he became lessee, or by immoral use made by him of the premises after he got possession. In *Feret v. Hill* (4) the defendant was quite innocent of the intended user by the lessee. The court treated the intention of the lessee as a collateral matter. I agree that in a sense the court refused to defeat the plaintiff's right of action on the ground that the plaintiff was not seeking to enforce a contract, but to enforce a right of property, but it is plain from an observation of JERVIS, C.J. (15 C.B. at p. 213): "The difficulty is that the agreement was not void at the time of its execution," that the court would have applied the doctrine if it had not held that the matter relied on to prevent the plaintiff recovering was collateral only and did not affect his right of possession or the validity of the conveyance, whereas in the present case the receipt of the money by the plaintiff was illegal at the moment of receipt, and according to the dictum of MELLISH, L.J., in *Taylor v. Bowers* (5) (1 Q.B.D. at p. 300): B D C

"If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out. . . ." F

If this is so it would seem that the men who paid the sums could have recovered the money if they had chosen to abandon the bet before the race was run, but this dictum has been doubted by FRY, L.J., in *Kearley v. Thomson* (6). The dictum of MELLISH, L.J., was that

"if money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." G

The comment of FRY, L.J., is (24 Q.B.D. at p. 746): H

". . . notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this court, yet in a higher tribunal; and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice." I

I only cite that case for the purpose of showing the nature of the property which the plaintiff had in this money.

Taking all the authorities, which I do not think it necessary to quote at length, into consideration, I am of opinion that it is clear that the principle that the court will not assist a plaintiff to recover money which has been obtained in an illegal transaction applies to actions for the recovery of property as well as actions on contracts tainted with illegality. I am also of opinion that this principle

- A** would be applied in cases where the defendant is not a party to the original illegality. An action to recover property will not, in my opinion, be defeated by the application of the principle embodied in the maxim *ex turpi causa non oritur actio*, unless it is an action to recover some specific thing such as could be recovered in an action of trover or detinue. The thing the subject of the action must have been directly acquired through the medium of a transaction which was fraudulent or illegal. It is not sufficient to induce the court to refuse its assistance to a plaintiff that he has acquired the property under a contract which is void in law. The property must have been acquired in an illegal transaction. The fact that the property was acquired by a contract void in law may, as between parties to the transaction under which the property is alleged to have passed to the plaintiff, afford a good defence, but it will not be a ground upon which the court will refuse its assistance. **C** *Primâ facie* it does not seem just that the defendant, the Chief Commissioner of Police, who is a stranger to the transaction, and has given no consideration, should as a result of the court's refusal to assist the plaintiff retain this money for the Police Fund. The effect is that the money is forfeited because the plaintiff received it in the course of a transaction made illegal by the Street Betting Act, 1906, which Act, while it makes several things liable to forfeiture, **D** does not make money seized by the police when arresting persons engaged in street betting liable to forfeiture as is done in the Betting Act, 1853; but the answer seems to be that the question in this case is not whether this person or that person is entitled to the money in question in this action, but whether the plaintiff has by acquiring possession of these specific coins in an illegal transaction lost the right to ask for the assistance of the court. I do not think he can do **E** this even as trustee for the various depositors. The money so long as it was in the plaintiff's hands never ceased to be deposited as security in a transaction made illegal by the Street Betting Act. The ground, if any, upon which the action of the plaintiff must fail is not a mere matter of defence; it is a ground which, whether set up by way of defence or not, the court will act upon. The ground is that the plaintiff has himself—in the course of his case—brought to the notice of **F** the court the fact that the money which he is seeking to recover in this action of detinue was money deposited with him in the course of an illegal transaction of street betting prohibited by the Street Betting Act, 1906. If it had been proved that this money had been deposited to secure to the plaintiff the due payment of a bet on a horse race, and that the money in question remained money tainted with illegality by reason of the purpose of the deposit, I cannot see why the application **G** of the rule *ex turpi causa non oritur actio* should not be applied by the court when invited to assist a plaintiff in such a transaction.

It is said that this would involve the court in enabling a thief or fraudulent bailee of money or property so deposited to get the benefit of his theft or fraud with impunity, and would do so in the case of every detention where such money or property had been stolen, whether the person was the Chief Commissioner of Police **H** or anybody else, but may it not be that in such a case the court would not feel bound to refuse to assist the defendant in an action of detinue, or for money had and received, because the plaintiff and defendant were not in *pari delicto* and because in such case the court would be violating its own principle of not giving the assistance of the court to assist litigants in a case in which the defendant brought the fact to the notice of the court that he avowedly was either relying on theft or **I** fraud, or detaining that which he informed the court he had no title to detain? I do not propose in this case to determine these questions which would arise, because it has been suggested to me that in this case there is no evidence and nothing in the plaintiff's case as stated before WARRINGTON, J., to show under what circumstances or for what purpose the plaintiff received the £107 6s. 8d. There is nothing to prove that it was a deposit and nothing to prove the condition of the deposit, if there was one. The money may have been received in payment of some previous transaction, betting or otherwise, some completed transaction. So I think the judgment of WARRINGTON, J., cannot stand, but I have thought it right

to make the observations I have made on this appeal because I have been allowed A
to read the judgment of FLETCHER MOULTON, L.J., and feel it right to say that I
cannot agree with his views of the application of the doctrine *ex turpi causa*
non oritur actio. *Tenant v. Elliott* (7) and *Farmer v. Russell* (8) throw
a great deal of light on the principles upon which the doctrine *ex turpi causa* is
applied, especially the latter case, but do not in my view militate against the
views which I have expressed as to the application of this doctrine. The result will B
be one in which we all concur—that this appeal should be allowed, and, of course,
with the usual consequences, with costs.

FLETCHER MOULTON, L.J.—The warrant under which the police acted was
issued under the provisions of s. 11 of the Betting Act, 1853. This Act authorises
the police in executing a warrant under it to seize documents relating to racing C
or betting found in a house suspected to be kept or used as a betting-house
contrary to the Act. But it does not authorise them to detain moneys found therein,
so that the fact that they were executing such warrant furnishes no justification
for their seizing or detaining the money in question in this case. It was faintly
suggested by counsel for the defendant that he might have proceeded under s. 48
of the Metropolitan Police Act, 1839, in which case it is arguable that these moneys D
might lawfully have been seized and in certain events confiscated, but it is enough
to say that he did not in fact proceed under such last-minute statute or comply
with the conditions precedent to the issue of the warrant thereunder. It is, there-
fore, not necessary to consider what would have been his powers in such a case,
but I must not be understood to accept the suggestion made by the defendant's
counsel that, even if he had been acting under a warrant so issued, he would E
have been entitled to retain the money found in the house belonging to a person
against whom he failed to obtain a conviction and who (as the plaintiff in this
case) was found by the jury not to be concerned with the keeping of the house as
a gaming-house, or with the betting going on therein. It follows that we may
at once put away from our minds all questions depending on the fact that the
money was taken by the police. They possessed no further or other right to take F
the money and keep it than would have been possessed by any other member of
the public since their powers in such a case depend solely upon the authority given
to them by the warrant which they are executing. It appears that at the trial one
of the policemen suggested that the seizure and detention of the money was neces-
sary for the purposes of the trial. To my mind, there is not the faintest justification
for such a suggestion. The production of actual coins found in the house as G
evidence could render no service which counting the money and depositing to the
amount would not equally render. Nothing could depend on the production at
the trial of the actual coins by which the sum was made up. But in justice to the
Chief Commissioner of Police I must add that, so far as I remember, reliance was
not put upon this point by his counsel in the argument before us. If the money
was actually seized and retained for the purposes of the trial, it was with regard H
to the case against the plaintiff, who was found "Not Guilty," and in such
circumstances the first principles not only of common honesty, but also of common
decency, would require an immediate return to him of that which had been thus
mistakenly seized and detained from him, and I should have been both surprised
and ashamed at a public official in such a position as the Chief Commissioner of
Police attempting to base his title to retain the money on any seizure which the I
result of the trial failed to justify.

We may, therefore, dismiss from our minds the fact that the defendant is an
official of the police. His powers as such do not lend any justification to the
retention of the money. The defence on which he relies would be equally good on
behalf of any person who on going into the room and seeing the money had
pocketed it and defied the plaintiff to recover it from him. This defence does
not rest upon any title or show of title in the defendant, but on an alleged im-
potence on the part of the plaintiff to recover the money from anyone who has

A got hold of it. The defendant does not pretend that he has any right to the money, nor does he in truth deny that it belongs to the plaintiff; but he keeps it because he believes that he may safely do so inasmuch as the courts of the land will refuse to assist the true owner to recover it by reason of the maxim *ex turpi causa non oritur actio*, the money being, in fact, the proceeds of bets made by him under circumstances which constituted him an offender under the Street Betting Act, 1906. In order to do justice to this defence one must examine the provisions of this Act. The operative section [s. 1] renders a person frequenting or loitering in streets or public places for the purpose of betting liable to penalties (and in the case of aggravated or repeated offences to possible imprisonment), and in addition it makes him liable to forfeit all books, cards, papers, and other articles relating to betting which may be found in his possession. It is evident, therefore, that the Act does not forfeit the money found on the offender, nor is it suggested by the respondent that it does. No doubt in respect of the money taken by him in respect of bets he is (as in the case of other moneys paid in respect of wagering transactions) liable to claims under the provisions of the various Gaming Acts. For instance, it may be that the person making the bet with him and paying the deposit may, if he change his mind, and desire to cancel the bet, sue for and recover the deposit as his money. But he would sue in debt and not in detinue. He would have no title to recover the actual coins handed by him to the other party for the purpose of the deposit, nor would the liability of the latter be anything other or different from the ordinary liability of a debtor—namely, to repay the amount of the debt. These considerations show what I should have thought to have been so clear as not to require argument—that the property in the specific coins paid in respect of the bet passed to the person receiving them just as absolutely as in the case of any other payment. There being no forfeiture of the money under the Street Betting Act, 1906, and the property in the coins having passed out of the payer by his own voluntary act of payment, it must be in the receiver, and whatever punishments and liabilities he may incur through his wrongful action in frequenting the streets for the purpose of betting, there is nothing that affects his property in the money received by him. It stands exactly in the same position as any other money that belongs to him, and his paying it into his account at his bank or his changing it for other moneys of an equal amount would be absolutely without effect on his legal position with regard to it.

This being so, I utterly fail to see how the maxim *ex turpi causa non oritur actio* can have any applicability to this case. Here the plaintiff became possessed of the money under circumstances which did not prevent the property passing to him with the possession. He is, therefore, simply in the position of a man suing for money belonging to him which has been taken and is being retained by a person who has no right to it. There is no *turpis causa* in the matter. The money is admittedly money of the plaintiff, and his action to obtain the repayment of it from the defendant rests on nothing but that fact. He is not asking the court to enforce any illegal contract or to grant relief dependent in any way on any illegal transaction on his part, but solely on the unjustifiable detention by the defendant of his money. Could it be pretended that a banker could with impunity appropriate moneys paid in by a customer on the ground that they had been obtained by transactions rendering the customer liable to a penalty, as, for instance, by the sale of goods which did not comply with the requirements of the Merchandise Marks Act, or that in similar circumstances the cashier to whom the money is given to take to the bank could refuse to pay it in and appropriate it to his own use? Yet such cases as these would be stronger cases in favour of the application of the principle than is the present case, for the penalty is attached by the Merchandise Marks Act to the operation of sale, whereas under the Street Betting Act, 1906, the penalty is directed against frequenting and loitering for the purpose of betting, and not against the bets themselves. A bet made in the street is not illegal, and as such has just as much and just as little validity as a transaction as any other bet.

The fact that actual bets have been made by a person prosecuted under the Street Betting Act, 1906, is only relevant as evidence of the purpose for which he was frequenting the street, and the bets do not constitute the offence itself. The law does not avail itself of such lawless methods as the defendant suggests in order to enforce respect of the law. If it intends moneys to be forfeited which are acquired by acts which are prohibited by statute it provides that they shall be so forfeited and to whom they shall go. But I know of no principle of law, or decision, or even dictum, which leaves money which has become the property of an individual liable to be taken and kept with impunity by any person who chances to get hold of it merely because it has been acquired by some wrongful or prohibited act, in which position the judgment appealed from would leave the plaintiff's money in the present case. A B

On broad grounds of principle, therefore, I am of opinion that this appeal must be allowed. But it may be worth pointing out that to dismiss it would be to say that, although under the Street Betting Act, 1906, the money found on a person contravening the Act is not liable to be forfeited, the constable making the arrest (or, indeed, any member of the public present at the time) may pocket and keep for his own private use any money so found. For there is no reason why the policeman should pay it to the Commissioner of Police. He has the rights of an ordinary member of the public, which, according to the judgment of the learned judge, give immunity to the taking and keeping possession of such moneys by reason of the refusal of the law to interfere in respect of them; and seeing that his alleged right to retain the moneys is not put upon his position as a member of the police force, but is declared to be common to all members of the public, the judgment of the learned judge would fully authorise his retaining it for his private use. The refusal to enforce the rights of the plaintiff is either a duty of the court or the reverse. It cannot be capriciously exercised or not as the court may desire so as to draw a distinction between the retention of the moneys by the constable himself or by his superior. C D E

BUCKLEY, L.J.—So far as I can properly do so, I express my regret that I find myself unable to affirm the decision of **WARRINGTON, J.** It might be a wholesome state of the law that money obtained in betting transactions might under circumstances such as those in the present case be seized and confiscated by the police. But that is not the law, nor since 1853 can it be successfully argued that that is the policy of the law. Section 12 of the Betting Act, 1853, did not repeat the provision of s. 48 of the Metropolitan Police Act, 1839, which empowered the police in certain circumstances to seize moneys and securities for money. The Act of 1853 authorises the seizing only of lists, cards, or documents relating to racing or betting found in the house. It is certainly the law that the court will refuse to enforce an illegal contract or obligations arising out of an illegal contract, and I agree that the doctrine is not confined to the case of contract. A plaintiff who cannot establish his cause of action without relying upon an illegal transaction must fail. And none the less is this true if the defendant does not rely upon the illegality. If the court learns of the illegality, it will refuse to lend its aid. The rule is founded, not upon any ground that either party can take advantage of the illegality, as, for instance, the defendant by setting it up as a defence. It is founded on public policy. **LORD MANSFIELD** in *Holman v. Johnson* (1) said (1 Cowp., at p. 343): F G H

"The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." I

But what is the cause of action in the present case? The plaintiff had the property and the possession. His cause of action is exhaustively stated by saying that he sues the defendant for having deprived him of his property. The defendant seeks to say: "True, it is your property, but it ought not to have been your property;

- A you ought not to have got it by or in betting transactions." That is a matter which forms no part of the cause of action. If the property is taken from the plaintiff on that ground, it is taken by confiscation. There is no ground of public policy upon which the defendant should keep that which under no circumstances is his. It may be that the plaintiff never ought to have acquired that property, but having acquired it his cause of action to recover it from the person who deprives him of it
- B arises only from the fact of deprivation. The passage upon which WARRINGTON, J., relied in LINDLEY, L.J.'s judgment in *Scott v. Brown Doeing, McNab & Co.* (2) ([1892] 2 Q.B. at p. 728) does not support the proposition for which the learned judge seeks to use it. The plaintiffs there were basing their action upon a contract which was illegal, and the passage in question is but an elaboration of the maxim *ex turpi causa non oritur actio*. Counsel for the defendant relied upon FRY, L.J.'s
- C words in *Cleaver v. Mutual Reserve Fund Life Association* (9) [1892] 1 Q.B. at p. 156),

"No system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person."

- D Those words bear no relation to the facts of the present case. The plaintiff here is not enforcing any rights directly resulting to him from his carrying on business as a bookmaker; he is not recovering bets; he is seeking to recover from the defendant, who has seized it, money which was his and none the less his because it became his by virtue of a gambling transaction. *Taylor v. Chester* (3) seems to me to be no authority against the plaintiff in the present action. The plaintiff
- E there sued for the detinue of his property—namely, the half of a £50 note. The defendant said: "True, it is yours, but I am entitled to it as mortgagee." The plaintiff replied: "True, you are mortgagee, but the mortgage debt is no debt because it was incurred for immoral purposes." The plaintiff, therefore, could not recover without setting up the illegality of the transaction, and in *pari delicto melior est conditio possidentis*. *Feret v. Hill* (4) is much nearer to the present case. The
- F plaintiff there acquired the premises and used the premises for immoral purposes, but he succeeded in ejectment in maintaining his title to the premises because the property was in him, inasmuch as the estate had passed by the lease. The purposes for which he had acquired the property were not a matter which he had to prove to establish his cause of action. In the present case the court no doubt learned how the plaintiff obtained the property and possession of the money. But, inasmuch
- G as he had in fact both the property and the possession, the way in which he obtained them formed no part of his cause of action. I think the order below must be discharged and judgment given for the plaintiff, with costs.

Appeal allowed.

Solicitors: *Good, Good & Co.; Wontner & Sons.*

H

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

Re EVAN'S AND BETTELL'S CONTRACT

[CHANCERY DIVISION (Parker, J.), July 7, 1910]

[Reported [1910] 2 Ch. 438; 79 L.J.Ch. 669; 103 L.T. 181;
54 Sol. Jo. 680]

Sale of Land—Title—Discharge of incumbrance—Land charged with payment of annuities and legacies—Payment of money into court in administration proceedings—Need of discharging order—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 5.

Where a testator charges land with the payment of annuities and legacies, the payment into court of a sum to cover them made in administration proceedings does not exonerate the land from the charge. A devisee wishing to sell the land discharged from the incumbrance should obtain a discharging order under the Conveyancing Act, 1881, s. 5.

Notes. The Conveyancing Act, 1881, s. 5, has been replaced by the Law of Property Act, 1925, s. 50.

After 1925, where land stands for the time being charged with the payment of any sums voluntarily or in consideration of marriage or by way of family arrangement, the land is settled land (Settled Land Act, 1925, s. 1 (i) (v)) and may be sold either free from such charge under the overreaching provisions contained in that Act, or subject to such charge under the Law of Property (Amendment) Act, 1926, s. 1, without a court order being required.

Considered; *Bowen v. I.R.Comrs.*, [1937] 1 All E.R. 607. Applied: *Andrews v. Hopkinson*, [1956] 3 All E.R. 422.

As to discharge of incumbrances, see 34 HALSBURY'S LAWS (3rd Edn.) 340 et seq.; and for cases see 40 DIGEST (Repl.) 293 et seq. For the Law of Property Act, 1925, s. 50, see 20 HALSBURY'S STATUTES (2nd Edn.) 544 et seq.

Cases referred to:

- (1) *Re Parry, Scott v. Leak* (1889), 42 Ch.D. 570; 61 L.T. 380; 38 W.R. 226; 89 Digest 204, 938.
- (2) *Harbin v. Masterman*, [1896] 1 Ch. 351; 65 L.J.Ch. 195; 73 L.T. 591; 44 W.R. 421; 12 T.L.R. 105; 40 Sol. Jo. 129, C.A.; 89 Digest 144, 392.

Originating Summons taken by vendors for a declaration that a good title had been shown by them and requisitions sufficiently answered.

By his will, dated Feb. 19, 1902, William Bettell, after appointing his wife Ann Bettell and Thomas Scarth executors and trustees thereof and making sundry specific bequests and legacies, some payable on the death or remarriage of his wife, as to the residue of his real and personal estate he directed his trustees to invest such part thereof as should consist of money at his death in such funds as trustees should by law for the time being be empowered to invest trust moneys, and out of the net income to arise therefrom and from the remainder of his real and personal estate, which he desired should be retained by his trustees, to pay certain annuities and contingent legacies and subject thereto directed that the residue should be held upon certain trusts for his two sons, William Bettell and Clarence Bettell. The testator died on Dec. 30, 1904, and his will was duly proved by his executors. By an indenture dated Feb. 2, 1905, and made between the sons William Bettell of the one part and Clarence Bettell of the other, it was agreed that the residuary real and personal estate of the testator should be deemed to have been left by him on trust for the two sons in equal shares subject to the annuities and legacies mentioned therein. By an order of JOYCE, J., dated Dec. 3, 1909, and made in proceedings for the administration of the estate of William Bettell and in the matter of the said indenture of Feb. 2, 1905, it was ordered (inter alia) that the trustees, Ann Bettell and Thomas Scarth should transfer the sums of £17,000 and £14,000 Consols into court to answer the annuities and legacies mentioned therein, and the

A court declared that the annuitants named were to be entitled, in case the income of the funds to the credit of the account mentioned should be at any time insufficient to make the payments directed, to resort to the capital of the funds to make good such deficiencies; and the trustees were ordered after such transfer into court and the payment or retainer of all other costs, charges, and expenses properly incurred by them to transfer and pay to William Bettell one moiety and to Clarence Bettell the other moiety of the testator's estate and income thereof. The said sums were duly paid into court by the trustees, and by an indenture dated April 18, 1910, in pursuance of the order they conveyed to the two sons for their use as tenants in common in fee simple the residuary real estate of the testator. By a memorandum of May 6, 1910, William Bettell and Clarence Bettell agreed to sell some of this real estate. The purchasers delivered a requisition alleging that the property, as forming part of the residuary estate of the testator was still, notwithstanding the order of Dec. 3, 1909, subject to and charged with the annuities and legacies given by the will. As the purchasers persisted in the requisition, the vendors took out this summons under the Vendor and Purchaser Act, 1874, [repealed] for a declaration that a good title had been shown by them, and that the requisitions and objections had been sufficiently answered.

D J. G. Wood for the vendors.
W. M. Cann for the purchasers.

PARKER, J.—In my opinion the events which have happened have not exonerated the real estate comprised in the will from the charge thereby created in favour of the annuitants and the persons who, in certain future and contingent events, become entitled to legacies. I think that the jurisdiction of the court exercised in *Re Parry*, *Scott v. Leak* (1) and *Harbin v. Masterman* (2) is a jurisdiction founded on administration only. When there is an annuity charged on the income of residuary personal estate and real estate, which personal estate is amply sufficient for providing for all rights of the annuitant, the court often, in the exercise of its administrative jurisdiction, sets apart a fund to answer the annuity and distributes the rest of the estate. But, as NORTH, J., says in *Re Parry* (1), that exercise of jurisdiction does not relieve the rest of the estate; and, if the annuity fund fails owing to unforeseen circumstances to answer the annuity, the annuitant may follow the property into the hands of the residuary legatees, since the residuary personality is still subject to the annuities. I am not sure that this jurisdiction has ever been, or could well be, exercised in the case of real estate. In the present case the residuary estate consists of personalty invested in securities and real estate. There is no trust for sale, and, subject to the annuities, the realty belongs to the residuary devisees under the will. The residuary personalty was amply sufficient to pay the legacies and annuities, and the court, in the exercise of its jurisdiction, has set aside a fund to answer the legacies and annuities, and has given leave to divide the personalty and realty. The real estate has been put up to sale and the purchaser takes the objection that a good title has not been shown, and that the real estate is still subject to the annuities given by the will. In my opinion that contention is right, and the realty is not released from the annuities and beneficial legacies. The difficulty, however, can be got over if the money is paid into court in the administration action and application is made in that action for an order as provided by s. 5 of the Conveyancing Act, 1881. In that action the court will declare the land free from the charge. It will be best, before making an order, to see what can be done. I will declare that the land comprised in the contract is still, despite the administration, subject to a charge in favour of the annuitants as legatees in the will mentioned.

Solicitors: Corbin, Greener & Cook, for R. A. Wilkinson, Barnsley; Horsley & Weightman.

[Reported by T. BERESFORD, ESQ., Barrister-at-Law.]

YONGE v. TOYNBEE

[COURT OF APPEAL (Vaughan Williams and Buckley, L.JJ., and Swinfen Eady, J.), November 12, 1909]

[Reported [1910] 1 K.B. 215; 79 L.J.K.B. 208; 102 L.T. 57;
26 T.L.R. 211]

Solicitor—Costs—Personal liability of solicitor to pay—Innocent misrepresentation of client's authority—Cessation of authority not known by solicitor—Implication of existence of authority.

The liability of a person who has professed to act as the agent of another arises (a) if, in so doing, he has been fraudulent, and (b) if he has without fraud untrue represented that he had authority from his principal to act when he had not got that authority, but also (c) where he innocently misrepresents that he has authority where the fact is either (i) that he never had authority, or (ii) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge. His liability in these cases arises, not from any wrong or omission of right on his part, but from implied contract—an implied undertaking or promise—made by him that the authority which he professes to have does in fact exist.

On Aug. 21, 1908, the defendant, against whom the plaintiff was threatening to institute an action for libel, instructed a firm of solicitors to act for him. On Oct. 8, unknown to his solicitors, the defendant was certified to be insane. On Sept. 30 the solicitors undertook to accept service of the writ on the defendant's behalf and enter an appearance for him, and on Nov. 6 they entered an appearance. The plaintiff discontinued this action and on Dec. 19 brought a second action against the defendant. On Dec. 21 the defendant's solicitor undertook to accept service and enter an appearance in that action and on Dec. 30 an appearance was entered. In January and February, 1909, pleadings were delivered by both sides. On April 5 the solicitors for the first time learned of the defendant's incapacity. The plaintiff then took out a summons asking that the appearance and all subsequent proceedings in the action be set aside and that the defendant's solicitors might be ordered to pay personally to the plaintiff all the costs of her action against the defendant up to date, on the ground that they had no authority to appear and defend.

Held: although the defendant's solicitors had acted throughout in good faith and without knowledge of the defendant's mental condition, they were personally liable to pay the costs upon an implied warranty or contract that they had an authority, which in fact they had not.

Collen v. Wright (1) (1857) 8 E. & B. 647 applied.

Smout v. Ilbery (2) 10 M. & W. 1 doubted.

Notes. Referred to: *Simmons v. Liberal Opinion, Re Dunn*, [1911-13] All E.R.Rep. 281; *Haxby v. Wood Advertising Agency* (1913), 109 L.T. 946; *Fernée v. Gorlitz*, [1915] 1 Ch. 177; *Re Wingfields*, [1923] 2 K.B. 112; *Edwards v. Porter*, [1925] A.C. 1; *Crowther v. Crowther*, [1951] 1 All E.R. 113.

As to the effect of a solicitor acting without his client's authority, and as to his liability to be ordered to pay costs, see 36 HALSBURY'S LAWS (3rd Edn.) 76, 77, 198-201. For cases see 42 DIGEST 63, 64, 337 et seq.

Cases referred to:

- (1) *Collen v. Wright* (1857), 7 E. & B. 301; 26 L.J.Q.B. 147; affirmed; 8 E. & B. 647; 27 L.J.Q.B. 215; 30 L.T.O.S. 209; 4 Jur.N.S. 357; 6 W.R. 123; 120 E.R. 241, Ex. Ch.; 1 Digest (Repl.) 758, 2957.
- (2) *Smout v. Ilbery* (1842), 10 M. & W. 1; 12 L.J.Ex. 357; 152 E.R. 357; 1 Digest (Repl.) 715, 2638.
- (3) *Polhill v. Walter* (1832), 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43; 1 Digest (Repl.) 760, 2967.

- A** (4) *Firbank's Executors v. Humphreys* (1886), 18 Q.B.D. 54; 56 L.J.Q.B. 57; 56 L.T. 36; 35 W.R. 92; 3 T.L.R. 49, C.A.; 1 Digest (Repl.) 758, 2960.
- (5) *Starkey v. Bank of England*, [1903] A.C. 114; 72 L.J.Ch. 402; 88 L.T. 244; 51 W.R. 513; 19 T.L.R. 312; 8 Com. Cas. 142, H.L.; 1 Digest (Repl.) 763, 2988.
- B** (6) *Lewis v. Nicholson* (1852), 18 Q.B. 503; 21 L.J.Q.B. 311; 19 L.T.O.S. 122; 16 Jur. 1041; 118 E.R. 190; 1 Digest (Repl.) 720, 2665.
- (7) *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43; 69 L.J.Ch. 20; 81 L.T. 437; 48 W.R. 92; 16 T.L.R. 25; 7 Mans. 74; 1 Digest (Repl.) 761, 2972.
- (8) *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (1879), 13 Ch.D. 310; 49 L.J.Ch. 231; 41 L.T. 637; 28 W.R. 217, C.A.; 42 Digest 64, 566.
- C** (9) *Fricker v. Van Grutten*, [1896] 2 Ch. 649; 65 L.J.Ch. 823; 75 L.T. 117; 45 W.R. 53; 40 Sol. Jo. 701, C.A.; 42 Digest 64, 567.
- (10) *Derry v. Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, 185.
- (11) *Anon.* (1698), 1 Salk. 86; 91 E.R. 81; 42 Digest 60, 525.
- (12) *Stanhope v. Firmin* (1836), 3 Bing.N.C. 301; 4 Scott, 39; 2 Hodg. 253; 6 L.J.C.P. 12; 132 E.R. 426; sub nom. *Stanhope v. Eavery*, 5 Dowl. 357; 42 Digest 61, 527.
- D** (13) *Bayley v. Buckland* (1847), 1 Exch. 1; 2 New Pract. Cas. 318; 16 L.J.Ex. 204; 42 Digest 64, 560.
- (14) *Robson v. Eaton* (1785), 1 Term. Rep. 62; 99 E.R. 973; 42 Digest 63, 559.
- (15) *Hubbart v. Phillips* (1845), 2 Dow. & L. 707; 13 M. & W. 702; 1 New Pract. Cas. 232; 14 L.J.Ex. 103; 153 E.R. 294; Ex. Ch.; 42 Digest 338, 3819.
- E** (16) *Reynolds v. Howell* (1873), L.R. 8 Q.B. 398; 42 L.J.Q.B. 181; 29 L.T. 209; 22 W.R. 18; 42 Digest 48, 391.
- (17) *Re Margetson and Jones*, [1897] 2 Ch. 314; 66 L.J.Ch. 619; 76 L.T. 805; 45 W.R. 645; 41 Sol. Jo. 625; 42 Digest 279, 3137.

Also referred to in argument:

- F** *Halbot v. Lens*, [1901] 1 Ch. 344; 70 L.J.Ch. 125; 83 L.T. 702; 49 W.R. 214; 45 Sol. Jo. 150; 1 Digest (Repl.) 761, 2970.
- Beattie v. Lord Ebury* (1872), 7 Ch. App. 777; 41 L.J.Ch. 804; 27 L.T. 398; 20 W.R. 994, L.J.J.; affirmed (1874), L.R. 7 H.L. 102; 44 L.J.Ch. 20; 30 L.T. 581; 38 J.P. 564; 22 W.R. 897, H.L.; 1 Digest (Repl.) 762, 2976.
- Merry v. Nickalls* (1872), 7 Ch. App. 733; 27 L.T. 12; affirmed sub nom. *Nickalls v. Merry* (1875), L.R. 7 H.L. 530; 45 L.J.Ch. 575; 32 L.T. 623; 23 W.R. 663, H.L.; 42 Digest 821, 308.
- Nurse v. Durnford* (1879), 13 Ch.D. 764; 49 L.J.Ch. 229; 41 L.T. 611; 28 W.R. 145; 42 Digest 64, 565.
- Geilinger v. Gibbs*, [1897] 1 Ch. 479; 66 L.J.Ch. 230; 76 L.T. 111; 45 W.R. 315; 41 Sol. Jo. 243; 42 Digest 338, 3820.
- H** *Underwood, Son and Piper v. Lewis*, [1894] 2 Q.B. 306; 64 L.J.Q.B. 60; 70 L.T. 833; 42 W.R. 517; 10 T.L.R. 465; 38 Sol. Jo. 479; 9 R. 440, C.A.; 42 Digest 51, 415.

Appeal by the plaintiff from the refusal of SUTTON, J., sitting in chambers, to order the defendant's solicitors to pay the plaintiff's costs of the action.

- 1** *Shearman, K.C.*, and *Ernest Todd* for the plaintiff.
G. A. Scott for Wontner & Sons, the defendant's solicitors.

Cur. adv. vult.

Dec. 21, 1909. The following judgments were read.

BUCKLEY, L.J.—The interesting and important question in this case is as to the extent to which the principle of *Smout v. Ilbery* (2) remains good law after the decision in *Collen v. Wright* (1).

In *Smout v. Ilbery* (2), ALDERSON, B., in giving the judgment of the court, dealt with the authorities under three heads. First, the case where the agent made a fraudulent misrepresentation as to his authority with an intention to deceive. In such case the agent is, of course, personally responsible. Secondly, the case where the agent, without fraud but untrue in fact, represented that he had authority when he had none, instancing under this head *Polhill v. Walter* (3). In that case A., having no authority from B. to accept a bill on his behalf, did accept it as by his procurement, bona fide believing that B. would retrospectively approve that which he was doing. In such case, again, the agent is personally liable, for he induced the other party to enter into a contract on a misrepresentation of a fact within his own knowledge. The third class is where the agent bona fide believes that he has, but in fact has not, authority. This third class the learned baron seems to subdivide into two heads—the first where the agent never had authority, but believed that he had (e.g., when he acted on a forged warrant of attorney which he thought to be genuine); and the second where the agent had in fact full authority originally, but that authority had come to an end without any knowledge or means of knowledge on the part of the agent that such was the fact. The latter was the state of facts in *Smout v. Ilbery* (2). I understand *Smout v. Ilbery* (2) not to dispute that in the former of these last two cases (that is, where the agent never had authority) he is liable, but to hold that in the latter (viz., where he originally had authority, but that authority has ceased without his having knowledge or means of knowledge that it has ceased) he is not liable. The principle is stated in the following words (10 M. & W. at p. 11):

"If, then, the true principle derivable from the case is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come."

It seems to me that, if that principle be the true principle, then the former of the two last-mentioned cases ought to have been resolved in the same way as the latter. I can see no distinction in principle between the case where the agent never had authority and the case where the agent originally had authority but that authority had ceased without his knowledge or means of knowledge. In the latter case, as much as in the former, the proposition, I think, is true—that without any mala fides he has at the moment of acting represented that he had an authority which in fact he had not. In my opinion he is then liable on an implied contract that he had authority whether there was fraud or not.

That this is the true principle is, I think, shown by passages which I will quote from judgments in three which I have selected out of the numerous cases upon this subject. In *Collen v. Wright* (1), WILLES, J., in giving the judgment of the court, uses the following language (8 E. & B. at pp. 657, 658):

"I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. . . . The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist."

- A This language is equally applicable to each of the two classes of cases to which I have referred. The language is not, in my opinion, consistent with maintaining that which *Smout v. Ilbery* (2) had laid down as the true principle—that there must be some wrong or omission of right on the part of the agent in order to make him liable. The question is not as to his honesty or bona fides. His liability arises from an implied undertaking or promise made by him that the authority
- B which he professes to have does in point of fact exist. I can see no difference of principle between the case in which the authority never existed at all and the case in which the authority once existed and has ceased to exist.

In *Firbank's Executors v. Humphreys* (4) the rule is thus stated by LORD ESHER, M.R. (18 Q.B.D. at p. 60):

- C “The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.”
- D Lastly, LORD DAVEY in *Starkey v. Bank of England* (5) ([1903] A.C. at p. 119), after stating that the rule extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person, rejects the argument that the rule in *Collen v. Wright* (1) does not extend to cases where the supposed agent did not know that he had no authority and had not the means of finding out,
- E cites LORD CAMPBELL's language in *Lewis v. Nicholson* (6) (18 Q.B. at p. 511) that the agent

“is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not.”

- F and concludes by saying ([1903] A.C. at p. 119) that in his opinion

“it is utterly immaterial for the purpose of the application of this branch of the law whether the supposed agent knew of the defect of his authority or not.”

- The result of these judgments, in my opinion, is that the liability of the person who professes to act as an agent arises (a) if he has been fraudulent; (b) if he has without fraud untruly represented that he had authority when he had not, and (c) also where he innocently misrepresents that he has authority where the fact is either (i) that he never had authority, or (ii) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge. Such last-mentioned liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect in his authority or not. This implied contract may, of course, be excluded by the facts of the particular case. If, for instance, the agent proved that at the relevant time he told the party with whom he was contracting that he did not know whether the warrant of attorney under which he was acting was genuine or not, and would not warrant its validity, or that his principal was abroad and he did not know whether he was still living, there will have been no representation upon which the implied contract will arise. This may have been the ratio decidendi in *Smout v. Ilbery* (2) as expressed in the passage (10 M. & W. at p. 11):
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“The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties.”

This seems to be the ground upon which STORY ON AGENCY, s. 265 A, approves the decision. The husband had left England for China in May, 1839, a time in the history of the world when communication was not what it is now, and the court

seems to have decided upon the ground that the butcher who supplied the goods knew that the facts were such that the wife did not because she could not take upon herself to affirm that he was alive. If so, there was no implied contract. The principle, as stated in the words I have quoted, may have been meant to be, but is not in words, rested upon that ground; and if it is to be understood, as it seems to have been understood in *Salton v. New Beeston Cycle Co.* (7), it is not, I think, consistent with *Collen v. Wright* (1). The true principle, as deduced from the authorities I have mentioned, rests, I think, not upon wrong or omission of right on the part of the agent, but upon implied contract. A B

The facts here are that the solicitors originally had authority to act for Mr. Toynbee, that that authority ceased by reason of his unsoundness of mind, that subsequently they, on Oct. 30, 1908, undertook to appear, and on Nov. 6, appeared, in the first action, and after that was discontinued did on Dec. 22 undertake to appear, and did on Dec. 30 enter an appearance, in the second action, and that they subsequently, on Feb. 22, 1909, delivered a defence pleading privilege and denying the slander, and did not until April 5 inform the plaintiff that their client had become of unsound mind. During all this time they were putting the plaintiff to costs, and these costs were incurred upon the faith of their representation that they had authority to act for the defendant. They proved no facts addressed to show that implied contract was excluded. It has been pressed upon us that a solicitor is an agent of a special kind with an obligation towards his client to continue to take on his behalf all proper steps in the action. The particular nature of his agency is not, I think, very material. On the other hand, it must be borne in mind that, after Aug. 21, when the defendant Toynbee wrote to the plaintiff's solicitors referring then to Wontner & Sons, the plaintiff could not, consistently with professional etiquette, communicate personally with the defendant. During the period from August, 1908, to April, 1909, the solicitors had the means of knowing and did not in fact ascertain the fact that the defendant had become of unsound mind. In the interval they did acts which amounted to representations on their part that they were continuing to stand in a position in which they were competent to bind the defendant. This was not the case. They are liable, in my judgment, upon an implied warranty or contract that they had an authority which they had not. For these reasons, I think that the plaintiff is entitled to succeed, and to have an order against the solicitors for damages, and the measure of damage is, no doubt, the amount of the plaintiff's costs thrown away in the action. The appeal, therefore, should be allowed, with costs here and below. C D E F

SWINFEN EADY, J.—The plaintiff, on Oct. 26 last, applied to the master that the appearance and all subsequent proceedings in the action might be struck out, and that Wontner & Sons, the solicitors for the defendant, might be ordered to pay the plaintiff's costs of the action down to date. The application was supported by an affidavit made by a clerk to the plaintiff's solicitors, from which it appears that the writ was issued on Dec. 19, 1908, and that Wontner & Sons undertook to appear for the defendant, and duly entered an appearance on Dec. 30. Paragraph 5 of that affidavit is as follows: G H

"On April 5, 1909, Messrs. Wontner called on me, and informed me that the said defendant, Harry Valpy Toynbee, had been certified, and was then lawfully detained as a person of unsound mind not so found by inquisition, and I have since ascertained that he was so certified and detained on Oct. 8, 1908, [that is, before the writ in either action was issued], and that on Feb. 26, 1909, an order was made in lunacy appointing his wife, Sarah Edith Toynbee, receiver of his estate with certain of the powers of a committee thereof. Until Messrs. Wontner & Sons so informed me of Mr. Toynbee's condition on April 5, 1909, I was unaware that he was of unsound mind, although they had more than once told me that he was in poor health and was unable to attend to business matters." I

A The master made an order as asked, except that he refused to order Messrs. Wontner to pay the costs of the action. The plaintiff appealed to the judge against this refusal, and the judge affirmed the master.

The plaintiff now appeals to this court, and asks for an order that Messrs. Wontner may be ordered to pay the costs of the action down to date. No suggestion is made that Wontner & Sons were aware of the unsoundness of mind of
B the defendant before April 5, 1909, nor is their good faith in any way impugned. The plaintiff contended that, by giving an undertaking to appear for the defendant and by entering an appearance, Wontner & Sons represented that they had authority to act as the defendant's solicitors, whereas by reason of the defendant's unsoundness of mind, occurring at a date antecedent to the action, they had not in fact any authority from him to enter an appearance on his behalf, or to
C give any undertaking to appear, and are, therefore, liable for their unauthorised acts. Wontner & Sons contended that in August, 1908, when the defendant was of sound mind, they received authority to represent the defendant, and did represent him, in respect of the matters to which the action relates, and that they were not aware and by due diligence could not have ascertained that their authority had been determined, and they rely upon *Smout v. Ilbery* (2) and *Salton v. New Beeston*
D *Cycle Co.* (7) as determining that under such circumstances they are not under any liability for the costs incurred by the other side. In my opinion the material date to consider is Dec. 30, 1908, when appearance was entered. That was the date upon which Wontner & Sons represented that they had authority to defend the action on behalf of the defendant, upon which representation the plaintiff has acted to her prejudice by continuing the legal proceedings which have so far
E proved abortive. On this view the respondents are not protected by the principle of *Smout v. Ilbery* (2), and they are simply in the position of having acted in good faith, but without authority. Under such circumstances good faith alone will not protect them, and they are liable to pay the costs of the party misled: *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (8); see also *Fricker v. Van Grutten* (9).

F If, however, contrary to my opinion, the true view is that the time with reference to which the point is to be decided whether the solicitors had originally authority to defend the action in August, 1908, when they were instructed to act for defendant, then it becomes necessary to consider what is the result of their continuing to act upon an authority which they once had, but which has determined without their knowledge. Where an agent represents that he has authority to do a particular
G act, and he has not such authority, and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty that he had the authority which he professed to have. It would seem to follow from this, in principle, that, where the authority upon which an agent is professing to act is a continuing authority, there is a continuing representation by him that he has authority to do the series of acts, and an implied
H contract or warranty that he possesses such authority. In *Firbank's Executors v. Humphreys* (4) the law is thus stated by LORD ESHER, M.R., (18 Q.B.D. at p. 60):

I "The principle of *Collen v. Wright* (1) extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred."

LINDLEY, L.J., said (*ibid.* at p. 62):

"Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this

general rule there is at least one well-established exception, viz., where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes."

Now this principle is, in my judgment, equally applicable whether the authority which the agent assumes extends to one act only, or to a series of acts; and, in the latter case, if some only of the acts are unauthorised by reason of an authority having determined, there is no reason why the principle should not extend to those. The fact that the earlier acts of the series were within the authority should make no difference as regards the later unauthorised acts.

The contention of the respondents is inconsistent with the opinion expressed by LORD DAVEY in the House of Lords in *Starkey v. Bank of England* (5). LORD DAVEY said ([1903] A.C. at p. 119):

"The whole stress of [Mr. Upjohn's] argument has been to show that this case is not an exception from the rule as to actions of deceit, and that the rule as laid down in *Collen v. Wright* (1) and other cases which need not be enumerated, does not extend to cases where the supposed agent did not know that he had no authority and had not the means of finding out. . . . I am of opinion that it is utterly immaterial for the purpose of the application of this branch of the law whether the supposed agent knew of the defect of his authority or not, and indeed that is the very doctrine which is asserted by STORRY, J., in the first edition as well as in subsequent editions of his work on AGENCY to which a reference has been made."

And LORD LINDLEY stated that the decision in *Firbank's Executives v. Humphreys* (4) was sound, thus repeating in the House of Lords what he had previously said in that case in the Court of Appeal, to which I have already referred. LORD HALSBURY expressed the same view, citing with approval some of the original judgments in *Collen v. Wright* (1), which were affirmed in the Exchequer Chamber, laying down that when a person purports to act as agent he promises or warrants that he is what he represents himself to be, and can be sued on the promise or warranty, although he believed it to be true. LORD HALSBURY also points out that this principle is unaffected by the decision in *Derry v. Peek* (10).

Having regard to the authorities to which I have referred, I am of opinion that the distinction acted upon by STIRLING, J., in *Salton v. New Beeston Cycle Co.* (7) is not a sound one, namely, the distinction between the period before and that after the date at which the solicitor knew, or by the exercise of due diligence might have known, of the revocation of his authority—the principle that there must be some wrong or omission of right on the part of an agent, for the time being acting without authority, to make him personally liable. In my judgment, *Smout v. Ilbery* (2) can no longer be regarded as law, if and so far as it decided that an agent continuing to act without knowledge of the revocation of his authority is not under liability to the other party for his warranty or representation of authority.

I wish to add that in the conduct of litigation the court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one. At one time the common law courts acted very firmly upon the view that, if an attorney took upon himself to sue or defend, the courts would presume his authority and not inquire into it; so much so that, if an attorney (being a solvent person) without authority instituted or defended proceedings, the court would not interfere, but left the party injured to his remedy in damages against the attorney.

- A In an anonymous case, in *SALKELD* (11), *HOLT*, C.J., said (1 Salk. at p. 86):
"The course of this court is, where an attorney takes upon him to appear, the court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him."
- B See also *Stanhope v. Eavery* (12); *Bayley v. Buckland* (13). Subsequently, and in consequence of LORD MANSFIELD's decision in *Robson v. Eaton* (14), the common law courts took a different view, and stayed the unauthorised action, and made the attorney pay the costs: *Hubbart v. Phillips* (15); *Reynolds v. Howell* (16). The manner in which business is ordinarily conducted requires that each party should be able to rely upon the solicitor of the other party having obtained a proper authority before assuming to act. It is always open to a solicitor to communicate as best he can with his own client, and obtain from time to time such authority and instructions as may be necessary. But the solicitor on the other side does not communicate with his opponent's client, and, speaking generally, it is not proper for him to do so, as was pointed out by KEKEWICH, J., in *Re Margetson and Jones* (17). It is, in my opinion, essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client; if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorised in what he said or did, and it would be impossible to conduct legal business upon the footing now existing; and, whatever the legal liability may be, the court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority. In my opinion, an order ought now to be made in accordance with the notice of appeal.
- E

VAUGHAN WILLIAMS, L.J.—Reluctantly, and not without doubt, I have yielded to the views expressed by my brethren. I concur, and have come to the conclusion that we must reverse the decision of *SUTTON*, J., dismissing the plaintiff's appeal against the decision of MASTER WILBERFORCE, refusing to order *Wontner & Sons* to pay all costs of the action against the defendant *Toynbee*, and must allow this appeal. In the case before us there was on the argument of the appeal no dispute as to the facts. It was agreed that, whether one regards the first writ or the second writ, there were in themselves sufficient general instructions to justify the appearance to both writs, but it is said that the lunacy of the defendant put an end to the instructions. If the authority was determined by the lunacy, I fear that as to all subsequent costs we must hold the solicitors, however innocent of knowledge, liable. It is, I believe, an extension of the law to hold that a solicitor is responsible where he had authority originally, but the authority is determined by lunacy or death without the solicitor's knowledge. I do not think it necessary to hold that *Smout v. Ilbery* (2) has been overruled by *Collen v. Wright* (1), for I think that the judgment of *ALDERSON*, B., is overridden by the words at the end of his judgment showing that the judgment is based on the relations in law of husband and wife existing at the date when the decision was given. I have only to add that, if there had been a contest as to fact before us, as there seems to have been at chambers, I should have thought it a better course to leave the plaintiff to her action rather than dispose of the matter on a summary disciplinary order. The judgment is that the appeal be allowed with costs here and below.

I

Appeal allowed.

Solicitors: *Wood, Bigg & Nash* for *J. H. Yonge*, Worcester; *Wontner & Sons*.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

- A** *Norval v. Pascoe* (1864), 4 New Rep. 390; 34 L.J.Ch. 82; 10 L.T. 809; 28 J.P. 548; 10 Jur.N.S. 792; 12 W.R. 973; 34 Digest 697, 878.
Rogers v. Hosegood, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, 2769.
Anon. (1587), Godb. 120; 78 E.R. 73; sub nom. *Purfrey's Case*, Moore, K.B. 243; 31 Digest (Repl.) 151, 2894.
- B** *Raymond v. Fitch* (1835), 2 Cr.M. & R. 588; 1 Gale 337; 5 Tyr. 985; 5 L.J.Ex. 45; 150 E.R. 251; 2 Digest (Repl.) 140, 1088.
The Prior's Case (1368), Co. Litt. 385a; 1 Roll. Abr. 520.
Spencer's Case (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, 2907.
Milnes v. Branch (1816), 5 M. & S. 411; 105 E.R. 1101; 31 Digest (Repl.) 240, 3745.
- C** *Chesterfield and Midland Silkstone Colliery Co., Ltd. v. Hawkins* (1865), 3 H. & C. 677; 34 L.J.Ex. 121; 12 L.T. 427; 11 Jur.N.S. 468; 13 W.R. 841; 159 E.R. 698; 12 Digest (Repl.) 45, 232.
Lord Southampton v. Brown (1827), 6 B. & C. 718; 5 L.J.O.S.K.B. 253; 108 E.R. 615; 31 Digest (Repl.) 367, 4984.
Spicer v. Martin (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 37 W.R. 689, H.L.; 40 Digest (Repl.) 386, 2744.
- D** *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.

Consolidated Appeals by the defendants from a decision of the Court of Appeal, reported sub nom. *Forster v. Elvet Colliery Co., Ltd.* ([1908] 1 K.B. 629), affirming judgments of RIDLEY, J.

- E** In 1871 the predecessors in title of the Ecclesiastical Commissioners conveyed to one John Forster in fee simple certain lands in the county of Durham, reserving all mines with power to work the minerals from below, making reasonable compensation for such damage as might be occasioned to the surface. In 1887 the Ecclesiastical Commissioners granted to one Thomas Crawford a mining lease of seams of coal lying under the lands conveyed to Forster and under adjoining lands.
- F** The lease contained the following covenant on the part of the "lessee," which expression by the terms of the lease was to include his executors, administrators, and assigns, unless such construction was excluded by the sense or the context:

G "And the said lessee hereby further covenants with the said lessors, and as separate covenants with others the owners or owner, occupiers or occupier for the time being of the said lands hereinbefore described, or any part thereof, or of any building standing or hereafter during the continuance of the said demise to be erected thereon . . . that the said lessee shall and will from time to time pay to the said lessors and other the covenantees or the covenantee compensation either annual or otherwise for all or any of the damage done or occasioned by the said lessee in or by reason of the winning or working of the mines or seams of coal hereby demised or any part thereof, or the exercise of any of the powers or liberties hereinafter contained. Any such compensation whether annual or otherwise, if payable to the lessors or to any other persons or person entitled or willing to have the sum so settled, to be settled in case of dispute by arbitration in manner hereinafter provided."

H

- I** In 1896 Crawford's lease was assigned with the assent of the Ecclesiastical Commissioners to a company called the Elvet Colliery Co., Ltd., which company covenanted to indemnify the trustees of Forster, who had died in 1900, against the payment of the rents and breaches of the covenants contained in the lease of 1887. In 1906 a serious subsidence had taken place causing considerable damage to the surface of the land and to the buildings on it, and several actions were commenced by surface owners to recover compensation from the trustees and executors of Crawford and from the colliery company, which in 1907 went into liquidation.

The plaintiffs in the first action were the trustees and devisees under the will of Forster. The plaintiffs in the other action, Quin, Seed and Morgan, were owners of

parts of the surface who had acquired their titles since the date of the lease. The substantial defendants were the legal representatives of Crawford. A

RIDLEY, J., gave judgment for the plaintiffs against the defendants, and the Court of Appeal affirmed his decision. The defendants appealed to the House of Lords.

Tindal Atkinson, K.C., and Compston for the appellants.

Scott Fox, K.C., and Simey for the respondents, Forster's trustees.

Manisty, K.C., and Meynell for the other respondents. B

The House took time for consideration.

Dec. 8, 1908. The following opinions were read.

LORD LOREBURN, L.C.—I have had the advantage of reading the opinion which is about to be delivered by LORD MACNAGHTEN, and I have nothing to add to it. C

LORD MACNAGHTEN stated the facts, and continued.—It is admitted that the mines have been worked so as to occasion damage to the surface of the lands conveyed to Forster. This action has been brought to recover compensation. The respondents are devisees of Forster and his successors in title. The substantial appellants are the legal personal representatives of Crawford, who died in November, 1900. The defence is twofold. In the first place the appellants say that Forster's assigns cannot take advantage of the covenant because the surface owners were not parties to the indenture in which the covenant is contained. Secondly, they say that the covenant does not run with the land and that, therefore, Forster's assigns could not have had the benefit of the covenant even if Forster himself had been named a party to the indenture. The Court of Appeal rejected both defences. In my opinion they were right. The first objection is, I think, answered by s. 5 of the Real Property Act, 1845. That section enacts that a stranger may take the benefit of a covenant respecting any tenements and hereditaments, although the taker be not named a party to the indenture. The Court of Appeal held that that provision only applied to covenants running with the land. They held, however, that this covenant did run with the land, and so was within the section. Whether the section must be confined to covenants running with the land may, perhaps, be doubted. The point, however, is not, I think, material in the present case, because I agree with the Court of Appeal in thinking that the covenant in question is one which runs with the land. The question is, Does this covenant affect the nature, quality, or value of the land, or is it a covenant simply collateral? It is not, I think, simply collateral, for one reason which is sometimes proposed as a test for the purpose of determining whether a covenant runs with the land or not. It is beneficial to the surface owner and beneficial to no one else: see *Vyvyan v. Arthur* (1) (1 B. & C. at p. 417), per BEST, J. I think that it affects the nature and also the value of the land. I think that it affects the nature of the land because it tends to prevent disturbance of the surface, and so it tends to preserve the natural state and condition of the land. A person who has agreed to pay compensation to his neighbour for injuriously affecting his land is more likely to be careful to avoid mischief than one who is not answerable for the consequences of his act. I also think that the covenant affects the value of the land in respect of which it was given. Suppose the land being properly drained were to be let for agricultural purposes, a tenant, I should suppose, would be more likely to take it and would probably give more for it if he were assured that compensation would be payable in the event of the drainage system being dislocated by subsidence. Similar considerations would apply if the land were to be let for building purposes. I am, therefore, of opinion that the decision of the Court of Appeal should be upheld, and the appeal dismissed with costs. The same question is involved in the other cases which were set down with the case of *Dyson v. Forster*, and the same result must follow. D
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A **LORD LOREBURN, L.C.**, said that the **EARL OF HALSBURY** and **LORD JAMES OF HEREFORD**, who were unable to be present, concurred in the judgment.

LORD DUNEDIN concurred.

B Solicitors: *Van Sandau & Co.*, for *Belk, Cochrane & Belk*, Middlesbrough; *Dangerfield & Blythe*, for *T. & W. G. Maddison*, Durham; *Worthington Evans, Daune & Co.*, for *T. Jones & Burrell*, Durham.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

C

D

WEST v. BRISTOL TRAMWAYS CO.

[COURT OF APPEAL (Lord Alverstone, C.J., Sir Gorell Barnes, P., and Farwell, L.J.), March 27, 1908]

E [Reported [1908] 2 K.B. 14; 77 L.J.K.B. 684; 99 L.T. 264; 72 J.P. 243; 24 T.L.R. 478; 52 Sol. Jo. 393; 6 L.G.R. 609]

Nuisance—Exercise of statutory powers—Method of exercise not expressly authorised by statute—Damage to adjoining land—Rylands v. Fletcher doctrine.

F The defendants, a tramway company, who were required by their special Act to pave part of a road with wood paving, for that purpose used creosoted wood, and plants and shrubs upon the plaintiff's land adjoining the road were injured by fumes or particles emanating from the creosote. The defendants did not know that the creosote might cause damage to the adjoining land, but they might have paved the road with other kinds of wood pavement which did not necessitate the use of creosote.

G **Held:** that the use of creosote was a non-natural user of the land which was not expressly authorised by the special Act and, therefore, the defendants were liable for the injury done to the plaintiff's land.

Rylands v. Fletcher (1) applied.

H **Notes.** Applied: *Balfour v. Barty-King*, [1956] 2 All E.R. 555. Referred to: *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.*, [1921] All E.R.Rep. 48; *St. Anne's Well Brewery Co. v. Roberts*, [1928] All E.R.Rep. 28; *Read v. J. Lyons & Co.*, [1946] 2 All E.R. 471.

As to the rule in *Rylands v. Fletcher*, see 28 HALSBURY'S LAWS (3rd Edn.) 145-149, and as to the exemption of public authorities from liability for acts authorised by statute, see 30 HALSBURY'S LAWS (3rd Edn.) 690-692. For cases see 36 DIGEST (Repl.) 292-295, and 38 DIGEST (Repl.) 13-19.

I

Cases referred to:

- (1) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest (Repl.) 313, 164.
- (2) *Filburn v. People's Palace and Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 38 W.R. 706; 6 T.L.R. 402, C.A.; 2 Digest (Repl.) 329, 219.

- (3) *Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 13, 54. A
- (4) *Hammersmith and City Rail. Co. v. Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, 59.
- (5) *Jones v. Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733; 9 B. & S. 835; 37 L.J.Q.B. 214; 18 L.T. 902; 32 J.P. 693; 17 W.R. 28; 38 Digest (Repl.) 400, 613. B
- (6) *Bamford v. Turnley* (1862), 3 B. & S. 66; 31 L.J.Q.B. 286; 6 L.T. 721; 9 Jur.N.S. 377; 10 W.R. 803; 122 E.R. 27, Ex. Ch.; 36 Digest (Repl.) 262, 123.

Also referred to in argument: C

Harrison v. Southwark and Vauxhall Water Co., [1891] 2 Ch. 409; 60 L.J.Ch. 630; 64 L.T. 864; 38 Digest (Repl.) 42, 215.

Crowhurst v. Amersham Burial Board (1878), 4 Ex.D. 5; 48 L.J.Q.B. 109; 39 L.T. 355; 27 W.R. 95; 2 Digest (Repl.) 90, 545.

London, Brighton and South Coast Rail. Co. v. Truman (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 36 Digest (Repl.) 324, 690. D

National Telephone Co. v. Baker, [1893] 2 Ch. 186; 62 L.J.Ch. 699; 68 L.T. 283; 57 J.P. 373; 9 T.L.R. 246; 3 R. 318; 38 Digest (Repl.) 39, 203.

Appeal by the defendants, the Bristol Tramways Co., from a decision of the Divisional Court (PHILLMORE and WALTON, JJ.). E

The plaintiff, the proprietor of a market garden, claimed damages for injury caused to shrubs and plants in his garden by material particles and gaseous fumes emanating from the wood pavement laid down by the defendants in the adjoining road. The special Act under which the defendants constructed and worked their tramway, the Bristol Tramways Act, 1894, provided, by s. 8, that

"The company shall pave with wood, or, by mutual agreement, with other suitable material, to the satisfaction of the corporation so much of [the road in question, among others] as lies between the rails of the tramways in the said respective roads and so much of the roadway as extends 18 in. beyond the rails of and on each side of such tramways, and also (where double lines are or shall be laid in these roads) the portion of the roadway between such double lines." F

The Tramways Act, 1870, s. 28, provides: G

"The promoters shall at their own expense, at all times, maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway." H

The defendants paved so much as they were obliged to pave of the road in question with beech blocks coated with creosote. It was proved at the trial that there were other methods of paving a road with wood which did not necessitate the use of creosote, and that a different kind of wood paving might have been used which could not have injured the plaintiff's plants and shrubs. Evidence was also given that if the work of paving had been done at a different season of the year probably no injury would have been caused. In answer to questions left to them at the trial, the jury found: that the injury to the plaintiff's plants was caused by the creosoted wood pavement laid by the defendants; that it was reasonably necessary for the defendants to pave the road as they did and when they did, according to their knowledge at the time, but not in the light of the evidence given at the trial; and I

A that it was not absolutely necessary for them to pave the road as and when they did. Upon these findings the learned recorder entered judgment for the plaintiff for £40, the agreed amount of damages. The defendants appealed, and the Divisional Court (PHILLIMORE and WALTON, JJ.), dismissed the appeal. The defendants appealed, with leave.

B *Clavell Salter, K.C.*, and *B. R. Vachell* for the defendants.
Inskip for the plaintiff.

LORD ALVERSTONE, C.J.—I have listened most carefully to the able and clear arguments of counsel for the defendants, but they have not raised any serious doubt in my mind as to the correctness of the judgment of the learned judges in the court below.

C I will first deal with the particular point, which was pressed upon us with great ability, that there was no common law right of action, and therefore, no necessity to rely upon the statutory powers. It seems to me that the propositions are correctly stated in GARRETT'S LAW OF NUISANCES (3rd Edn.), pp. 138, 139, which I will read as part of my judgment, because I do not think I could use language which would express my meaning more clearly. It is there stated as follows:

D "Where the owner of land uses his land for any purpose for which it may in the ordinary course of enjoyment of land be used, he will not in the absence of negligence on his part be liable though damage result to his neighbour, in the ordinary enjoyment by the latter of his property; for it lies with the latter to protect himself from the operation of natural laws."

E That is the one side. Then, on the other side:

F "But if the owner of land uses it for any purpose which from its character may be called non-natural or extraordinary user, such as for example the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbour's land from this escape, or if the latter's legitimate enjoyment of his land is thereby materially curtailed."

G If the argument of senior counsel for the defendants is correct on the main proposition which he pressed upon us, those propositions are stated much too widely. The owner of land does not do it at his peril unless, if counsel is right, the plaintiff shows that that which he brought upon the land was likely to escape and was likely to cause damage. It seems to me that is putting an onus upon the person complaining, who has ex hypothesi sustained damage, which is not supported by the authorities cited before us. The nearest approach to it, and I agree that it does come nearest, is the sort of distinction drawn in the case of animals escaping, by which it is now established that, if a tame animal be kept and does escape, although the owner may be liable for some consequences, he is not liable for all.

H He may be liable for the grass if the escaped animal eats grass, but not for the bite or gore which it may have given in the first exuberance of its escape from captivity. That seems to me not to be sufficient for counsel's point, because I wish to call attention to the fact that when BOWEN, L.J., in *Filburn v. People's Palace and Aquarium Co., Ltd.* (2), was stating the proposition, he stated it in the same way

I almost as LORD ESHER, M.R., did, and he said (25 Q.B.D. at p. 261):

"If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief."

It seems to me, in order to establish his proposition, counsel for the defendants has to show that that which the defendants have done is something which, according to

the experience of mankind, is not dangerous and not likely to do mischief. Certainly I think that the onus of proving it (assuming it to apply) would lie upon the person who brought his land into a non-natural condition. I doubt if that applies at all to a case of chemicals being brought upon land, and, even if it does, there is no evidence here that according to the experience of mankind this use of creosote was not dangerous. It does not mean the particular opinion of a particular individual, but the common knowledge of mankind that must be taken to be the state of things known to all mankind. Therefore, upon the first point with which we are pressed by counsel for the defendants, that he need not rely upon the statute because there was no common law tort, in my judgment the appeal must fail, and the judgments of the court below are perfectly right, and I adopt those judgments.

It seems to me, to use the language of the second proposition which I have quoted from GARRETT ON NUISANCES, that there was a user of the land, which, from its character, may be called a non-natural or extraordinary user. The substantial point, therefore, to be argued, in my judgment, is whether the statute affords any defence. The law, I think, is now clearly established that, if the statute has authorised the use of any particular thing, then no action lies for the use of that particular thing if there is no negligence, and that is so whether it is authorised in express terms or by necessary implication. I cannot do better than adopt the language of COCKBURN, C.J., in *Vaughan v. Taff Vale Rail. Co.* (3) which was approved of in the House of Lords in *Hammersmith and City Rail. Co. v. Brand* (4). He there said (5 H. & N. at p. 685):

“... when the legislature has sanctioned and authorised the use of a particular thing and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such a thing independently of negligence the party using it is not responsible.”

Therefore, where the use of the thing is authorised by statute, negligence must be proved; but, if there is no statutory authority, it has been established that there is liability even though there is no negligence: *Jones v. Festiniog Rail. Co.* (5). Now, what was the authority here? It can be put as it was crisply put by PHILLIMORE, J. Do the words, “the company shall pave with wood or with other suitable materials to the satisfaction” and so on, mean pave with creosoted wood? If the statute meant to solve once for all the question of what pavement can be safely used, and therefore, if it means that because one class of wood pavement is creosote pavement the defendants are allowed to use that apart from negligence whatever the consequence may be, I think very different words ought to have been used. In my judgment this is an obligation on the defendants to use wood pavement, but is not an obligation on the defendants to use a wood paving which in fact is dangerous from its user to the persons whose property is affected by it. I know not whether in this particular case it would not have been dangerous to use it at another time of the year. There certainly does seem to be some evidence that at another time of the year it would not have been dangerous. The jury may be taken to have found that, as it was used and when it was used, it did cause damage by the particles or effluvia escaping and injuring the plants on the plaintiff's property adjoining the road. Under these circumstances it seems to me that the contention that there was no common law right of action fails, and that the contention that the statute authorised the use of this particular thing also fails, and that the judgment of the court below, affirming the judgment of the inferior court, must be affirmed.

SIR GORELL BARNES, P.—I am of the same opinion. I will only add this. It seems to me that the defendants' first point is erroneous when the principles laid down in the cases more fully quoted by the Lord Chief Justice are considered. At common law it seems to me that on the facts there would have been a right of action. I do not wish to elaborate what the Lord Chief Justice has said, based

A upon the passages in the judgments he has read, and that therefore, the defence must rest here upon the question of the construction of the statute. Now, upon that it seems to me that the argument which is addressed to us fails in establishing that the construction by creosoted wood pavement was that which was expressly authorised by the Act of Parliament. In substance I agree with the judgments of PHILLIMORE and WALTON, JJ., and I think that this appeal fails.

B

FARWELL, L.J.—I agree. On the question of the construction of the statute I adopt the judgments of the court below, and particularly that of WALTON, J., which appears to me to cover the whole ground. On the other point, which is one of some interest, it appears to me that what underlies the case of *Fletcher v. Rylands* (1) is the non-natural use of the land. As BRAMWELL, J., put it in *Bamford v. Turnley* (6) (3 B. & S. at p. 83):

“... those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.”

D

He goes on to say that does not apply to the use not in a common and ordinary way, but in an exceptional manner; and he points out that the first is necessary on what he calls the “rule of give and take and live and let live.” I may annoy my neighbour by painting my house to-day, but he wants to do the same thing next year, and the doctrine applies to each. It has no application to the putting down of wood pavement and tramrails running over it. Then, the statute being out of the way, the defendants have to justify the bringing of the creosoted wood upon the land, the fumes of which are found by the jury to have done injury to the plaintiff's land, and they try to bring themselves within the exception in *Fletcher v. Rylands* (1), that, although a man uses his land in a non-natural way, that is to say, although he has brought there beasts which he is bound to keep there, he is not liable for every consequence of the escape of those beasts, and is only liable for what are called the natural consequences according to the common knowledge of mankind. That was put by BLACKBURN, J., in *Fletcher v. Rylands* (1) when he said that “our ancestors have settled that it is not the general nature of horses to kick or bulls to gore”; but LORD ESHER, M.R., in *Filburn v. People's Palace and Aquarium Co., Ltd.* (2) put it like this (25 Q.B.D. at p. 260):

F

“I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof.”

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There is no such assumption that I can see with regard to chemicals, which, at any rate, can hardly be said to be within the common knowledge of mankind. Chemists, no doubt, have great knowledge, and their knowledge increases, and I think I may fairly say varies, from year to year. It would be impossible to support a case of this sort by calling experts to say that, given those conditions, our opinion is that it is quite impossible the injury would occur when it is found by the jury that the injury has been so caused. That is not the sort of knowledge that is referred to, which is a matter of common knowledge of common things, and not of expert knowledge of particular things. On these grounds, I agree that the appeal fails and must be dismissed.

I

Appeal dismissed.

Solicitors: *Stanley, Wasbrough & Doggett*, Bristol; *Whites & Co.*, for *J. Inskip & Son*, Bristol.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

CLOVER, CLAYTON & CO., LTD. v. HUGHES

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Collins and Lord Shaw), January 31, February 1, March 14, 1910]

[Reported [1910] A.C. 242; 79 L.J.K.B. 470; 102 L.T. 840;
26 T.L.R. 359; 3 B.W.C.C. 275; 54 Sol. Jo. 374]

Workmen's Compensation—"Arising out of employment"—Need to prove employment *causa proxima* of accident—Sufficiency of proof that employment contributory cause—Disease of workman—Exertion required by work too great—Resultant death—"Accident"—"Unexpected" occurrence—Want of anticipation by workman—Irrelevance of opinion of other persons—*Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 1 (1).

For an accident to a workman to "arise out of the employment" within s. 1 (1) of the *Workmen's Compensation Act, 1906*, there must be some relation of cause and effect between the employment and the accident. The applicant for compensation, however, need not prove that the employment was *causa proxima* of the accident. It is enough if the employment is shown to be one of the contributing causes without which the accident would not have happened. An accident arises out of the employment when the exertion called for by the work is too great for the workman and results in his death or injury, whatever be the degree of exertion required or the condition of the workman's health.

The test whether an occurrence is "unexpected" so as to be an accident within the definition in *Fenton v. Thorley & Co., Ltd.* (1), [1903] A.C. 443, is whether or not it is unexpected by the person who suffers from it, not whether or not it would be expected by medical men or persons other than the deceased or injured person.

Where a man, suffering from an aneurism in so advanced a state that it might have burst at any time, while doing his ordinary work in the ordinary way, without any unusual exertion or strain, ruptured the aneurism, so that he died immediately, there was evidence that he was killed by an accident arising out of his employment, and, therefore, his employers were liable to pay compensation to his widow under the *Workmen's Compensation Act, 1906*.

So held by LORD LOREBURN, LORD MACNAGHTEN and LORD COLLINS, LORD ATKINSON and LORD SHAW dissenting.

Notes. The *Workmen's Compensation Act, 1906*, was repealed by the *Workmen's Compensation Act, 1925*, itself repealed by the *National Insurance (Industrial Injuries) Act, 1946*, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the Act of 1946 provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the language of s. 1 (1) of the Act of 1906. See also s. 7 of the Act of 1946.

Considered: *Fennah v. Midland and Gt. Western Railway of Ireland* (1911), 4 B.W.C.C. 440; *Hawkins v. Powells Tillery Steam Coal Co.*, [1911] 1 K.B. 988. Applied: *Trodden v. McLennard* (1911), 4 B.W.C.C. 190. Distinguished: *Spence v. Baird* (1912), 5 B.W.C.C. 542. Followed: *M'Ardle v. Swansea Harbour Trust* (1915), 85 L.J.K.B. 733. Considered: *Maxwell v. Ruabon Coal and Coke Co.* (1916), 86 L.J.K.B. 428. Applied: *Flanagan v. Ackers Whitley* (1926), 19 B.W.C.C. 399. Considered: *McFarlane v. Hutton (Stevedores), Ltd.*, [1926] All E.R.Rep. 246. Distinguished: *Ferguson v. Shotts Iron Co.* (1927), 20 B.W.C.C. 741; *Muscroft v. Stewarts and Lloyds* (1928), 21 B.W.C.C. 274. Considered: *Davis v. London, Midland and Scottish Rail. Co.* (1930), 23 B.W.C.C. 368; *Jones v. Baenavon Co.* (1931), 24 B.W.C.C. 148. Applied: *Davies v. John Vipond & Co.* (1932), 146 L.T. 498; *Treloar v. Falmouth Docks and Engineering Co.* (1932), 147 L.T. 271. Considered: *Walker v. John Brown & Co.* (1932), 25 B.W.C.C. 166;

- A** *Davis v. McNamara & Co. (1921), Ltd. (1932)*, 25 B.W.C.C. 550. *Applied: Partridge Jones and John Paton, Ltd. v. James*, [1933] All E.R.Rep. 316. Considered: *Walker v. Bairds and Dalmellington, Ltd.*, [1935] All E.R.Rep. 153; *Whittle v. Ebbw Vale Steel, Iron and Coal Co.*, [1936] 2 All E.R. 1221; *Ormond v. Holmes & Co.*, [1937] 2 All E.R. 795; *James Patrick & Co. (Pty.), Ltd. v. Sharpe*, [1954] 3 All E.R. 216. Referred to: *Barnabas v. Bersham Colliery Co. (1910)*, 102 L.T. 621; *Yates v. South Kirby, etc. Collieries*, [1910] 2 K.B. 538; *Groves v. Burroughes and Watts (1911)*, 4 B.W.C.C. 185; *Beaumont v. Underground Electric Railways of London (1912)*, 5 B.W.C.C. 247; *Euman v. Dalziel (1912)*, 6 B.W.C.C. 900; *Noden v. Galloways*, [1912] 1 K.B. 16; *Alloa Coal Co. v. Drylie (1913)*, 6 B.W.C.C. 398; *Broforst v. Steamship Blomfield (1913)*, 6 B.W.C.C. 613; *Doughton v. Hickman (1913)*, 6 B.W.C.C. 77; *Mitchinson v. Day Bros. (1913)*, 82 L.J.K.B. 421; *Aitken v. Finlayson, Bousfield & Co. Ltd. (1914)*, 7 B.W.C.C. 918; *Trim Joint District School, Board of Management v. Kelly*, [1914] A.C. 667; *Kerr (or Lendrum) v. Ayr Steam Shipping Co.*, [1915] A.C. 217; *Woods v. Wilson (1915)*, 84 L.J.K.B. 1067; *Glasgow Coal Co. v. Welsh*, [1916] 2 A.C. 1; *Wright and Greig v. M'Kendry (1918)*, 12 B.W.C.C. 410; *Innes (or Grant) v. Kynoch*, [1919] A.C. 765; *Treasure v. Cardiff Collieries (1920)*, 13 B.W.C.C. 28; *Clark v. Lord Advocate (1922)*, 15 B.W.C.C. 320; *Carr v. Port Glasgow Burgh (1923)*, 16 B.W.C.C. 331; *Bradshaw v. Richardsons, Westgarth & Co. (1931)*, 24 B.W.C.C. 64; *Hayman v. Pensford and Bromley Collieries (1921), Ltd. (1932)*, 25 B.W.C.C. 37; *Hilton v. Billington and Newton, Ltd.*, [1936] 3 All E.R. 292; *Fife Coal Co. v. Young*, [1940] 2 All E.R. 85; *Rothwell v. Caverswall Stone Co.*, [1944] 2 All E.R. 350; *Wilson v. Chatterton*, [1946] 1 All E.R. 431.
- E** As to industrial accidents and diseases, see 27 HALSBURY'S LAWS (3rd Edn.) 302 et seq.; and for cases see 34 DIGEST 266 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.) 797.

Cases referred to:

- F** (1) *Fenton v. Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 34 Digest 266, 2264.
- (2) *Pugh v. London, Brighton and South Coast Rail. Co.*, [1896] 2 Q.B. 248; 65 L.J.Q.B. 521; 74 L.T. 724; 44 W.R. 627; 12 T.L.R. 448; 40 Sol. Jo. 565, C.A.; 29 Digest 401, 3178.
- (3) *Brintons, Ltd. v. Turvey*, [1905] A.C. 230; 74 L.J.K.B. 474; 92 L.T. 578; 53 W.R. 641; 21 T.L.R. 444; 49 Sol. Jo. 445; 7 W.C.C. 1, H.L.; 34 Digest 464, 3799.
- G** (4) *Hensley v. White*, [1900] 1 Q.B. 481; 69 L.J.Q.B. 188; 81 L.T. 767; 63 J.P. 804; 48 W.R. 257; 16 T.L.R. 64; 2 W.C.C. 1, C.A.; 34 Digest 266, 2264.
- (5) *Stewart v. Wilsons and Clyde Coal Co. (1902)*, 5 F. (Ct. of Sess.) 120; 34 Digest 270, 2293 iii.
- (6) *Coe v. Fife Coal Co., Ltd.*, 1909 S.C. 393; 46 Sc.L.R. 328; 34 Digest 273, 2314 i.
- H** (7) *Ismay, Imrie & Co. v. Williamson* [1908] A.C. 437; 77 L.J.P.C. 107; 99 L.T. 595; 24 T.L.R. 881; 52 Sol. Jo. 713; 1 B.W.C.C. 232, H.L.; 34 Digest 267, 2276.

Also referred to in argument:

- I** *M'Innes v. Dunsmuir and Jackson, Ltd.*, 1908 S.C. 1021; 45 Sc.L.R. 804; 16 S.L.T. 214; 1 B.W.C.C. 226; 34 Digest 270, e.
- Wicks v. Dowell & Co., Ltd.*, [1905] 2 K.B. 225; sub nom. *Wilkes v. Dowell & Co.*, 74 L.J.K.B. 572; 92 L.T. 677; 53 W.R. 515; 21 T.L.R. 487; 49 Sol. Jo. 480; 7 W.C.C. 14, C.A.; 34 Digest 266, 2265.
- Roper v. Greenwood & Sons (1900)*, 83 L.T. 471; 3 W.C.C. 23, C.A.; 34 Digest 269, 2293.
- Boardman v. Scott and Whitworth*, [1902] 1 K.B. 43; 71 L.J.K.B. 3; 85 L.T. 502; 66 J.P. 260; 50 W.R. 184; 18 T.L.R. 57; 4 W.C.C. 1, C.A.; 34 Digest 270, 2294.

Appeal by the employers from a decision of the Court of Appeal (COZENS-HARDY, A M.R., FARWELL and KENNEDY, L.JJ.) affirming an award of the learned judge of Lancaster County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906, on an application for compensation under the Workmen's Compensation Act, 1906, by the widow of a deceased workman.

Simon, K.C., and *F. Cuthbert-Smith* for the appellants.

A. Powell, K.C., and *Stewart-Brown* for the respondent.

Their Lordships took time for consideration.

Mar. 14, 1910. The following opinions were read.

LORD LOREBURN, L.C.—In this case a workman suffering from an aneurism in so advanced a state of disease that it might have burst at any time was tightening a nut with a spanner when the strain, quite ordinary in this quite ordinary work, ruptured the aneurism and he died. This is a mere summary of the facts. The learned county court judge held, and the Court of Appeal have confirmed his decision, that in these circumstances the workman's dependants are entitled to compensation. I agree. The judgments which have been given in the courts below make it unnecessary that I should review the authorities, which I wish to follow loyally, but in a case of such great importance in the construction of this Act, I wish to state my own view as to its meaning in the light of the weighty opinions which have been cited to us in argument. It seems to me important that we should regard not merely the question: "Was this an accident or not?", but also the whole of s. 1 (1) of the Workmen's Compensation Act, 1906, in which the liability of the employer to make compensation is set up. It runs as follows:

"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with Sched. 1 to this Act."

The injury must be caused by an accident, and the accident must arise out of the employment. We are not concerned here with the course of employment.

What, then, is an "accident"? It has been defined in this House as "an unlooked for mishap, or an untoward event which is not expected or designed." All the Lords who took part in the decision of *Fenton v. Thorley & Co., Ltd.* (1) agreed in substance with this definition in LORD MACNAGHTEN's speech. I take that as conclusive. Next, the accident must be one "arising out of" the employment. There must be some relation of cause and effect between the employment and the accident, as well as between the accident and the injury. I think that some of our difficulties in applying the Act are due to this. Courts of law have frequently been obliged to consider, especially in actions on policies of insurance, what is to be regarded as the cause of some particular event. In one sense every event is preceded by many causes. There is the *causa proxima*, the *causa causans*, the *causa sine qua non*. I will not pursue scholastic theories of causation. The *causa proxima* is alone considered in actions on a policy, as a general rule. I do not think that it is the proper rule for cases under the section now under discussion, for the reasons explained by LORD LINDLEY in *Fenton v. Thorley & Co., Ltd.* (1). It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually happened would not have happened, and if the accident is one of the contributing causes without which the injury which actually followed would not have occurred.

The workman in this case died from the rupture of an aneurism, and "the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal." Again, "the aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion, or strain, would have been sufficient to bring about a rupture." The first question here is whether or not the learned judge was entitled to regard the rupture as an "accident" within the meaning of

A this Act. In my opinion, he was so entitled. Certainly it was an "untoward event." It was not designed. It was unexpected in what seems to me the relevant sense—namely, that a sensible man who knew the nature of the work would not have expected it. I cannot agree with the argument presented to your Lordships that you are to ask whether a doctor acquainted with the man's condition would have expected it. Were that the right view, then it would not be an accident if a man very liable to fainting fits fell in a faint from a ladder and hurt himself. No doubt the ordinary accident is associated with something external; the bursting of a boiler, or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think that it may also be something going wrong within the human frame itself, such as the straining of a muscle, or the breaking of a blood-vessel. If that occurred when he was lifting a weight it would be properly described as an accident. So, I think, rupturing an aneurism, when tightening a nut with a spanner, may be regarded as an accident. It cannot be disputed that the fatal injury was in this case due to this accident, the rupture of the aneurism.

That of itself does not dispose of the case. It establishes that there may have been an injury by accident caused to the workman. But it does not establish that the accident was one "arising out of the employment." It is on these words that the stress of the case mainly lies. When the man's condition was such that he might have died in his sleep, and the mere tightening the nut with no more strain than ordinary in such work caused the accident, can it be said that the accident was one "arising out of" the employment? That seems to me to be the crucial point. I do not think that we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the county court judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think that we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health. It may be said, and was said, that if the Act admits of a claim in the present case, everyone whose disease kills him while he is at work will be entitled to compensation. I do not think so, and for this reason. It may be that if the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that, whatever the man had been doing, it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone, or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it or did the work which he was doing help in any material degree? In the present case I might have come to a different conclusion on the facts had I been arbitrator, but I am bound by the findings if there was evidence to support them. It is found that the strain contributed to the death. There was evidence on which the learned judge was entitled so to find, as I respectfully think, and I, therefore, advise your Lordships to affirm the order of the Court of Appeal.

LORD MACNAGHTEN.—In this case your Lordships have heard a very able and ingenious argument upon the construction of s. 1 of the Workmen's Compensation Act. I need hardly say that it is not from any want of respect to the learned counsel who advanced it that I pass that argument by. It has been disposed of

already. It was advanced and rejected in *Fenton v. Thorley & Co., Ltd.* (1). There the Court of Appeal had held that if a man meets with a mishap in doing the very thing which he means to do, the occurrence cannot be called an accident. There must be, it was said, an accident and an injury. You are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away these niceties of subtle disquisition, and the endless perplexities of causation. It was held that "injury by accident" meant nothing more than "accidental injury," or "accident," as the word is popularly used. It is not, perhaps, quite accurate to say that in that case a definition of the term "accident" was hazarded. It would be more correct to say that the decision was that the word "accident" was to be taken in its ordinary and popular sense. Some of the noble and learned Lords who gave judgment explained what they understood to be the ordinary meaning of the word, and I cannot but think that the explanations given, though varying slightly in expression, are substantially correct.

In the argument in *Fenton v. Thorley & Co., Ltd.* (1) many decided cases were cited in which the word "accident" was considered. There is one which was cited in the argument, but was not noticed in the judgment, and is, I think, a very good example of the far-reaching application of the word. I may, perhaps, be permitted to refer to it. It is not the less instructive because it occurred before the Workmen's Compensation Act, 1897. The case was this. A railway company had established a system of insurance for the benefit of their servants who contributed to it. One of their servants, a signalman in his signal box, saw a train coming, and noticed that there was something wrong with one of the carriages. He was much alarmed, and waved his flag frantically. The engine-driver saw the signal, the train was stopped, and an imminent disaster was averted. But the signalman was so horrified that he lost his nerve, and was incapacitated for work. Was that an accident? The condition of the insurance was "against all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty." The Court of Appeal, consisting of LORD ESHER, M.R., KAY and SMITH, L.JJ., held unanimously that the plaintiff had been incapacitated by accident within the meaning of the policy. SMITH, L.J., said:

"The sole question is whether the facts which have been proved constitute an injury to the assured by an accident within the meaning of the policy. . . . This is not a case in which, as has been suggested, the plaintiff has only suffered mental pain or grief. If that had been so, it would not have been within this policy; but this is a case in which he has been subjected to such a shock to his nerves that he has been physically prostrated, and put out of employment for months. The company has undertaken to pay to the assured the weekly allowance of £1 in case of his being incapacitated for employment by reason of an accident however caused. That I read to mean an unforeseen circumstance, however caused, occurring to him in the discharge of his duty in the company's service. . . . It may be that an accident of this sort was not thought of when the policy was framed, for it is of rare occurrence, but that does not prevent it from coming within the terms of the policy": *Pugh v. London, Brighton and South Coast Rail. Co.* (2), [1896] 2 Q.B. at p. 253.

In the present case I have no doubt that there was an accident in the popular sense of the word. The man ruptured an aneurism in his aorta. An aneurism, as I understand it, is an unnatural or abnormal dilation of an artery, but still it is part of the artery, and so of the man's body. The man "broke part of his body," to borrow LORD ROBERTSON'S expression in *Brintons, Ltd. v. Turvey* (3), and he certainly did not mean to do it. That the accident, if it was an accident, occurred in the course of the man's employment cannot be disputed. He was at his ordinary work at the time. The real question, as it seems to me, is this: Did it arise out of his employment? On this point the evidence before the county court judge was undoubtedly conflicting. But he has held that it did, and I think that there was

A evidence sufficient to support this finding, though I do not say that I should have come to the same conclusion myself. The learned judge said :

“The death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.”

B The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work, but it was too heavy for him. It must be taken, on the finding of the learned county court judge, that the accident was not expected by the workman. It can hardly be supposed that he intended to kill himself. The fact that the result would have been expected, or, indeed, contemplated, as a certainty, by a medical man of ordinary skill if he had diagnosed the case is, I think, nothing to the purpose. An occurrence is, I think, unexpected if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen. All accidents, I suppose, may be divided into two classes—those which are due to one's own fault, and those which are not. Accidents due to a man's own fault are for the most part the result either of inadvertence or miscalculation.

D If a man miscalculates his powers, and so fails in what he attempts to do, and, it may be, injures himself, he has probably plenty of friends who will tell him, at any rate after the event, that they knew exactly what would happen. But still, as it seems to me, the untoward occurrence would popularly be called an “accident.” I am of opinion that the judgment appealed from is right, and that the appeal should be dismissed with costs.

E **LORD ATKINSON.**—I regret that I am unable to concur with the opinions which have been delivered. I think that the meaning put upon the word “accident” in *Fenton v. Thorley & Co., Ltd.* (1) must now be accepted in all cases turning on the construction of the phrase “injury by accident,” used in the Workmen's Compensation Act, 1906, as its true meaning—namely, “an unlooked for mishap, or an untoward event which is not expected or designed.” It must exclude disease.

F What is “unlooked for” or “unexpected” must in every case exist either in the external influences to which the sufferer is subjected, or in the effect upon him which those influences produce. I assume for the purposes of this case that it would be sufficient if they existed in the effect produced, though that may be, according to the argument for the appellants, to confound the injury with the accident. If the external conditions which surround, and the external influences which act upon, a workman at the time when he receives the injury are the normal conditions and influences which would surround and act upon anyone engaged in the discharge of the normal duties of employment such as his, it could not, I think, be contended that anything “unlooked for” or “unexpected” had come to pass in these conditions and influences; and if the physical state of the workman

H be such that those acquainted with it, and capable of forming an intelligent opinion upon the effect which those influences would, under such conditions, produce upon him, regard the injury as the certain, or highly probable, consequence of their action, I fail to see how the injury could be regarded as an accident.

I In my view, there was no evidence before the county court judge to show that, having regard to the duties which the deceased was employed to discharge, there was anything whatever abnormal, unexpected, or unlooked for in the external conditions which surrounded him, or in the external influences to which he was subjected at the time of his death. I think that the findings of the county court judge amount to a finding to this effect. He says :

“I have come to the conclusion that the strain put upon the deceased by the exertion of tightening the nut with the spanner caused the rupture. There was no evidence from which I could draw any exact conclusion as to the extent of the strain which was being put on the deceased at the time, but it was at all events not more than is ordinary in such work: but the evidence satisfied

me that such a strain was sufficient to bring about a rupture of the aneurism, having regard to the man's condition at the time, and I find as a fact that the rupture was so brought about."

This ordinary strain, however, was too much for the deceased, but why? Because he was suffering from a most dangerous disease, aneurism of the aorta. The disease was in a stage so far advanced that it might terminate fatally even when he was in his bed asleep and perfectly quiescent. The following passage is also to be found in the judgment of the county court judge:

"On a post-mortem examination it was found that there had existed a very large aneurism of the aorta, and death was attributed to rupture of the aorta. The aneurism was in such an advanced condition that it might have burst while the man was asleep, and a very slight exertion or strain would have been sufficient to bring about a rupture."

The medical evidence is very strong and fully supports the summing-up. Dr. Winter says:

"There was a very large aneurism of the aorta, that is a dilation of the aorta, which is the large artery that feeds the heart. This was ruptured. This caused his death. . . . I think that the rupture was brought about by some strain or slip. Extra muscular strain might cause it. I think that the pulling of the nut might cause a strain which would cause death."

But on cross-examination he says:

"The aneurism was in an advanced condition. The man might have died in his sleep. I think that the pressure on the nut would accelerate the rupture of the aneurism. I think that this was the natural cause. . . . I say that the third turn of the nut is sufficient to produce the strain."

Dr. Glynn says:

"In my view the aneurism very probably ruptured during the slight strain which the man applied when screwing the nut. . . . He might have gone on for a few weeks longer. The fact that he had returned from dinner would render rupture more likely to occur."

On cross-examination he admits that "the man might have died in his sleep, or while walking to his work from extra force needed." That means, I presume, from the extra force needed to walk to his work. Dr. Owen expressed an opinion that the exertion which the deceased was undergoing "contributed to the rupture of the aneurism," and that "muscular exertion is usually the immediate cause of the rupture of an aneurism." That appears to me merely to amount to this, that the disease was so far advanced that the rupture might have happened from natural causes, even when the deceased was asleep, and quiescent; but that muscular exertion, even so slight as that involved in walking, might accelerate the fatal end, and the slight exertion of turning the nut did, in the opinion of the doctors, in fact accelerate it in this case.

Now, what was the nature of this slight exertion? It was normal in the deceased's employment. It was not sudden. It was not severe. It was neither unexpected nor unlooked for. On the contrary, it was the very exertion which he was employed to make, and it was contemplated that he should make it. Connell, the fellow-workman of the deceased man, said:

"We were making a condenser bath. We were putting nuts on the bolts by which the sides were held together. The sides had to be screwed tight together. . . . I held the washer while he put on the nut and screwed it up with his fingers; then he tightened it with a spanner. He had taken about two turns of the spanner. He was about to take another."

He then goes on to describe the supposed slip which, if it ever occurred, was not thought to have caused the deceased's death. "The spanner," he said, "would be

A about 18 in. or 20 in. long." On being re-examined he said that the deceased had only put on two bolts before. He had done no heavy work before that morning. "It [I presume that he meant the nut] might only take six turns," that means, I presume, six turns to screw it up tight. Only two were in fact given. The time when a severe strain would be required had plainly not arrived.

B That was the respondent's case. The evidence given on her behalf leads, in my view, irresistibly to the conclusion that, having regard to the condition of the deceased, the rupture of this aneurism and his subsequent sudden death were in the nature of things as certain, or, if not certain, as extremely probable, a consequence of the exertion necessary in the ordinary performance of his work as anything could well be, and I think that no reasonable man could come to any other conclusion. For the defendants, Dr. Verral, who assisted Dr. Winter, the respondent's witness, at the post-mortem examination, was examined, and he said that

"the walls were thin, and liable to go at any moment. There was a rupture in the aneurism. In my opinion, having regard to these facts, death might have occurred without any exertion at all."

And in cross-examination he says:

D "I could not say one way or the other that his work had nothing to do with it. His aneurism had a very thin wall likely to break at any time, and more likely to break at the time of exertion. He was in such a condition that a very slight muscular exertion might bring about the rupture. He ought to have been in bed, and not at work. . . . He might have gone off without working. It is very probable that he might. I would not swear that his rupture had nothing to do with his work."

E

On re-examination he said:

"A serious heavy job would have led me to infer that it was due to the work, but the work in this case was of such a nature that I cannot infer one way or the other."

F Two experts—namely, Mr. Montserrat and Professor Buchanan—corroborated this witness, Dr. Verral.

The only two conclusions to which, I think, any reasonable man could come on that evidence are (i) that the natural termination of the disease, rupture, was reached unaffected by the work which the deceased was doing; or (ii) that the work accelerated that termination. The strain was very slight. It could scarcely have

G been slighter if he was to do any work at all. The rupture was, as I have said, the certain, or highly probable, result of the slightest muscular exertion. It may not have been looked for or expected by the deceased, his employers, or his fellow-workmen. There is no evidence that he or they knew or suspected what his condition was, but the ignorance of such people cannot, I think, turn the inevitable, or highly improbable, result of a diseased or hidden condition of the body into an

H "accident." Neither, in my opinion, can the fact that the final catastrophe consisted in the rupture of a tissue do so, if that rupture be known to be the certain, or highly probable, result of the malady. In order that the "mishap" should be "unlooked for," or the event be "unexpected," so as to make an injury an "injury by accident" within the meaning of this Act, the mishap must, I think, be "unlooked for," or the event be "unexpected" by some person with knowledge of

I the facts, and capable of judging reasonably of them. The death of the deceased was, as it appears to me, no more an accident than if, had he been a butler, he had died while walking slowly up the stairs of the house in which he served, or, had he been a coachman, he had died while slowly mounting to his box. It may possibly be that it would be better in the interest of workmen that they should be entitled to compensation for all injuries which arise out of, and in the course of, their employment, however caused, though that is far from clear, since it might result in depriving of employment all who were in any way unsound, or past their prime; but while the word "accident" remains in the statute force and meaning

must be given to it in construing the statute, and, much as we must sympathise with the claimant, I, for my part, am unable to see that anything which was not normal and most probable, if not certain, befell the deceased, and there was, therefore, no evidence upon which the county court judge, as a reasonable man, could legitimately find as he has found. I therefore think that the appeal should be allowed. A

LORD COLLINS.—I am of opinion that this appeal must be dismissed. I agree with the Court of Appeal that the case is concluded by the authority of *Fenton v. Thorley & Co., Ltd.* (1). In fact the argument for the appellants was substantially that which prevailed in the Court of Appeal in a series of cases which were overruled by that decision. One of those specially commented upon by LORD MACNAGHTEN—*Hensey v. White* (4)—was in essentials identical with this case. The workman, who was in an unsound physical condition, ruptured himself in attempting to turn a wheel which proved too stiff for his physical powers. A post-mortem examination disclosed the fact that he had been suffering from chronic inflammation and congestion of the intestines, and to this, as the antecedent cause, one of the medical witnesses attributed the fatal result of the strain. The county court judge had found as a fact that “the death was the result of chronic disease,” and held that something beyond the mere fact that a long-standing disease had suddenly assumed a fatal form, in consequence of the deceased doing his usual hard work in the usual way, was necessary in order to constitute an accident within the meaning of the Act. The Court of Appeal had affirmed this view. LORD MACNAGHTEN in overruling this, and a group of other cases, says ([1903] A.C. at p. 446): B

“If a man in lifting a weight or trying to move something not easily moved were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight or trying to move something too heavy for him.” C

He then goes on to express his entire agreement with the decision in *Stewart v. Wilsons and Clyde Coal Co.* (5), and singles out for special approval a passage in the judgment of LORD M'LAREN: D

“If a workman in the reasonable performance of his duties sustains a physical injury as the result of the work in which he is engaged . . . this is an accidental injury in the sense of the statute.” E

LORD LINDLEY likewise expresses his approval of the same decision. In view of these authorities I cannot see that the Court of Appeal had any option of deciding otherwise than as it did in the present case. F

LORD SHAW.—In *Coe v. Fife Coal Co., Ltd.* (6) to which I shall afterwards more particularly refer, Lord President DUNEDIN uses this language: G

“I confess that I have found the case to be one of great delicacy and difficulty, with which one is not unfamiliar in the law, where one seems almost driven by the course of decisions, each of which gradually goes a little further than the one which preceded it, until at last you reach a point which, when the first decision was given, was probably not contemplated.” H

These words, in which I entirely concur, aptly express my own situation in this case. When one has so to interpret an Act of Parliament as to put an interpretation upon interpretations of it, there is much danger of being landed very far away from the meaning of the statute itself; that danger in the present case is very real, and it is not lessened by the wish to accept and the necessity of accepting with complete loyalty the decisions of your Lordships' House. I

A The evidence as to this unfortunate man's condition is thus stated by the county court judge :

“On a post-mortem examination it was found that there had existed a very large aneurism of the aorta, and death was attributed to rupture of the aorta. The aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion or strain would have been sufficient to bring about a rupture.”

B The man was engaged in tightening a nut with a spanner. As to “strain” in doing so, the judge says :

C “It was at all events not more than ordinary in such work, but the evidence satisfies me that such strain was sufficient to bring about the rupture of the aneurism, having regard to the man's condition at the time; and I find as a fact that the rupture was so brought about. In this case the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.”

D Apart from the facts so stated, the formal finding that the deceased died from injury caused by accident arising out of and in the course of his employment is clearly dependent upon the law, and it is pronounced by the learned judge as he very properly states, “having regard to the general trend of the cases.” This, and this alone, which has been treated as a determinate conclusion in fact, and in fact alone, I must respectfully decline to accept. Apart from these cases, and on these facts, I am of opinion that this workman did not die owing to injury by accident, E but died of heart disease. There was nothing unusual or abnormal in the work, no strain “more than ordinary” was imposed or involved, no occurrence took place to intercept or even disturb the work or the workman; all that can be said is that, being at work, and diseased, he died. His death was caused, in my view, not by any injury by accident, but simply by the disease under which he unhappily suffered. That is my opinion on the facts, apart from the decisions; and, having F considered the latter with much anxiety and respect, and recognising to the full the delicacy of some of the distinctions drawn, I am confirmed in the opinion that neither in language nor intention does the Workmen's Compensation Act, 1906, apply to this case.

Your Lordships' House has, after considering the various decisions in lower courts, made three important pronouncements on this branch of the law. Remem- G bering that the present case is one of the employé carrying about with him, so to speak, a fatal disease, I turn to see how far such a case is governed by these authorities. In *Fenton v. Thorley & Co., Ltd.* (1) “a workman, employed to turn the wheel of a machine, ruptured himself,” and it was held that compensation under the Act was due. So far as the condition of the workman was concerned, nothing more different from the facts in this case could be stated, because, as H LORD MACNAGHTEN points out, “Fenton was a man of ordinary health and strength.” But the unexpected, totally unexpected, had happened, and LORD MACNAGHTEN ([1903] A.C. at p. 448) came to the conclusion that

I “the expression ‘accident’ is used in the popular and ordinary sense of the word, as denoting an unlooked for mishap or an untoward event which is not expected and designed.”

By anticipation LORD MACNAGHTEN had warned commentators against making too wide a use of even this definition, and, in my opinion, he touched circumstances like the present closely when he said (*ibid.*),

“the words ‘by accident’ are, I think, introduced parenthetically, as it were, to qualify the word ‘injury,’ confining it to a certain class of injuries, and excluding other injuries, as, for instance, injuries by disease or injuries self-inflicted by design.”

The other learned Lords all proceed on the same view, and LORD ROBERTSON expressly says that the workman was a person of ordinary strength, while LORD LINDLEY also holds that there was an accident in the external sense, that "the machine was accidentally put out of order," had been stopped by an "accident," etc., and he adds (*ibid.* at p. 456):

"It is not, therefore, necessary to consider whether the Act applies to cases in which the cause of the injury is not known, or in which the only unforeseen occurrence is the injury itself."

It is sufficient to say of that case that the issue of disease, as alternative to accident, was not being dealt with or decided there. But, if isolated passages are permissible, these would seem to show very clearly that a case of disease, like the present, was expressly treated as differentiated from that of Fenton and excluded from the Act. I observe that in *Fenton v. Thorley & Co., Ltd.* (1) and also in *Ismay, Imrie & Co. v. Williamson* (7) a citation was made, as it has been made to-day, of a sentence from the judgment of LORD M'LAREN in *Stewart v. Wilsons and Clyde Coal Co.* (5), to the following effect:

"If a workman, in the reasonable performance of his duties, sustains a physiological injury, as the result of the work he is engaged in, I consider that this is accidental injury in the sense of the statute."

I respectfully ask, to what argument were these observations directed? I do so because LORD M'LAREN himself says expressly that his "observations will be confined to one point." The point was this, it was argued that "an accident implied some agency external to the injured person." In displacing such a limitation of the statute (*viz.*, to "some external, visible, or palpable cause—e.g., the breakdown of machinery"), the learned judge makes use of the observation so often quoted for much wider purposes, and the illustrations which he gives show most clearly on what single point he was remarking—e.g.,

"the case of a railway servant engaged in shunting operations and crushed between two carriages without detriment to the carriages. Another illustration is the case of a man whose hand is crushed between wheels or rollers without any damage resulting to the machinery."

These illustrations show, in my humble judgment, the extreme danger of using his concluding proposition as meant to cover an issue such as the present—*viz.*, as between accident and pre-existing disease. That issue the next case—namely, *Brintons, Ltd. v. Turvey* (3)—approaches, but does not reach. A workman sorting wool was infected by the bacillus of anthrax passing from the wool into his eye. The mischief was held to be clearly due to accident, or, as LORD MACNAGHTEN put it, to a chapter of accidents; these caused the injury by setting up the disease to which the workman succumbed. There was no case whatsoever of the man having proceeded to work while already labouring under disease having its origin quite distinct, as here, from his work, nor any case even of acceleration of the effects of pre-existing disease, so that one can hardly regard the case as bearing upon the issue now before the House.

It was maintained that this case, however, was in truth and substance governed by *Ismay, Imrie & Co. v. Williamson* (7). I have carefully and respectfully examined that decision. What had happened was that "a workman, in a weak and emaciated condition, while raking out ashes from under the boiler in the stokehold of a steamship, received a heat stroke from the effect of which he died." On the point whether the man died from accident, LORD LOREBURN, L.C., says ([1908] A.C. at p. 439):

"What killed him was a heat stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause,

A often no doubt threatened, but generally averted by precautions, which experience in this instance had not taught."

B How unlooked for, how unexpected, the thing was appears from the facts, as reported, that "The doctor in a long experience had only known of four cases, and the engineer only of one." When I am asked to affirm from a case so very special as that that a general rule should be deduced to the effect that, if in the normal circumstances of normal work a diseased workman dies, the death is to be attributed to accident, I reply that I cannot do it. Further, I do not think that it was meant to be so applied. As I have shown, the decision of this House in *Fenton v. Thorley & Co., Ltd.* (1) leans distinctly the opposite way. LORD MACNAGHTEN, who delivered the leading judgment in *Fenton v. Thorley & Co., Ltd.* (1), dissents from the conclusion of the Lord Chancellor and LORD ASHBOURNE in *Ismay, Imrie & Co. v. Williamson* (7). But the Lord Chancellor in that case expressly lends the weight of his authority to the decision of the House in *Fenton v. Thorley & Co., Ltd.* (1). LORD ASHBOURNE dwells on the unlooked for and unexpected nature of the occurrence, founds on LORD M'LAREN's dictum to which I have referred, and distinctly reserves the general case when he observes :

D "I do not at all say that all diseases arising out of or in the course of employment should be regarded as a personal injury by accident."

E I am glad to be confirmed in the opinion I have formed by the decision of the Court of Session in *Coe v. Fife Coal Co., Ltd.* (6), and in particular by the analysis of the three decisions of this House just referred to, made by that most experienced judge, LORD KINNEAR. In *Coe v. Fife Coal Co., Ltd.* (6)

"the cause of the appellant's incapacity for work was cardiac breakdown, due to the fact that the work in which he had been engaged was too heavy for him."

It was held that the death could not be attributed to injury by accident.

F Dealing with the argument—also strongly pressed in this case—that the event was accident if "unexpected," "unlooked for," "unintended," &c., LORD KINNEAR uses language as follows, which I very respectfully adopt :

G "It seems to me that all these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and is to be distinguished from the necessary and ordinary effect upon a man's constitution of the work in which he is engaged day by day. So defined, the word 'accident' seems to me to exclude the anticipated and necessary consequence of continuous labour."

H The present is, in my opinion, exactly such a case. Where disease is a result brought about by the employment itself—such as that of lead-workers—those cases are specially and separately dealt with as diseases, and what I may call liability on the employment is imposed. Nothing could more clearly indicate that in the passing of this Act Parliament did not mean, at least in the ordinary case, to include such cases within the category of accidents. In my opinion, in the present case it is impossible for me to attribute this unfortunate and afflicted workman's death to injury by accident, as such a pronouncement, however prompted by compassion for those bereaved, would be erroneous in fact, and involve a liability which is not imposed either by the language or in the intention of the statute. Nor do I think it altogether without a bearing on the sound construction of the statute, that if a different interpretation be put upon the words cited, then a new peril will have been introduced into the lives of many workers who, notwithstanding debility and chronic disease, are most anxious and willing to devote their remaining powers to earning an independent livelihood. Should such persons be held to carry with them into and upon employment the serious additional liability alluded to, employment may become for such persons, often the most needy and deserving

of the population, more difficult to obtain. I, accordingly, tender my dissent from the conclusions reached by the majority of your Lordships. A

Appeal dismissed.

Solicitors: *Barlow, Barlow & Lyde*, for *J. H. Glover*, Liverpool; *Helder, Roberts, Walton & Giles*, for *John A. Behn*, Liverpool. B

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*] C

HUDSON v. SPENCER

[CHANCERY DIVISION (Warrington, J.), June 8, 1910]

[Reported [1910] 2 Ch. 285; 79 L.J.Ch. 506; 103 L.T. 276;
54 Sol. Jo. 601] D

Gift—Donatio mortis causa—Subsequent legacy in will—Delivery of deposit notes for £2,000—Legacy for same amount—Effect on gift.

H., when very ill, gave to the plaintiff, his housekeeper, deposit notes for £2,000 under such circumstances as to constitute a valid donatio mortis causa of the sums thereby represented. Two days later he made a will giving the plaintiff a legacy of £2,000. E

Held: there was no circumstance in the case which could lead the court to conclude that the testator intended that the legacy should be in satisfaction of the gift, and, therefore, the will did not revoke the gift and the plaintiff was entitled to both the gift and the legacy. F

Jones v. Selby (1) (1710), Prec. Ch. 300, examined and explained.

Notes. As to gifts mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 400-406; and for cases see 25 DIGEST 541 et seq.

Case referred to:

(1) *Jones v. Selby* (1710), Prec. Ch. 300; 2 Eq. Cas. Abr. 573; 24 E.R. 143; 25 Digest 552, 374. G

Also referred to in argument:

Johnson v. Smith (1749), 1 Ves. Sen. 314; 27 E.R. 1053, L.C.; 44 Digest 466, 2867.

Witness Action by the plaintiff for a declaration that the delivery to her by one T. P. Hudson of certain deposit notes, representing a principal sum of £2,000, constituted a valid donatio mortis causa in her favour of that sum. H

Cave, K.C., and *C. Church* for the plaintiff.

H. Terrell, K.C., and *F. C. Watmough* for the defendants, the executors of the will.

WARRINGTON, J.—The question in this case is whether the plaintiff is entitled to these deposit notes, representing a principal sum of £2,000, which formed part of the estate of one Thomas Pedder Hudson. The plaintiff claims the amount represented by these deposit notes as a donatio mortis causa made to her by Mr. Hudson. The facts are very simple. The plaintiff was, and for many years had been, the housekeeper of Mr. Hudson, and she had a child by him. In the month of June, 1909, he was very ill, and on June 21, in the night he was so seriously ill that the doctor had to be sent for, and it was thought that he would I

A then have died. However, he got a little better, and, on the morning of June 23, he called the plaintiff to his bedside. He told her to give him a pocket-book out of his drawer. She gave it to him. He then took out the notes in question, and said :

B "Take these; I have always kept them for you in case anything happened to me, but should I get well you will hand them back to me. There will be my little household bills owing at the time, which I expect you to pay out of these. You will only have to write to Mr. Sandell or see him, and he will cash them for you."

C The plaintiff took away the notes, put them in a drawer of her own, and kept them in her possession until after the testator's death. Nothing more was said by the testator to her, or by her to the testator, on the subject of these notes. The testator died on June 27 of the illness from which he was suffering on June 22. Under these circumstances it is quite clear that there was a valid donatio mortis causa of the money represented by these deposit notes.

D The defence to the plaintiff's claim is that the donatio has been satisfied by a subsequent testamentary gift. The facts with regard to that are these: On the same date as the donatio mortis causa he sent for a solicitor and gave him instructions for a will. The testator being in a dangerous state of health, the solicitor jotted down the instructions, put them into the form of a will, and the will was signed the same day—June 22. By that will he gave to the plaintiff the house in which he lived, the furniture, and £2,000 to trustees upon trust to allow the plaintiff to use the residue and furniture during her life, and then with power to the trustees to sell. They were to invest the £2,000 and pay the income to the plaintiff for life, and after her death they were to hold the residue, the furniture, and the £2,000 in trust for his son by the plaintiff. That will did not take effect, because two days later—on June 24—he made a further will. That will bequeathed certain legacies, and it bequeathed the house and furniture to the plaintiff for life, and after her death to the son, John Howard Hudson. The testator also gave to the plaintiff E £2,000 absolutely, free of legacy duty, and he directed the trustees to pay the profits of his business, so long as it should be carried on, to her for life, and, if the business were sold in her lifetime, she was to have one-third of the proceeds in lieu of the profits, and no further interest in the residue at all. The ultimate residue was divided between the testator's two sons, not including the son by the plaintiff.

G It is said that the gift of the £2,000 was in satisfaction of the donatio mortis causa. It was suggested that the will itself was a revocation of the gift; but that was not insisted upon, and, in my opinion, there is no foundation for saying that the mere execution of a will subsequently to the donatio mortis causa is in itself a revocation of the donatio. But it is urged that the gift of the legacy of £2,000, being the same amount as the principal money secured by the notes, must be taken H to be in satisfaction of the donatio. There is really no authority for that proposition, except *Jones v. Selby* (1). That case, decided in the year 1710 by Cowper, L.C., was somewhat peculiar. The testator there had given to the plaintiff, who was his housekeeper, by will, a legacy of £500; he had subsequently, according to the plaintiff's evidence, delivered to her a box without telling her what was in it, but which ultimately proved to have in it, among other trifling things, a document representing £500. He subsequently, three years afterwards, made his will, by which he in terms revoked all previous wills, and gave the plaintiff I £1,000. The plaintiff claimed the legacy of £1,000, and, in addition, the £500 represented by the document which she says was contained in the box at the time it was given to her by the testator. The matter came before the Lord Chancellor, who held, on the evidence, that there was no donatio at all of the money represented by the document in question, for the reason that the plaintiff failed to prove that that document was in the box at the time when the box was given to her by the testator. He held, therefore, on the facts, that the plaintiff's claim failed, and it was quite

unnecessary for him to go any further. But he did go on to say this (Prec. Ch. at p. 304): A

"As to the second point [which was the question of law, whether the will were not a revocation, as had been contended] it could not be properly called a revocation; but the £1,000 therein given should be looked upon as a satisfaction of the £500 given her by the first will, and the £500 tally after that. One cannot be said to revoke a debt by his will, but yet he may satisfy it, by giving a legacy of equal value; and since he had revoked all former wills, this £1,000 was a satisfaction equivalent to a revocation, and must go in recompense of the £1,000 he had before intended her, since she could not prove he intended it otherwise." B

This is the only authority for the proposition contended for. Now, does that case lay down this general proposition, that if a man makes a donatio mortis causa, and afterwards gives a legacy of the same amount as the subject of the donatio, that legacy must be presumed to be in satisfaction of the donatio mortis causa; because it must go so far as that; and no further evidence be requisite beyond the mere fact that he gives a legacy of the same amount? In the first place, there is no authority which lays down the presumption or rule in terms, nor is it even found in the text-books. All that they say is, relying on *Jones v. Selby* (1) for their sole authority, that a legacy may be a satisfaction of a donatio. So it may. The circumstances may be such that on the whole case the court comes to the conclusion the legacy was intended to be in satisfaction of the previous donatio; but there is no authority, in my opinion, in support of the proposition that the mere fact, and nothing more, of the legacy being of the same amount as the donatio is sufficient satisfaction. I do not quite see why it should be. The testator intends the object of the gift of the donatio mortis causa to have that, whatever happens, in case he should die, unless he recalls it, as, of course, he may do. If he subsequently give the donee a legacy of the same amount, why is the court to be driven to the conclusion that he does not intend her to have both? He knows he has made the donatio mortis causa, and afterwards gives the legacy. Why should the court come to the conclusion that he did not intend it in addition, but in substitution? I see no reason whatever. C

I want now to examine *Jones v. Selby* (1), and see whether it is an authority for the general proposition referred to. I do not think it is in the least. I think that what LORD COWPER meant there was that, under the circumstances of that case, the legacy of £1,000 was intended to be in satisfaction of the previous provisions which the testator had made. It is important for that purpose to bear in mind that LORD COWPER relies on the previous legacy of £500 as an element in the case; he relies upon the express terms of the second will, revoking all former wills, and he relies upon the fact that though the legacy was equal not only to the amount of the donatio, but to the amount plus the amount of the previous legacy, that it was intended to be in satisfaction of the previous legacy there is no question. The conclusion come to was, looking at all the circumstances, including that to which I have referred, it was intended to be in satisfaction of the donatio. I do not think, judging from the report, which is a short one and not very satisfactorily recorded, that I can say that the case ought to be treated as an authority for the general proposition that a legacy of the same amount as a donatio is in itself a satisfaction of a donatio. There may be circumstances in which such a presumption would arise—for example, if the donatio mortis causa were made to a person as to whom the presumption against double portions arises, then the subsequent legacy may be a satisfaction or an ademption of the previous gift. So also, if the donatio is made in satisfaction of a debt, and a subsequent legacy is given to the creditor, it may be the legacy was not intended to be an additional gift, but in satisfaction of the debt. There may be circumstances of that sort. I do not find any authority for that general proposition. In this case I can find no circumstances which would lead me to infer that the testator really intended to substitute the legacy for the donatio; D

A and I must, therefore, hold that the plaintiff is entitled to the declaration she asks for—namely, that she is entitled to receive the £2,000 secured by these notes. Of course, that is subject to the condition which the testator imposed upon her of paying out of it what he called the little household bills. As to that there is no dispute. Subject to that, the plaintiff is entitled to the money secured by the deposit notes.

B Solicitors: *Lovell, Son & Pitfield*, for *Paris, Smith & Randall*, Southampton; *Allen, Edwards & Oldfield*, for *R. Drutt*, Bournemouth.

[Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.]

C

D Re HARRINGTON. WILDER v. TURNER

[CHANCERY DIVISION (Warrington, J.), October 14, 1908]

[Reported [1908] 2 Ch. 687; 78 L.J.Ch. 27; 99 L.T. 723;
72 J.P. 501; 25 T.L.R. 3; 52 Sol. Jo. 855; 21 Cox, C.C. 709]

E *Bastardy—Affiliation order—Enforcement—Death of putative father—Claim by mother against his estate for arrears—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict., c. 65), s. 4.*

A claim against a putative father for arrears of weekly sums ordered to be paid by him under the Bastardy Law Amendment Act, 1872, **held** to be only enforceable against him by the means provided by that Act, and consequently after his death, when those means no longer applied, such a claim would not be enforced under the ordinary law against his representatives or his estate.

F **Notes.** The Bastardy Law Amendment Act, 1872, s. 4, has been replaced by the Affiliation Proceedings Act, 1957, ss. 4, 5 (1): 37 HALSBURY'S STATUTES (2nd Edn.) 40, 42.

G As to affiliation orders, see 3 HALSBURY'S LAWS (3rd Edn.) 122 et seq.; and for cases see 3 DIGEST (Repl.) 460 et seq.

Cases referred to in argument:

Hampton v. Rickard (1874), 43 L.J.M.C. 133; 30 L.T. 636; 38 J.P. 646; 3 Digest (Repl.) 441, 335.

Doe d. Bishop of Rochester v. Bridges (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 42 Digest 750, 1737.

H *Stevens v. Jeacocke* (1848), 11 Q.B. 731; 17 L.J.Q.B. 163; 11 L.T.O.S. 101; 12 Jur. 477; 116 E.R. 647; 42 Digest 750, 1739.

Ruttinger v. Temple (1863), 4 B. & S. 491; 3 New Rep. 34; 33 L.J.Q.B. 1; 9 L.T. 256; 28 J.P. 71; 9 Jur. N.S. 1239; 12 W.R. 9; 122 E.R. 544; 3 Digest (Repl.) 438.

I *R. v. Berry* (1859), Bell, C.C. 46; 28 L.J.M.C. 86; 32 L.T.O.S. 324; 23 J.P. 86; 5 Jur.N.S. 320; 7 W.R. 229; 8 Cox, C.C. 121, C.C.R. 3 Digest (Repl.) 355, 442.

R. v. Lightfoot (1856), 6 E. & B. 822; 25 L.J.M.C. 115; 27 L.T.O.S. 235; 20 J.P. 677; 2 M.C. 115; 27 L.T.O.S. 235; 20 J.P. 677; 2 Jur.N.S. 786; 4 W.R. 655; 119 E.R. 1070; 3 Digest (Repl.) 454, 429.

Adjourned Summons to determine whether the claimant was entitled to rank as a creditor against the estate of one Harrington who had been adjudged the putative father of her illegitimate child.

In September, 1896, by an order of the justices sitting for the borough of Ports-mouth, made in the usual form, C. D. M. Harrington was adjudged the putative father of the bastard child born in that year of Nellie Hall, and ordered to pay the sum of 5s. per week for the maintenance and education of the child until it should attain the age of sixteen years or die. C. D. M. Harrington died in 1903 intestate, and in the same year an action was brought for the administration of his estate, and the usual accounts and inquiries were ordered and the master certified accordingly. Upon becoming aware of the death of the intestate, Nellie Hall, who had subsequently married, put in a claim to rank as a creditor upon the estate for the sum of £37 for arrears of the weekly sums unpaid at his death, for the sum of £119 4s. for arrears of the weekly sums accruing since his death, and for those which would accrue up to the time of the child becoming sixteen years old. She took out this summons in the action to establish her claim.

G. F. Hart for the claimant.

A. C. Nesbitt for the plaintiff in the action; *S. C. Lushington* for the heir-at-law and next-of-kin; and *H. P. Rashleigh* for a mortgagee.

WARRINGTON, J. (after stating the facts).—The order of the justices was made under the Bastardy Law Amendment Act, 1872, the only material section of which is s. 4, which provides for the making of the order under the circumstances, detailed, and continues:

"if at any time after the expiration of one calendar month from the making of such order as aforesaid it be made to appear to any one justice upon oath or affirmation that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices; and in case such putative father neglect or refuse to make payment of the sums due from him under such order . . . such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due . . . to be recovered by distress and sale of the goods and chattels of such putative father, and may order such putative father to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless he give sufficient security . . . for his appearance before two justices on the day which may be appointed for the return of such warrant of distress,"

and then, if sufficient distress cannot be had, the putative father may be committed to prison. The claim in the present case is a claim against the estate of a deceased person, and, in order to succeed, such a claim must be in respect of a debt, and the claimant must establish that she is a creditor of the deceased, and that the sum due can be recovered by action. It is a well-known principle of law, established by many authorities, that if an obligation is imposed by statute and a mode of enforcing that obligation is provided by the same statute, the intention of the legislature is that that should be the only mode of enforcing the obligation, and that it should not be enforced by the ordinary process of the law. That applies here. Section 4 of the Act provides that the justices may order that the putative father shall pay weekly sums to the mother of the child, and the same section contains elaborate provisions for enforcing payment. So far as the authorities go there are none in point except those which establish the general principle to which I have referred. But the text-writers on the subject are unanimous that there can be no action against the estate of the putative father after his death. No case is referred to by them which directly supports that proposition, but still less is there any case in which the holder of a bastardy order has been allowed to prove against the estate of the deceased putative father. In my opinion the reason why there is no authority in regard to such a claim is because hitherto no one has been bold enough to assert such a right. Inasmuch as the mode provided by the statute in which the payment of the weekly sums is to be enforced ceases with the life of the putative father, as there is in terms an obligation only on the father himself,

- A** the obligation must cease with his life also. I hold that there is no right to recover either the sums claimed which accrued before the death of the putative father or those which are claimed as arising since his death.

Claim dismissed.

- B** Solicitors: *Norris & Martin; Hammond & Richards; Wadeson & Malleson.*

[*Reprinted by N. Tebbutt, Esq., Barrister-at-Law.*]

C

Re NIGHTINGALE. BOWDEN v. GRIFFITHS

- D** [CHANCERY DIVISION (Neville, J.) January 11, 12, 1909]

[Reported [1909] 1 Ch. 385; 78 L.J.Ch. 196; 100 L.T. 292]

Will—Class gift—Gift by reference to statutes of distribution—Shares of beneficiaries to be determined by statutes.

- E** Where there is a gift to a class to be ascertained by reference to the statutes for the distribution of intestates' estates the shares in which the class take as well as the persons who are the objects of the gift are *prima facie* to be determined by the statutes, and it makes no difference whether the gift be a gift for "such person or persons as under the statutes of distribution of intestates' estates would be the next-of-kin," or a gift to "such persons as would be entitled under the statutes," or "as would take according to the statutes."

- F** *Bullock v. Downes* (1) (1860), 9 H.L.Cas. 1, considered and followed.

Notes. The Statute of Distribution, 1670, 9 HALSBURY'S STATUTES (2nd Edn.) 658, has been repealed, except as to deaths before 1926, by the Administration of Estates Act, 1925 (*ibid.*, p. 718).

- G** Considered: *Re Gansloser's Will Trusts, Chartered Bank of India, Australia and China v. Chillingworth*, [1951] 2 All E.R. 936.

As to the rules of intestate succession for people dying before 1926, see 16 HALSBURY'S LAWS (3rd Edn.) 412 et seq.; for cases on next-of-kin, see 44 Digest 875 et seq.; and for those on concurrent gifts concerning joint tenancy and tenancy in common, see *ibid.*, 972 et seq.

- H** Cases referred to:

(1) *Bullock v. Downes* (1860), 9 H.L.Cas. 1; 3 L.T. 194; 11 E.R. 627, H.L.; 44 Digest 876, 7328.

Also referred to in argument:

Horn v. Coleman (1853), 1 Sm. & G. 169; 22 L.J.Ch. 779; 20 L.T.O.S. 290; 17 Jur. 408; 1 W.R. 194; 65 E.R. 73; 44 Digest 978, 8341.

- I** *Re Rees, Williams v. Davies* (1890), 44 Ch.D. 484; 59 L.J.Ch. 305; 62 L.T. 362; 38 W.R. 523; 44 Digest 886, 7431.

Re Ranking's Settlement Trusts (1868), L.R. 6 Eq. 601; 40 Digest (Repl.) 695, 1282.

Re Greenwood's Will (1861), 3 Giff. 390; 31 L.J.Ch. 119; 5 L.T. 487; 8 Jur.N.S. 907; 10 W.R. 117; 66 E.R. 461; 44 Digest 884, 7402.

Adjourned Summons to determine whether upon the death of a spinster intestate her share of the estate passed to her four surviving sisters as joint tenants or tenants in common.

By his will, dated Mar. 16, 1865, Daniel Nightingale devised and bequeathed A
 his real and personal estate to trustees upon trust to convert and invest the same,
 and to pay the annual proceeds to his wife, Elizabeth Nightingale, during her
 life, and after her decease to his five daughters or the survivor or survivors of them
 in such manner as his trustees should think most advisable for their maintenance,
 with power to accumulate any surplus income. Such provisions for his daughters B
 he directed should be for their respective separate use free from marital control,
 but there should be no power to anticipate income, and, subject to such provisions,
 the testator's real and personal estate should be considered as divided into five
 equal parts. Each of his daughters so surviving should have power to appoint
 her vested or presumptive share by deed or by her will or codicil to her issue,
 and likewise to appoint a life estate to any husband, and in default of appointment C
 the share of each married daughter should be in trust for her children. If any
 of his daughters should die without issue, then the share of such daughter should
 go to such person or persons for such estate or estates and generally in such manner
 as she should by deed or will appoint, and, subject to the limitations aforesaid, the
 share of each of the said daughters so surviving him should go to such person or
 persons as under the statutes for the distribution of intestates' estates would be
 her next-of-kin if she died unmarried. The testator died on Oct. 28, 1869, D
 leaving his widow and the five daughters him surviving. The widow died on
 Mar. 18, 1879. The daughter Elizabeth died on July 28, 1891, and Emma on
 April 20, 1892, both spinsters and intestate and without having exercised their
 power of appointment. Two other daughters died subsequently, and the last sur-
 viving daughter, Louisa Griffiths, died on Mar. 31, 1908, leaving one child, the
 defendant H. C. R. Griffiths, and having purported to exercise her power of E
 appointment by a codicil. This summons was taken out by the present trustees
 of the testator's will for the determination (among others) of the following question,
 whether upon the death of the daughter Elizabeth, a spinster and intestate, and
 without having exercised her power of appointment, her share passed to her four
 surviving sisters, who were her next-of-kin, as joint tenants or tenants in common.

Peterson, K.C., and Henry Fellows for the summons. F

Butcher, K.C., and Ward Coldridge for the representatives of the sister who
 survived all the others.

Jenkins, K.C., and L. Mossop for the representatives of a sister who died earlier.

Cyprial Williams, C. St. J. W. Nicholson, C. G. Church and Edward Beaumont
 for other parties. G

NEVILLE, J.—This case depends upon what is the true rule of constructions
 recognised by the House of Lords in *Bullock v. Downes* (1). That a rule was
 recognised in that case, there can be no doubt, and the question is what is the extent
 of it?

In my opinion, the rule which was there assented to was that where there is a H
 gift to a class to be ascertained by reference to the statutes for the distribution
 of intestates' estates, the shares in which the class take as well as the persons
 who are the objects of the gift are *prima facie* to be determined by the statutes,
 unless, of course, a contrary intention is expressed by the will. The rule itself
 appears to be a matter of inference. I cannot find upon the construction of the
 expressions used in the numerous cases which were cited to the House of Lords
 any expression of intention that the shares should be in accordance with the I
 statutes of distributions, and it seems that that is so, whether the gift be a gift
 as in the present case for such person or persons as under the statutes would be
 the next-of-kin, or a gift to such persons as would be entitled under the statute
 or as would take according to the statute. In each case you have a method of
 ascertaining who the class to take are, and a complete silence as to the share
 in which they are to take. But the courts have thought it right to infer from the
 reference to the statutes of distributions that the testator intended that the next-

A of-kin should take the share which under the statutes the next-of-kin would be entitled to take.

Therefore, no distinction ought to be drawn upon the various forms of expression which one finds used in cases where the class are to be ascertained by a reference to the statutes of distributions. I may repeat that where a rule of construction exists it seems the worst policy in the interests of the public at large to draw
B nice distinctions between one form of words and another form of words, and to say that in such and such a case the rule applies, and that in another case it does not apply. The rule should be taken in as universal a way as possible, in order that persons interested under a will may have some reasonable opportunity of knowing what the courts will hold to be the interpretation of the will in case
C it should come before them; and therefore, I can draw no distinction between the words used in this case and the words used in the numerous cases that have been cited to me, in which it has been held that a gift to a class to be ascertained by reference to the statutes of distributions is a gift to them as tenants in common and not as joint tenants.

Solicitors: King, Wigg & Co., for George Armstrong & Sons, Newcastle-on-Tyne;
D Hillearys; H. C. Mossop & Co.; W. H. Smith; Hicks, Arnold & Mozley.

[Reported by W. C. SANDFORD, Esq., Barrister-at-Law.]

E

WILSON AND ANOTHER v. WILLIAM HARPER, SON & CO.

[CHANCERY DIVISION (Neville, J.), May 26, 1908]

F

[Reported [1908] 2 Ch. 370; 77 L.J.Ch. 607; 99 L.T. 391]

Agent—Commission—Commission payable on moneys received by principals from customers introduced by agent—Death of agent—Termination of agency—Right of agent's estate to commission on future orders.

G

The plaintiffs were the executors of W. deceased, who had agreed to introduce customers to the defendants on the consideration that they should pay him a 5 per cent. commission on the moneys received from such customers so long as the defendants did business with them. After having introduced customers for sixteen years to the defendants, who duly paid him the commission agreed, W. died, and, although the defendants continued to execute orders from the customers he had introduced, they refused to pay to his estate the commission on such orders, on the ground that W.'s death had put an end to the agreement.

H

Held: the contract was determined by the death of W., as the introduction of fresh customers became impossible, but the defendants must still pay the commission so long as they continued to do business with the customers the deceased had introduced, in the same way as they would have had to pay the commission if, after having determined the contract in the lifetime of W., they had continued to do business with his customers.

I

Notes. As to remuneration of agent, see 1 HALSBURY'S LAWS (3rd Edn.) 196-202, and for cases see 1 DIGEST (Repl.) 608-611.

Cases referred to:

(1) *Barrett v. Gilmour & Co.* (1901), 17 T.L.R. 292; 6 Com. Cas. 72; 1 Digest (Repl.) 609, 1980.

Also referred to in argument:

Farrow v. Wilson (1869), L.R. 4 C.P. 744; 38 L.J.C.P. 326; 20 L.T. 810; 18 W.R. 43; 1 Digest (Repl.) 795, 3220.

Bilbec v. Hasse & Co. (1889), 5 T.L.R. 677; affirmed (1890), Times, January 16, A
C.A.; 1 Digest (Repl.) 608, 1974.

Morris v. Hunt & Co. (1896), 12 T.L.R. 187; 1 Digest (Repl.) 608, 1978.

Salomon v. Brownfield and Brownfield Guild Pottery Society, Ltd. (1896), 12
T.L.R. 289; 1 Digest (Repl.) 609, 1979.

Witness Action for a declaration that an agreement was not determined by the death of one of the parties. B

The plaintiffs were the executors of the will of Joseph Wroe, of Oakfield, Acre Lane, Cheadle Hulme, in the county of Chester. The defendants were a firm carrying on business in the name of William Harper, Son & Co., as malleable and soft grey iron founders, at the Star Foundry, Birmingham Street, Willenhall.

On May 19, 1890, Joseph Wroe, who was in a position to introduce customers to the defendants, wrote them a letter offering his services for the sale of their goods. Payment was to be 5 per cent. commission on all accounts introduced so long as business was done with the customers. On Aug. 9, 1890, the defendants replied accepting the offer. C

J. Wroe introduced from time to time customers who did business with the defendants, and the defendants duly paid him the commission agreed upon until his death on Nov. 22, 1906. After his death the defendants continued to do business with some of the customers which he had introduced, but refused to pay the plaintiffs any commission on these transactions on the ground that the death of J. Wroe had determined the contract, and that such commission was consequently not payable. D

The plaintiffs thereupon brought an action claiming a declaration that the agreement was not determined by the deceased's death, and that the defendants were liable to pay to his estate commission upon all orders received after his death from and paid for by such customers. E

Peterson, K.C., Thomas Tindal Methold, and James R. Seanor for the plaintiffs.
Jenkins, K.C., and William J. Disturnal for the defendants. F

NEVILLE, J.—This case simply involves a question of construction of two letters. I have already intimated that any statement by Mr. Harper that the unsigned letter of 1898, which has been discovered among the papers of the firm, was sent, is a mistake. I do not think it ever was sent, and I say so chiefly having regard to the terms of the letter of Aug. 9, which seems entirely inconsistent with the idea that the letter of May 22 had in the meantime been sent. But I may say it does not seem to make any substantial difference to the rights of the parties whether the letter was sent or not. I think that this is all I have to consider. Mr. Wroe writes and says: "I suggested to your Mr. Harper, jun., that I could and would assure you a few good customers," etc. . . . Then he enlarges upon the opportunities he has for introducing business, and he indicates his willingness to follow inquiries, and so forth. There are interviews in the meantime between Mr. Wroe and members of the firm, and his letter receives no answer until Aug. 9, when the firm write and say to Mr. Wroe, "Since you were here last week," etc. . . . That seems to me to be the beginning and the end of the transaction which concerns the present case; and I think it is only the letter of Aug. 9 that is sometimes spoken of as a commission note. It was simply saying to a man, "If you introduce business I will pay you 5 per cent. upon the business introduced"; and it seems that all question as to duration is set at rest by the words which have been used here: "So long as we do business with them you place on our books." These words show quite clearly that the commission was not only in respect of orders given through the agent, if you like to call him so, as in *Barrett v. Gilmour* (1) which has been cited to me, but that there was a commission of 5 per cent. to be paid as the price of an introduction for all business done by the firm with the customers introduced. G
H
I

A It seems quite impossible to say that you are to read in business documents of this kind an implied limitation that no remuneration is to be paid to the executors of one of the contracting parties; because, if you read the word "you" as meaning "you, and not your representatives after your death," the result would be that earned commission—that is, commission in respect of orders already executed—would not be payable because there is nobody to receive; the man
B is dead, and you are not bound to pay his executors. It appears, therefore, that you must read the agreement to pay "you" in the ordinary sense in which those words are used—that is, "to pay you, and after your death to pay your executors." What you are to pay is quite clear. You are to pay 5 per cent. as the orders received from firms introduced by Mr. Wroe. Therefore, it seems that it does not matter whether he was dead or alive, because after he is dead the thing comes to
C an end in this way, that no further customers can be introduced by anybody on the terms of this document. It seems it might have been determined at any time by notice by Harper & Sons, and from that moment no commission could be recovered in respect of any fresh business introduced; but I do not think that would affect the right to receive commission in respect of business from firms introduced, and I do not think that death puts an end to that any more than the notice of
D determination of the agreement by Harper & Sons would have done in Mr. Wroe's lifetime.

Then it is said that this was an agreement for agency, and that the agreement is determined by the death of the agent, because it is an agreement for personal services. I do not think it was an agreement for agency at all. There is a reference to his being appointed agent, and it appears that some time afterwards he held
E himself out as the agent of the firm, and so held himself out as their agent with, at all events, the subsequent authorisation of the firm itself. They allowed him to do so, and he also did a considerable amount of work mainly and particularly with regard to the business with the firm which he introduced, and it was as much in his interest as in the interest of Harper & Son that he should do so, because
F the better they performed their contracts the more likelihood there was of the firms introduced by him giving fresh orders. He was clearly concerned in the facilitating of business between the firms introduced by him and the firm of Harper & Son, and it appears that he also occasionally did other work for the firms for which no remuneration was paid him. It seems that the position between the parties does not in the least interfere with or affect the agreement, which had
G been entered into by the firm, that they would pay 5 per cent. on the orders received so long as the customers introduced remained their customers. I think, therefore, the plaintiffs succeed. But I do not like the form of the declaration before me: "That the agreement was not determined by the death." It was determined by the death. It is the remuneration that survived.

H Solicitors: *Dangerfield & Blythe*, for *S. J. Barlow*, Manchester; *E. Flux, Lead-bitter & Neighbour*, for *Rowland Tildesley*, Willenhall.

[Reported by A. J. B. TAPLING, ESQ., Barrister-at-Law.]

KIRCHNER & CO. v. GRUBAN

[CHANCERY DIVISION (Eve, J.), December 16, 17, 1908]

[Reported [1909] 1 Ch. 413; 78 L.J.Ch. 117; 99 L.T. 932;
53 Sol. Jo. 151]

Master and Servant—Contract of service—Covenant restraining freedom of servant—Covenant by servant not to make gains by other business or divulge employers' secret—Enforcement—Refusal of injunction.

In 1905 by an agreement in the German language, the defendant, a German, became sole agent in Great Britain and Ireland for the plaintiffs, a German company. By cl. 7 of the agreement the defendant agreed to devote all his activity to the sale of the plaintiff's machines, not to make gains by another business, not to divulge the plaintiffs' business matters, to remain in their service, and not to give notice before July 1st, 1910. By cl. 12a disputes were to be submitted to the courts in Leipzig. In May, 1908, the defendant terminated the agreement and became the manager of an English rival company and the plaintiffs brought an action against him for injunctions and other relief. A conditional appearance was entered by the defendant who applied by summons to stay the proceedings and to refer the dispute to the court at Leipzig. The plaintiffs then served notice of motion for (i) an injunction to restrain the defendant from engaging in any business other than that of the plaintiffs until after July 1, 1910, or until the disputes had been submitted to the German courts and a final order made; (ii) an injunction to restrain the defendant, for a similar period, from divulging matters relating to the plaintiff's business. On a summons to stay the action and the defendant's motion:

Held: (i) *prima facie* the agreement for reference of disputes to the Leipzig courts ought to be sustained; (ii) the first injunction could not be granted as cl. 7 of the agreement, though negative in form, was affirmative in effect and the court would not compel specific performance of a contract of service; (iii) the plaintiffs were not entitled to the second injunction, for the implied contract not to divulge information after the conclusion of his service by an employee depended upon the construction of a written contract which the agreement of the parties precluded the court from construing; and (iv) on the defendant agreeing to submit to the jurisdiction of the German court, further proceedings in the action must be stayed.

Robb v. Green (1), [1895] 2 Q.B. 315, applied.

Notes. Followed: *The Cap Blanco*, [1911-13] All E.R.Rep. 366. Considered: *Mortimer v. Beckett*, [1920] All E.R. Rep. 179. Applied: *Bents Brewery Co. v. Hogan*, [1945] 2 All E.R. 570. Referred to: *London, Chatham and Dover Railway and South Eastern and Central Rail. Co.'s Managing Committee v. Spiers and Pond* (1916), 32 T.L.R. 493; *Prosperity v. Lloyds Bank* (1923), 39 T.L.R. 372; *Warner Bros. Pictures, Incorporated v. Nelson*, [1936] 3 All E.R. 160.

As to duties of servant, see 25 HALSBURY'S LAWS (3rd Edn.) 462-465; and for cases see 34 DIGEST, 117-123. As to injunctions for protection of contractual rights, see 21 HALSBURY'S LAWS (3rd Edn.) 379 et seq.; and for cases see 28 DIGEST (Repl.) 816 et seq.

Cases referred to :

- (1) *Robb v. Green*, [1895] 2 Q.B. 315; 64 L.J.Q.B. 593; 73 L.T. 15; 59 J.P. 695; 44 W.R. 25; 11 T.L.R. 517; 39 Sol. Jo. 653; 14 R. 580, C.A.; 28 Digest (Repl.) 854, 853.
- (2) *Law v. Garrett* (1878), 8 Ch.D. 26; 38 L.T. 3; 26 W.R. 426, C.A.; 2 Digest (Repl.) 479, 360.
- (3) *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; 60 L.J.Ch. 428; 64 L.T. 716; 39 W.R. 433; 7 T.L.R. 325, C.A.; 1 Digest (Repl.) 524, 1564.

- A (4) *Davis v. Foreman*, [1894] 3 Ch. 654; 64 L.J.Ch. 187; 43 W.R. 168; 8 R. 725; 1 Digest (Repl.) 634, 2140.
- (5) *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116; 62 L.J.Ch. 252; 67 L.T. 820; 41 W.R. 146; 9 T.L.R. 72; 37 Sol. Jo. 45; 2 R. 156, C.A.; 28 Digest (Repl.) 820, 659.
- B (6) *Lumley v. Wagner* (1852), 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687, L.C.; 28 Digest (Repl.) 829, 726.

Also referred to in argument:

- Willesford v. Watson* (1873), 8 Ch. App. 473; 42 L.J.Ch. 447; 28 L.T. 428; 37 J.P. 548; 21 W.R. 350, L.C. & L.J.J.; 2 Digest (Repl.) 491, 430.
- C *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society, Ltd.*, [1903] 1 K.B. 249; 72 L.J.K.B. 211; 88 L.T. 6; 51 W.R. 402; 19 T.L.R. 155; 47 Sol. Jo. 222, C.A.; 2 Digest (Repl.) 480, 365.
- General Billposting Co., Ltd. v. Atkinson*, post p. 619; [1909] A.C. 118; 78 L.J.Ch. 77; 90 L.T. 943; 25 T.L.R. 178, H.L.; 34 Digest 102, 759.
- Ehrman v. Bartholomew*, [1898] 1 Ch. 671; 67 L.J.Ch. 319; 78 L.T. 646; 46 W.R. 509; 14 T.L.R. 364; 43 Digest 34, 297.
- D *Morison v. Moat* (1851), 9 Hare, 241; 20 L.J.Ch. 513; 18 L.T.O.S. 28; 15 Jur. 787; 68 E.R. 492; affirmed (1852), 21 L.J.Ch. 248, L.J.J.; 28 Digest (Repl.) 854, 849.
- Lamb v. Evans*, [1893] 1 Ch. 218; 62 L.J.Ch. 404; 68 L.T. 131; 41 W.R. 405; 9 T.L.R. 87; 2 R. 189, C.A.; 34 Digest 121, 927.

Action for an injunction.

- E By an agreement made at Leipzig in the German language, dated June 30, 1905, between the plaintiffs Kirchner & Co., a company registered according to German law, and the defendant, Johannes George Wilhelm Gruban, a German subject, the defendant was engaged as the plaintiff's agent for the United Kingdom, with domicile at London, at 5,000 marks yearly salary payable monthly, and certain railway fares, expenses, and commissions on profits. Clause 6 of the agreement as translated was as follows:

- F "Mr. Gruban agrees to devote all his activity and industry to the sales of the machines and other articles of the firm, Kirchner & Co., A. G. Leipzig, not to make gains by another business of any kind, not to divulge any business matters to anyone, and to follow exactly and conscientiously all instructions and directions of the firm, Kirchner & Co., A. G. Leipzig."

- G Clause 7:

- H "Mr. Gruban agrees under a penalty of twenty thousand marks to remain in his position and not to give notice before July 1, 1910 (three months). A penalty of twenty thousand marks comes into force if Mr. Gruban by neglect of duty or other permanent abuse of his position of trust shows himself unworthy to remain in his position, so that according to the German commercial code dismissal is justified. Should such an event take place, Kirchner & Co. secure themselves in the first place by the security paid by Mr. Gruban and further by the commissions due or falling due later. Kirchner & Co. agree not to give notice to Mr. Gruban before July 1, 1910 (three months), provided that Mr. Gruban does not give cause for lawful dismissal."

- I By cl. 10 the defendant gave security by payment for the proper execution of his duties. Part of the amount was not to carry interest before July 10, 1910, and the repayment of the security moneys was not to take place, at the earliest, before that date.

Clause 12a:

"The contracting parties submit themselves in all cases of dispute to the exclusive jurisdiction of the Royal Landgericht or the Amtsgericht at Leipzig and to the exclusive applicability of German law."

The defendant continued to act as the London manager of the plaintiffs until May 1, 1908, when he became managing director of Haigh & Co., Ltd., of Oldham. With the latter he had entered into an agreement of service on Feb. 15, 1908, to take effect on his leaving the plaintiffs. In March he wrote to them saying he was no longer bound by his agreement. On June 9, 1908, the plaintiffs commenced an action in the Chancery Division for an injunction to restrain the defendant from engaging in any other business and from divulging matters relating to the plaintiff's business until after July 1, 1910. On June 18, 1910, the defendant entered a conditional appearance to the writ and on June 29 issued a summons asking that the writ of summons be set aside or proceedings be stayed. On Aug. 28, 1910, the plaintiffs served a notice of motion for an injunction.

They alleged that their customers had been solicited and that certain matters relating to their business had been divulged. There was also evidence that cl. 12a was valid and would on application be enforced by the German courts. The summons to stay and motion were heard together.

Danckwerts, K.C., and *W. H. Cozens-Hardy* for the defendant, the applicant on the summons.

Lawrence, K.C., and *J. Waggett* for the plaintiffs on the motion.

EVE, J., stated the facts and continued: As a general rule, these agreements to refer are often entered into without a full appreciation by the parties of the difficulties which may arise in the contractual relationship brought about by the very contract in which is incorporated the agreement to refer, and without full consideration of the circumstances, or the possible circumstances, which may arise and render the reference necessary. But, at the same time, it is part of the agreement between the parties, and *primâ facie* it is an agreement by which the parties are bound and upon which the court must act, unless for some good cause there is reason to think that the matter ought to be determined otherwise than by the tribunal to which the parties have deliberately agreed to submit their differences. On this contract I read the provision as an agreement to refer all disputes between the parties to the courts which are referred to in the agreement. I am quite satisfied that there is nothing in the suggestion that the decision of those courts may not be final. It may be that an appeal lies from those courts to other courts, but, assuming that to be so, that does not in the least operate to defeat the agreement into which the parties entered that the differences between them should be referred to those courts. *Primâ facie*, therefore, the agreement for reference is one which ought to be sustained, and to which the parties ought to be held liable, and I have to consider whether there has been made out such a case for either of the injunctions which are claimed as would bring the facts of this case within the class of case referred to by *BAGGALLAY, L.J.*, in the judgment in *Law v. Garrett* (2). He says (8 Ch.D. at p. 37):

"Now is there anything in the present case to rebut the *primâ facie* case arising out of the 17th article? [for reference to the tribunal selected.] It is true that the plaintiff prays for an injunction, and if a case for an injunction was made by the evidence, that would probably be a sufficient reason for refusing to send the matter to arbitration; but no such case is made, indeed, it is somewhat difficult to make out from the pleading or the evidence in respect of what the injunction is asked."

Therefore in dealing both with the summons and the motion the proper course to pursue is to consider whether on the motion the plaintiffs have made out a case for both or either of the injunctions which they claim, and, if I come to the conclusion that they have not, then *primâ facie* the parties must be held bound by the agreement into which they have entered.

The notice of motion goes to two wholly distinct matters, and the first injunction claimed is an injunction in terms really to restrain the defendant from determining

- A his engagement with the plaintiffs prior to July 1, 1910. It is admitted, or conceded, by the counsel for the plaintiffs that if this were a mere affirmative agreement by the defendant to serve the plaintiffs until July 1, 1910, and he had refused to continue that service, the court would not, according to the well-settled practice, interfere by an injunction to compel him to render his services to the plaintiffs down to the date at which in the ordinary course the engagement of service would
- B come to an end. But it is urged here that it is not merely an affirmative covenant, but that there is in this document a negative stipulation which the court, according to the practice, can enforce by restraining the defendant in the terms of the covenant. The negative stipulation is to be found in cl. 7 of the agreement:

- C “Mr. Gruban [that is the defendant] agrees under a penalty of 20,000 marks to remain in his position and not to give notice before July 1, 1910.”

It is said that that which he has done is a breach of his agreement not to terminate the service before July 1, 1910, and, if the matter were entirely free from authority, that would be an argument to which I should have had to give very much more weight than I am able to do in the present state of the authorities.

- D The question as to the practice of the court to enforce affirmative covenants of this sort was dealt with and fully disposed of, at any rate for the present, by *Whitwood Chemical Co. v. Hardman* (3), and at a later date the principle upon which that and similar cases had been determined came up for consideration before the late KEKEWICH, J., in *Davis v. Foreman* (4). There the form of the agreement between the employer and the employed was this,

- E “the employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business £15 each and every month.”

- F There was an agreement in the negative by the employer that so long as a certain state of things continued to exist he would not give notice to the employee determining the engagement. KEKEWICH, J., having heard all that was to be said on behalf of the plaintiff, who in that case was the employee seeking to restrain the employer from acting upon the notice, gave his judgment in which he arrives at this conclusion; that though in form the stipulation and agreement is negative in substance, it is really affirmative and positive; and that an agreement not to give
- G notice to determine his employment is for all practical purposes an agreement to continue the employment. Having come to that conclusion, he says ([1894] 3 Ch. at pp. 657, 658):

- H “Having regard to the principles expounded by the Court of Appeal in *Whitwood Chemical Co. v. Hardman* (3) and recognised again in *Ryan v. Mutual Tontine Westminster Chambers Association* (5), which is not directly in point, what ought I to do here, in dealing with a covenant or stipulation which, as I have said, though negative in form is positive in substance? There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words, give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of *Lumley v. Wagner* (6) which is not to be extended to a case of this character.”
- I

Every word of that judgment is applicable to the present case, and I should be disregarding an authority which is certainly binding upon me if I were to hold that merely because Mr. Gruban has entered into a contract not to terminate the engagement before July 1, 1910, I could grant an injunction the effect of which would be as against him to order specific performance of an agreement to continue to serve the plaintiffs down to July 1, 1910. So that on the first part of the motion I hold that, apart from all other considerations, the plaintiffs would not be entitled to the order which they ask. With regard to the second part of the motion different, and somewhat wider, considerations arise. That part of the motion is directed to an injunction to restrain the defendant from divulging to his present employers, or to others, confidential information which he has obtained while in the employ of the plaintiffs. I am not desirous at the present moment of saying anything which would in the least affect the tribunal before whom these matters will ultimately come, and the more so because I have not heard his counsel upon these matters in which it is suggested the defendant has acted in breach of his duty towards his employers. When I say my judgment proceeds on the assumption that there may have been such a breach, I must not be understood as expressing any opinion that there has been in fact such a breach. Assuming for the moment for the purpose of my judgment that there has been such conduct on the part of the defendant as would in the ordinary course in this court lead to the court making an injunction against him until judgment or further order, what ought I to do having regard to the contract between the parties here? It is clear upon the authority of *Robb v. Green* (1) that the real principle upon which the employee is restrained from making use of confidential information which he has gained in the employment of some other person is that there is, in the contract of service subsisting between the employer and employee an implied contract on the part of the employee, that he will not after the service is determined use information which he has gained while the service has been subsisting to the detriment of his former employer. It rests on the implied contract, and in order to arrive at a decision whether a particular contract is to be implied it becomes absolutely necessary to resort to the contract to ascertain what is the meaning of that contract and what implications can properly and legitimately be drawn from that contract of service.

That involves as a necessity the construction of the contract. In whatever way one looks at his contract the parties here have agreed that it shall be construed according to the German law, and, it may be, that construing this contract according to the law of Germany, the German court would not deduce from this any implied obligations such as might have been deduced if the contract was to be construed according to English law, or if, indeed, the only contract between the parties was the contract established by the relationship of master and servant subsisting between them. The terms of cl. 12a preclude me from drawing the inference of implied contract as to this contract which the parties have agreed should be construed not according to the law which I am applying, but according to the law of a foreign country. In these circumstances I do not feel myself warranted in granting any injunction founded upon an implied contract to be deduced from this contract, and, accordingly, I am not in a position to grant, nor have the plaintiffs made out a case in which I ought to grant, any injunction on the motion. If that conclusion is right, the further decision seems almost to follow as a matter of course that there is no cause shown why the parties should not be held to this agreement—an agreement the effect of which as German subjects I must presume they fully appreciated. For some reasons which they then no doubt thought adequate, all parties agreed that disputes should be determined in the country of which they were citizens, and, under these circumstances, it seems to me that my only duty is to make an order on the summons staying the action.

Solicitors: *Osborn & Osborn; Cruesemann & Rouse.*

[Reported by W. P. PAIN, Esq., Barrister-at-Law.]

A

LARSEN v. SYLVESTER & CO.

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Ashbourne, Lord James of Hereford, Lord Robertson, and Lord Collins), May 21, 1908]

B

[Reported [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 24 T.L.R. 640; 11 Asp.M.L.C. 78; 13 Com. Cas. 328]

Shipping—Demurrage—Exception clause—Detention of vessel by “hindrance of what kind soever beyond [charterers’] control”—Application of ejusdem generis rule—Not to be applied loosely—Effect to be given to intention of parties—Value of doctrine.

C

A ship belonging to the appellant was chartered by the respondents, and was ordered to G. to load a cargo of coal. In consequence of the crowded state of the dock at G. the ship was delayed in obtaining a berth at the coal-tips, and consequently her loading was not completed within the lay days allowed by the charterparty. The charterparty, however, contained an exemption from liability “arising from frost, floods, strikes, lock-outs of workmen, disputes between masters and men, or any other unavoidable accidents or hindrances of what kind soever beyond the control [of either party] preventing or delaying the working, loading, or shipping of the said cargo.”

D

Held: “hindrances of what kind soever” could not be restricted to hindrances ejusdem generis with the matters previously enumerated, and, therefore, the charterers were not liable for the delay caused by the crowded state of the dock.

E

Per LORD LOREBURN, L.C.: It is impossible to lay down any general rules for the application of the doctrine of ejusdem generis, but there may be great danger in applying it too loosely, which may result in effect not being given to the intention of the parties.

Per LORD LOREBURN, L.C., and LORD ROBERTSON: Nothing must be deduced from this decision to shake the soundness of the ejusdem generis rule of construction, which is perfectly sound.

F

Notes. Distinguished: *Thorman v. Dowgate Steamship Co.*, ante p. 174. Applied: *France, Fenwick & Co. v. Spackman* (1912), 108 L.T. 371. Considered: *Re Layard, Layard v. Bessborough* (1916), 85 L.J.Ch. 505; *Magnhild (Owners) v. McIntyre*, [1920] 3 K.B. 321. Referred to: *Herman v. Morris* (1919), 35 T.L.R. 574; *Diamond Alkali Export Corp. v. Bourgeois*, [1921] All E.R.Rep. 283; *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730; *A.-G. v. Blackpool Corp.* (1928), 92 J.P. 50; *Re Jenkins, Jenkins v. Davies*, [1931] 2 Ch. 218; *Lazard Bros. & Co. v. Brooks* (1932), 38 Com. Cas. 46; *Beaumont-Thomas v. Blue Star Line, Ltd.*, [1939] 3 All E.R. 127; *Chandris v. Isbrandtsen-Moller Co., Inc.*, [1950] 1 All E.R. 768; *Reardon Smith Line, Ltd. v. Ministry of Agriculture*, [1959] 3 All E.R. 434.

G

As to construction of charterparties, see 35 HALSBURY'S LAWS (3rd Edn.) 255 et seq., and 389-392 (loading); and for cases see 41 DIGEST 306-308. As to ejusdem generis rule generally, see 11 HALSBURY'S LAWS (3rd Edn.) 430, 431; and for cases see 17 DIGEST (Repl.) 282-285.

H

Case referred to:

I

(1) *Earl of Jersey v. Neath Poor Law Union Guardians* (1899), 22 Q.B.D. 555; 58 L.J.Q.B. 573; 53 J.P. 404; 37 W.R. 388; 5 T.L.R. 337, C.A.; 34 Digest 605, 26.

Also referred to in argument:

Shamrock Steamship Co. v. Storey & Co. (1899), 4 Com. Cas. 80; on appeal, 81 L.T. 413; 16 T.L.R. 6; 8 Asp.M.L.C. 590; 5 Com. Cas. 21, C.A.; 41 Digest 570, 3946.

Milverton Sailing Ship Co., Ltd. v. Capetown and District Gas Light and Coke Co., Ltd. (1897), 13 T.L.R. 548; 2 Com. Cas. 281; 41 Digest 441, 2770.

- Crawford and Rowat v. Wilson, Sons & Co.* (1896), 12 T.L.R. 170; 1 Com. Cas. 154, 277, C.A.; 41 Digest 441, 2769. A
- Akt. Inglewood v. Millar's Karri and Jarrah Forests, Ltd.* (1903), 88 L.T. 559; 19 T.L.R. 405; 9 Asp.M.L.C. 411; 8 Com. Cas. 196; 41 Digest 445, 2791.
- Re Richardsons and M. Samuel & Co.*, [1898] 1 Q.B. 261; 66 L.J.Q.B. 868; 77 L.T. 479; 14 T.L.R. 5; 8 Asp.M.L.C. 330; 3 Com. Cas. 79, C.A.; 41 Digest 306, 1680. B
- Re Allison & Co. and Richards* (1904), 20 T.L.R. 584, C.A.; 41 Digest 306, 1681.
- Hutcheson v. Eaton* (1884), 13 Q.B.D. 861; 51 L.T. 846, C.A.; 2 Digest (Repl.) 601, 1287.
- Duck v. Bates* (1884), 13 Q.B.D. 843; 53 L.J.Q.B. 338; 50 L.T. 778; 48 J.P. 501; 32 W.R. 813, C.A.; 13 Digest (Repl.) 118, 594.
- Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, 3471. C
- Tillmanns & Co. v. S.S. Knutsford, Ltd.*, [1908] 2 K.B. 385; 77 L.J.K.B. 778; 24 T.L.R. 454; 13 Com. Cas. 244; sub nom. *S.S. Knutsford, Ltd. v. Tillmanns & Co.*, 99 L.T. 399, C.A.; on appeal sub nom. *S.S. Knutsford Ltd. v. Tillmanns & Co.*, post p. 549; [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 24 T.L.R. 786; 11 Asp.M.L.C. 105; 13 Com. Cas. 334, H.L.; 17 Digest (Repl.) 283, 907. D
- Anderson v. Anderson*, [1895] 1 Q.B. 749; 64 L.J.Q.B. 457; 72 L.T. 313; 43 W.R. 322; 11 T.L.R. 253; 14 R. 367, C.A.; 17 Digest (Repl.) 283, 905.
- Modesto Pineiro & Co. v. Dupre & Co.* (1902), 86 L.T. 560; 9 Asp.M.L.C. 297; 7 Com. Cas. 105; 18 T.L.R. 351; 41 Digest 443, 2783.
- Leonis Steamship Co., Ltd. v. Rank, Ltd.*, [1908] 1 K.B. 224; 24 T.L.R. 128; 52 Sol. Jo. 94; 13 Com. Cas. 136, C.A.; 41 Digest 569, 3937. E
- Baerselman v. Bailey*, [1895] 2 Q.B. 301; 64 L.J.Q.B. 707; 72 L.T. 677; 43 W.R. 593; 8 Asp.M.L.C. 4; 14 R. 481, C.A.; 41 Digest 430, 2703.

Appeal by the plaintiff in the action from a decision of the Court of Appeal (VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.) affirming a decision of a King's Bench Divisional Court (PHILLIMORE and WALTON, JJ.). F

The defendants were the charterers of the steamship *Mauranger*, and the action was brought by the owner of the vessel to recover £91 5s. for 146 hours' demurrage in respect of delay in the loading of the ship. By cl. 5 A of the charterparty the cargo was to be loaded within eighty-four running hours (certain holidays excepted), time to count when written notice of readiness to receive the entire cargo was given to the staithman or colliery agent, or handed into his office between the hours of 6 a.m. and noon; demurrage to be at the rate of 12s. 6d. per running hour, and the charterparty contained the following exceptions clause: G

"The parties hereto mutually exempt each other from all liability arising from frosts, floods, strikes, lock-outs of workmen, disputes between master and men, and any other unavoidable accidents or hindrances of what kind soever beyond their control, preventing or delaying the working, loading, or shipping of the said cargo occurring on or after the date of this charter until the actual completion of the loading." H

The *Mauranger* arrived in dock at Grimsby at 7 a.m. on July 18, to receive a cargo of coal, and written notice that she was ready to receive her cargo was given at 9 a.m. It was common ground that her lay days under the charterparty then began, and, subject to any exception in the charterparty they would expire at 9 p.m. on July 23. The loading, however, did not begin until July 27 at 9 p.m., and finished on July 29 at 10.30 a.m. There were six tips at the dock, at one of which the ship was bound to load. It was admitted that during the whole time the charterers had coal available if they had been able to get the ship to a tip, and also that the dock was entirely under the control of the Great Central Rail. Co., who owned it and according to whose regulations ships had to take their proper turn at the berths. The reason for the delay in loading was that at the relevant time some I

A thirty ships were waiting to be loaded. The learned judge of Hull County Court held that the defendants had not brought themselves within the exception in cl. 5 A of the charterparty, and that the word "hindrances" must be construed as meaning hindrances of a kind ejusdem generis with those previously mentioned. He, therefore, gave judgment for the plaintiff. The Divisional Court reversed that decision and gave judgment for the defendants. Their decision was affirmed by the Court of Appeal, and the plaintiff now appealed to the House of Lords.

J. A. Hamilton, K.C., and Bailhache, K.C., for the appellant.

Scrutton, K.C., and MacKinnon, for the respondents, supported the judgment of the Court of Appeal.

C LORD LOREBURN, L.C.—I think that this judgment ought to be affirmed. The question is raised upon a charterparty, the relevant words of which have been referred to fully. In my opinion, the hindrance which delayed the shipping in this case was a block of steamers waiting their turn. I think that it was only the block which caused the hindrance. It was argued that this hindrance was not beyond the control of the charterers, because they had certain other ships which took turn before the vessel in question, and so delayed her. I think that the best answer to that contention is that the facts do not establish that those vessels were responsible for the delay in question. Then counsel for the appellant argued that this hindrance was not within the words of the charter, and he invoked the doctrine of ejusdem generis. The language used is, "any other unavoidable accidents or hindrances of what kind soever beyond their control." Those words follow particular specified hindrances, which it is impossible to put into one and the same genus. It is sufficient for me to say that in *Earl of Jersey v. Neath Poor Law Union Guardians* (1) Fry, L.J., referred to words of a very similar kind, and indicated what, I think, is perfectly true—namely, that you have to regard the intention of the parties as expressed in their language, and that words such as "hindrances of what kind soever" very often are intended to mean, as I am sure they are in this case intended to mean, exactly what they say. It is impossible to lay down any general rules for the application of the doctrine of ejusdem generis, but I agree with Fry, L.J., that there may be great danger in applying it too loosely. It may result, as he says (22 Q.B.D. at p. 566), in

"giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have."

G One other point was made which I confess I did not fully understand—namely, that this block in the harbour did not occur on or after the date of the charter. I think that it commenced before the actual hindrance of this vessel, but that it was a continuing hindrance, and I do not think that there is any ground for the objection that has been made upon that point.

H LORD ASHBOURNE.—I entirely agree with what has been said by my noble and learned friend upon the Woolsack. The case has been argued with great force and insistence, and it has been stated that this is in consequence of the fact that the case does not stand by itself, but there are other cases looking to it for decision. The case rests upon a statement of a very few facts which have been necessarily mentioned to us more than once during the progress of the arguments. A block for I which neither of the parties was at all answerable took place in the harbour and prevented the ship from arriving at its destination—at its proper place—within the time at which otherwise it would have been able to arrive, and it is sought by each party to place the loss that so occurred, without any blame on either side, upon the other. It is alleged on behalf of the appellant that the block is not covered by the wide words used in the charterparty, and that the words that follow the statement of the several matters that are mentioned as grounds of excuse ("frosts, floods, strikes, locks-out of workmen, disputes between masters and men, and any other unavoidable accident") "or hindrances of what kind soever beyond their control"

are to be read ejusdem generis, which practically means that they are to be denied all meaning whatever. If that conclusion could be reached, it would be a very easy way of deciding the matter; but when parties use words of that kind, which are obviously of considerable width, and use them after consideration, not stopping short at any ordinary general term, but saying "hindrances of what kind soever beyond their control," it is obvious that the more natural construction would be to assume that they meant something operative and did not mean to use blind words to be dismissed by the phrase that they were only ejusdem generis. I quite assent to the suggestion of my noble and learned friend upon the Woolsack that the words of Fry, L.J., were wise and reasonable words in the case that has been referred to, and I do not see any reason why I should be astute to discover any difference in them. I can see no reason in fact or in common sense, or upon the construction of the document, why I should seek to find any special ground for excluding from the general words to which I have referred the block that occurred and had the effect stated. Therefore, I am of opinion that the judgment appealed from should be affirmed and the appeal dismissed with costs.

LORD JAMES OF HEREFORD.—I concur.

LORD ROBERTSON.—I have fully appreciated the force of the argument which has been addressed to us on behalf of the appellant, an argument characterised not merely by ingenuity, but, I thought, also by great general soundness. I am bound to say that so far as I, personally, am concerned, I should be well disposed to accede to that argument but for the words in the clause in question "hindrances of what kind soever." I hope nothing will be deduced from our decision to-day which shakes the soundness of what is called the ejusdem generis system of construction, because it seems to me that both in law, and also as matter of literary criticism, it is perfectly sound—that is to say, that where there are specific specimens given of what are intended a deduction is to be made from that applicable to other matters. I base my opinion in the present case solely upon this. The parties, I think, have realised, or at least may well be held to have realised, the applicability of that rule to such contracts as charterparties and they inserted these words "of what kind soever" simply for the purpose of excluding that rule of construction. The effect of the insertion of these words is to exclude the limitation which would naturally arise from the context and gives to the word "hindrance" its full meaning. That, I take it, is the net result of this clause, and, accordingly, the remaining question is whether, giving to the word "hindrance" its full latitudes, the occurrence in question is within it? I think this may be solved by a very simple test. Supposing this vessel to have arrived at its further destination and to have been asked, "You are very late, what has hindered you?" the answer would have been, "The hindrance was a block in the harbour." Upon that simple ground I think that the decision which your Lordships propose is entirely in accord with what I call the net result of the clause.

LORD COLLINS.—I am of the same opinion.

LORD LOREBURN, L.C.—I only desire to add that I agree with what my noble and learned friend LORD ROBERTSON has said as regards the well-established rule ejusdem generis.

Appeal dismissed.

Solicitors: *Woodhouse & Davidson*, for *Aske & Ferens*, Hull; *W. C. Crump & Son*.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

A

Re LUCAS AND CHESTERFIELD GAS AND WATER BOARD

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Buckley, L.J.J.),
March 13, July 9, 10, 29, 30, 1908]

B

[Reported [1909] 1 K.B. 16; 77 L.J.K.B. 1009; 99 L.T. 767;
72 J.P. 487; 24 T.L.R. 858; 52 Sol. Jo. 173; 6 L.G.R. 1106]

Compulsory Purchase—Compensation—Special adaptability—Land required for public purpose—Existence of a “market”—Purpose existing only for particular purchaser who has obtained compulsory powers—Other possible purchasers—Special adaptability of land taken in conjunction with adjoining land—Parliamentary powers needed for adjoining land.

C

Where, under the Lands Clauses Consolidation Act, 1845, it is sought to acquire land for a public purpose, e.g., a reservoir, and the land, when taken in conjunction with adjoining land, possesses peculiar natural advantages for use for the public purpose in question, if the purpose exists only for the special purchaser who has obtained powers of compulsory purchase, the special adaptability of the land cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the land to be purchased under it. But when the special value exists also for other possible purchasers so that there is a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have the element of special value taken into consideration just as he would be entitled to have taken into consideration the fertility or the aspect of a piece of land capable of being used for agricultural or building purposes. This is so even though Parliamentary powers are needed for the acquirement of the adjoining land.

D

E

F

Notes. The provisions of the Lands Clauses Consolidation Act, 1845, regarding the measure of compensation have been amended by various statutes—the Acquisition of Land (Assessment of Compensation) Act, 1919, the Town and Country Planning Acts, 1944, 1947, 1953, and 1954. The whole question of compensation is dealt with at 10 HALSBURY'S LAWS (3rd Edn.) 91 et seq. The statutes mentioned are to be found in HALSBURY'S STATUTES (2nd Edn.) as follows: (1845) vol. 3, p. 890; (1919) vol. 3, p. 975; (1944) vol. 25, p. 391; (1947) vol. 3, p. 1089, vol. 25, p. 489; (1953) vol. 33, p. 856; (1954) vol. 34, p. 74. For cases see 11 Digest (Repl.) 124 et seq.

G

Considered: *Sri Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam*, [1939] 2 All E.R. 317; *Re Naylor Benzon Mining Co.*, [1950] 1 All E.R. 518. Referred to: *Corrie v. MacDermott*, [1914] A.C. 1056; *Sidney v. North Eastern Rail. Co.*, [1914–15] All E.R.Rep. 341; *Fraser v. Frasersville City*, [1917] A.C. 187; *Swift v. Board of Trade*, [1925] A.C. 520; *Swift v. Board of Trade*, [1926] 2 K.B. 131; *Lambe v. Secretary of State for War*, [1955] 2 All E.R. 386.

H

Cases referred to:

I

- (1) *Re Countess Ossalinsky and Manchester Corpn.* (1888), Browne & Allan's Law of Compensation (2nd Edn.), 659, D.C.; 11 Digest (Repl.) 133, 179.
- (2) *Re Gough and Aspatria, Silloth and District Joint Water Board*, [1904] 1 K.B. 417; 73 L.J.K.B. 228; 90 L.T. 43; 68 J.P. 229; 52 W.R. 552; 20 T.L.R. 179; 48 Sol. Jo. 207, C.A.; 11 Digest (Repl.) 133, 181.

Also referred to in argument:

Re Tynemouth Corpn. and Duke of Northumberland (1903), 89 L.T. 557; 67 J.P. 425; 19 T.L.R. 630; 11 Digest (Repl.) 133, 180.

Appeal by the Chesterfield Gas and Water Board from a decision of BRAY, J., reported [1908] 1 K.B. 571, upon an award stated in the form of a Special Case by an umpire appointed under the Lands Clauses Consolidation Act, 1845. A

By a notice in writing under the seal of the Chesterfield Gas and Water Board, dated Nov. 19, 1904, the Board, in pursuance of the provisions of the Chesterfield Gas and Water Board Act, 1904, and of the Lands Clauses Consolidation Act, 1845, and other Acts respectively incorporated therewith, gave notice to Bernard Lucas, the respondent to this appeal, and to all persons having or claiming any estate or interest in the lands thereafter mentioned that the Board required to purchase and take the lands of which particulars were contained in the schedule thereto, with the appurtenances, which lands the Board were authorised to purchase and take. By a notice in writing addressed to the Board under the hand of the said Bernard Lucas, and dated Dec. 31, 1906, the said Bernard Lucas gave notice that it was his desire that the amount to be paid to him in respect of his claim as owner of the land required should be settled by arbitration in the manner prescribed under the Lands Clauses Consolidation Act, 1845. The land in question was required for a water reservoir. The matter went to arbitration and the umpire formed the opinion that the special natural advantages of the site as a site for a reservoir was a fit and proper matter for consideration as an element in assessing the value of the lands and hereditaments to be taken, but that he ought not to make any award as compensation for water. He awarded and determined that £1,615 was the amount of the purchase money and compensation for the fee simple of the lands and hereditaments included in the notices to treat and for the damage, if any, to be sustained by the owner of the land by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of the Act of 1904, or any Act incorporated therewith, and he further awarded and determined that the said Bernard Lucas was not entitled to any compensation from the board in respect of any claim for water. The question the umpire stated for the opinion of the court was whether, in estimating the value of the lands and hereditaments to be acquired by the Board, the natural and peculiar adaptability of the lands in question for the construction of a reservoir was or was not a fit and proper matter for consideration by him as an element in the value thereof in the assessment of compensation, having regard to the fact that such a reservoir could not be constructed without the concurrence of the Board unless the works of the Board were acquired by the rural district council under cl. 40 of the Chesterfield Gas and Water Board Act, 1895, and such district council were to combine with Bernard Lucas and the Duke of Devonshire in the construction of a reservoir or were to concur in such construction by them. BRAY, J., held that the special adaptability of the land for a reservoir site was a fit and proper matter for consideration by the umpire in assessing the compensation to be paid by the Board, although, in the absence of the Board's concurrence, the land could not be used for a reservoir unless statutory powers were obtained for that purpose. An appeal came on for hearing on Mar. 13, 1908, before a Court of Appeal composed of LORD ALVERSTONE, C.J., and FARWELL and KENNEDY, L.JJ., when, after hearing arguments on behalf of the Board, the court were of opinion that the Special Case was not clear upon certain points. They, therefore, submitted to the umpire questions, the umpire's answers to which were as follows: B C D E F G H

"Question 1. In estimating the compensation at £1,615 did you assume that any purchaser would have to obtain Parliamentary powers to interfere with or acquire the lines of pipes belonging to the Chesterfield Gas and Water Board?—Answer: I assumed my values of the reservoir site on the basis of powers being already in existence either by virtue of an existing Act of Parliament or of an order obtainable from the Local Government Board, which would enable the various authorities interested to acquire the site compulsorily. I have not taken into consideration any expenses which might be incurred by any purchasers in obtaining any further Parliamentary powers for the purpose I

A of acquiring the reservoir site, including the line of pipes referred to in the question.

Question 2. Did you or did you not assume that among possible purchasers were the Chesterfield Gas and Water Board?—Answer: I did so assume.

B Question 3. If you answer the first question in the negative, what, if any, alteration should you make in the £1,615?—Answer: None. I had no evidence before me upon the point."

W. M. Acworth (*Balfour Browne, K.C.*, with him) for the Board.

E. Sutton for Bernard Lucas.

Cur. adv. vult.

C July 30, 1908. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—In answer to the question raised by the Special Case BRAY, J., said:

D "The question, therefore, that I have to consider is reduced to this—whether the umpire was precluded from considering what I may call the special value of Mr. Lucas' land as an element in its value by reason of the fact that the reservoir could not be constructed without the concurrence of the Board, which is the same thing as saying that it could not be constructed except by some body which had obtained Parliamentary powers to acquire compulsorily the land of the Board lying within the area of the reservoir, and to interfere with the line of pipes."

E He comes to the conclusion that the umpire was not precluded. I agree with BRAY, J., that the fact that no buyer for reservoir purposes can be found except a buyer who has obtained Parliamentary powers does not prevent the special value being marketable, both on the ground that is stated by STEPHEN, J., in *Re Countess Ossalinsky and Manchester Corpn.* (1) (*Browne & Allan's Law of Compensation* (2nd Edn.), at p. 670), quoted by BRAY, J., and also on the ground that the fact
F that the Board itself might become possible purchasers who would give a special price for the land ought to be considered. I also agree in the statement of BRAY, J., that

G "land adjoining large works would in fact often have a special value because the owner of the works would be likely to require additional land, and would be willing to give a larger price because it adjoined his works, and why should not this land have a special value because, if the Board desired to build a new reservoir, this was the most convenient site on which to build it?"

H In *Re Countess Ossalinsky and Manchester Corpn.* (1) it will be noted that two objections were taken to the award of the arbitrator giving a sum of £64,000 as the value of the land and a certain contingent valuation depending upon the opinion of the court upon a Special Case, which he sets out at the end of his award.
I The objections made on which the rule was granted were these: First, "that the arbitrator in estimating the value of the land has improperly taken into consideration its enhanced value, or alleged enhanced value, by reason of the water that may be collected, diverted, and impounded upon the land, and also by reason of its natural and peculiar adaptation for the construction of a reservoir." The second objection was "that the arbitrator has taken into consideration the increased value of the land in consequence of the powers conferred on the Corporation of Manchester by the Manchester Corporation Waterworks Act, 1879." GROVE, J., after setting out a catalogue (not intended to be exhaustive) of the grounds upon which awards are set aside, says:

"The only one of those that can apply to this case is the latter one—that the arbitrator has acted *ultra vires*. In other words, that he has made an element of his calculation of the value of this land that which legally cannot or ought not to be an element in its consideration—namely, the enhanced value

of the land on account of its capability of being used for diverting and impounding water or of being converted into a reservoir, or for any useful purpose for which persons would pay a substantial price. It appears to me that that in itself is not an objection to the award, and that the arbitrator ought to take that into consideration. If the land has what I may call an adventitious value, that is something beyond its mere agricultural or normal value, and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land, would give a higher price for that land, then the arbitrator has a fair right to take that into consideration; it is a matter no doubt contingent, but still it is a matter which is not to be ignored or put out of consideration by an arbitrator."

And after giving illustrations of this contingent value arising from adaptability which he says ought to be taken into consideration by the arbitrator he goes on with these words:

"It is quite another case when you come to the second head of objection here—namely, the particular value which the land is to one of the parties before the arbitrator. That is quite another ground. But supposing the general value is only given, if this land was probably certain, within a reasonable time, to be used for certain purposes which would give it a very much enhanced value, that is a matter for the arbitrator to take into consideration. I am clearly of opinion that it is and that the arbitrator has rightly taken that matter into consideration."

The learned judge then goes to the second head of objection above mentioned, and says:

"That would be a serious objection to the award, and a fatal one, because, as far as my experience goes, it has been the invariable practice sanctioned by the courts that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly where the matter is under Parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there—that it is to be excluded from consideration, and the only way that it can or ought to be put forward at all is as a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under Parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument."

In the present case I do not think that either side take any exception to the law laid down by GROVE, J., in reference to special adaptability being an element which the probability of purchasers requiring the land for such purposes gives to the land compulsorily taken for such purposes. But it is said that the element which the arbitrator may take into consideration is not the fact that the land has in fact been taken, and that the probability has been realised by the promoters having obtained compulsory powers to take the land in question, but only the value of the probability as it existed before the promoters had obtained their powers. It is said that these values cannot possibly be the same; and, further, that the umpire in the present case, by his answers to the questions sent to him by the Court of Appeal, has plainly shown that, in his judgment, the contingent value of the probability and the realised value, by reason of the promoters having obtained Parliamentary powers to take the land, are identical. I think this is so,

- A** and that, as on the answers to the questions it appears that the umpire has treated the probability and the realised probability as identical for the purposes of valuation, he has gone on a wrong basis, and that we ought to send the award back to the umpire in order that he may value the possibility of the site going into the market as being required for the enlargement of the waterworks, and not on the basis of a realised possibility or on account of the promoters having obtained
- B** from Parliament compulsory powers. The value of that possibility, as stated by LORD COLLINS in *Re Gough and Aspatia, Silloth and District Joint Water Board* (2) ([1904] 1 K.B. at p. 423), is a question entirely for the umpire. It may be that the adaptability of the land for the purpose of enlarging the reservoir was so unique that the umpire will give a value little less than that which he would give if dealing with the realised possibility. But, in my judgment, he ought to value
- C** the possibility and not the realised possibility. I have only to add that I entirely reject the contention of counsel on behalf of the Water Board that because the Board itself owns a portion of the land essential to the construction of the reservoir, for the construction of which the land compulsorily taken is specially adaptable, and because the Board could always have refused to combine with the other owners of land essential to the construction of the reservoir, therefore the
- D** adaptability of Mr. Lucas's land could not be taken into consideration as an element to be considered in compensation. The argument seemed to be that, because the Water Board had obtained powers to construct the reservoir, the possibility of a purchaser requiring the land had come to an end.

- FLETCHER MOULTON, L.J.**—This is an appeal from the decision of BRAY, J.,
- E** on an award under the Lands Clauses Consolidation Acts, which, by consent of the parties, was stated in the form of a Special Case. The question upon which the court was asked to pronounce related to the quantum of compensation to be given for certain lands situated near Chesterfield, which the Chesterfield Gas and Water Board were desirous to acquire for the construction of a reservoir, powers to acquire which they had obtained under the Chesterfield Gas and Water Board
- F** Act, 1904. The owner of the lands claimed, and the umpire has found as a fact, that these lands possessed peculiar natural advantages for a reservoir site when taken in conjunction with certain other lands, part of which belonged to the Board themselves and part to a third person. The umpire assessed the compensation at a sum of £1,615, but directs in the Special Case that this is to be reduced by the sum of £779 if the court should be of opinion that the adaptability of the land for
- G** a reservoir was not a fit and proper matter for consideration as an element in the assessment. This was, therefore, the question which the court was asked to decide. The learned judge in the court below supported the award for the larger sum, and the present appeal is brought from that decision.

- The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up
- H** their equivalent—i.e., that which they were worth to him in money. The property is, therefore, not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognised as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon
- I** the market value of his lands as they stood before the scheme was authorised by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him. At a very early date in the history of this branch of the law there arose what is known as the question of "special adaptability." The phrase is not a happy one, for special adaptability for some purpose or other is the very basis of the market value of all land, except, perhaps, land that in all respects falls below the average. In agricultural land extra fertility, in town lands advantages of site, are true cases of

special adaptability for farming or building purposes. These tend so directly to increase both the value and the market price of lands in the hands of a private owner that it has never been doubted that he could urge them in augmentation of the compensation which he was entitled to receive. The question has arisen only in cases where the special adaptability is that of lands which are required for works of public utility, uses which are naturally different from the uses to which lands are put while in private hands, and which, therefore, do not necessarily influence the price which such lands command in the market. A B

Ought the owner to be entitled to higher compensation by reason of the, to him, useless peculiarities which the lands possess? No better example of the problem could be found than that which we have in the present case. The land in question is by its position and conformation marked out as a favourable site for an impounding reservoir to collect water for the public supply of a district. The peculiarities which make it suitable for that purpose add nothing to its value as agricultural or grazing land, which I will assume to be the only alternative uses. A public authority obtains powers to take it for a reservoir—ought it to pay any higher price than is represented by its agricultural or grazing value? Is not any price in excess of this a violation of the canon that you are only to give that which represents its worth to the seller, and that you are to disregard all questions of its worth to the buyer? The decided cases seem to me to have hit upon the correct solution of this problem. To my mind, they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes. There is nothing strange or abnormal in this. Although a large reservoir is not a need that ordinarily occurs in the experience of individuals, yet it is a recognised and often occurring need in the experience of the community, and in a densely populated country like England it may well happen that some out-of-the-way tract of land suitable by its position and conformation to be formed into a reservoir is capable of being useful in this way to more than one locality, and be the subject of competition between them, and may thus command in the market a corresponding price. In such a case I can see no reason why an owner should not be entitled to have this fact taken into consideration in assessing his compensation. It is a true element of market value. Nor is it, in my opinion, an answer to say that the purchasers must necessarily be persons possessing Parliamentary powers, and that none such exist at the moment except the one that is actually exercising his compulsory powers. In the case of waterworks for public supply, promoters must always arm themselves with Parliamentary powers, since distribution itself would otherwise be impracticable. But if by its prudence and forethought a public authority had by private negotiation secured a desirable site for a reservoir for the water supply of its own district, it would not be in accordance with the practice of Parliament to refuse to it the powers necessary to its effective use for that purpose. There is, therefore, nothing unreasonable in considering that in certain cases land specially suitable for such purposes might fairly become in private hands the subject of competition between rival public authorities desirous of getting the advantage of that special suitability; and, this being so, the tribunal assessing the compensation would be entitled, and bound, to consider what is the fair market value so arising, and if it be greater than that obtained by taking it as purchased for ordinary uses, to give to the seller the larger of the two. As I read the award of the arbitrator, he has specifically found as a fact that there exists such a special suitability in the lands in question, and that there also exists such a possible competition in the district in respect of C D E F G H I

A the supply of water as would entitle him to estimate the compensation in the way I have described, and it is not contested that there was evidence on which he could so find.

This being so, I should under ordinary circumstances have refused to interfere with the award of the larger sum. But in the present case the award shows on the face of it that the umpire has made a mistake in law which may, and, in my
B opinion, probably has, influenced him in arriving at the sum awarded. I have said that the existence of competition entitles the arbitrator to take special adaptability into account in arriving at the quantum of compensation. But the extent and the imminence of such competition must have an important bearing on the weight to be given to it as affecting the quantum of compensation, and it is plain to me that the umpire has wrongly supposed that in this case at least one other
C possible competitor existed already equipped with the necessary Parliamentary powers for acquiring this site for reservoir purposes—viz., the rural district council. He has arrived at this conclusion by erroneously construing the provisions of s. 40 (1) of the Chesterfield Gas and Water Board Act, 1895. The powers thereby given to the rural district council only relate to lands or works situated within its district, and the lands in question are not so situated. I cannot say that such a
D mistake in the construction of the statute may not have affected the amount of his award, and if I am to state my personal opinion, I think that it must have affected it. Quantum is a matter entirely for the arbitration tribunal, and we are not competent to remedy the consequences of this error on his part, and, accordingly, the award must be sent back to him for his reconsideration.

E This would suffice for the purposes of our decision, but seeing that two points of law of general importance and of direct bearing on the case have been fully argued before us, I do not think that we ought to send the case back to the umpire without expressing our opinion on them for his guidance. The first point arises from the fact that the lands in question do not include the whole of the site necessary for the proposed reservoir. Two other pieces of land must go to form
F the reservoir, and it is argued by the Board that in such a case no special adaptability exists. They put the argument in the following form. If the lands necessary for a reservoir which taken as a whole possess special suitability for that purpose belong to A, B, and C, then no one of these owners can claim in respect of it because the consent of the other two is needed to enable that special suitability to be utilised, and such consent might not be given. In my opinion, this contention
G is wholly wrong. In actual life people as a rule act in the way which they believe will conduce most to the advancement of their own interests, and owners in such a case would thus not throw away the enhancement of value in which they would all share. In such a case an arbitrator would, in my opinion, be bound to treat the enhancement of value as something to be shared by the component pieces of land in such proportions as he thought their relative importance merited.

H A further contention more ingenious than commendable was here raised on behalf of the Board based upon the fact that they themselves are one of the part owners. It was said that in such a case the ordinary rule, which I have enunciated, would not apply, because they would be certain to refuse the consent which it assumes, since by so doing they would destroy the possibility of the land being put to its natural use as a reservoir, and thus enable themselves to get it at a lower price.
I Seeing that their object in acquiring it is in fact to so use it, such an argument does not reflect very favourably on the principles upon which such a public body would act. But there is no foundation for the contention. The most direct answer to it was given by BUCKLEY, L.J., in the course of the argument when he pointed out that the ownership of a portion of the land by the Board themselves rendered it an a fortiori case for the application of the general rule, because not only the consent of the Board to the use of the land as a reservoir, but the obligation upon them so to use it, was the very basis of the application which they made to

Parliament for their statutory powers, so that, so far as they are concerned, the consent that it should be put to that special use was obtained by anticipation. A

But I am content to rest my judgment upon a more general ground—viz., that the compensation for lands depends upon the nature and circumstances of those lands themselves (taken as far as necessary in connection with the nature and circumstances of other lands to be used with them) and has nothing to do with the personal views or wishes of the individuals who may chance at the moment to be owners of those lands. If two pieces of land are to be compulsorily taken to form a rifle range the compensation payable will be the same whether one or both the portions belong to an ardent militarist or to a quaker who objects to everything of a warlike character. The second point is raised by the judgment of BRAY, J., in the court below. Speaking of the claim of this land to an enhanced price by reason of its situation, he says: B

“I cannot doubt that land adjoining large works would, in fact, often have a special value because the owner of the works would be likely to require additional land and would be willing to give a larger price because it adjoined his works, and why should not this land have a special value because, if the Board desired to build a new reservoir, this was the most convenient site on which to build it.” C

There is nothing in this language of which I complain, if it is taken with its proper limitations. It undoubtedly adds to the value of the land that a new customer has been introduced who is likely to offer a special price because the land is accommodation land for which he will be willing to pay more than its ordinary market value for purposes and at times not covered by his compulsory powers. But if the land still remains in the position that there is no competition for it by reason of its special position and adaptability and that when the compensation has to be assessed there is no one (apart from the one purchaser who has obtained compulsory powers to purchase) to whom the land has a higher value than its value for ordinary purposes, I can see nothing to exclude the operation of the principle that you are to look at the value to the seller and not at the value to the purchaser. The scheme which authorises the new reservoir only entitles the owner of the land to receive as compensation the value of the land unenhanced by that scheme, and unless its situation and peculiarities create a market for it as a reservoir site in which other possible bidders exist, I do not think that the single possible purchaser that has obtained Parliamentary powers can be made to pay a price based on special suitability merely by reason of the fact that it was easy to foresee that the situation of the land would lead to compulsory powers being some day obtained to purchase it. No element of that which economists term “value in use” can, in my opinion, increase compensation unless it is either a “value in use” to the seller or a “value in use” to persons other than the proposed purchaser so as to introduce the element of competition as a factor in fixing price. D

BUCKLEY, L.J.—The frank cynicism of the argument which the Board have had the courage to address to the court has occasioned me surprise. I hope I do not go too far when I say that the argument can only be seriously advanced by a speaker who studiously shuts his eyes to the immorality of its substructure. The Board admit, and upon authority they cannot deny, that if there be three persons whose combined properties offer special adaptability for some purpose, each is in compensation under the Act entitled to receive the fair value of his land, having regard, among other things, to its special adaptability, and that whether it be or be not proved that each of the other owners is prepared to concur in devoting it to that purpose. The Board admitted as much in the court below, and have admitted it before us. But if one of the three is desirous of buying out the other two, then, if their argument is right, the element of special adaptability is removed, because he as one of the three can prevent the user for the special purpose. They contend that, where one of the three is in fact desirous of using the land for that E

A special purpose, and has in fact obtained from the legislature compulsory powers to enable him to do so, he can deprive the other two of the special value arising from the adaptability, and that upon the ground that the special purpose cannot be effectuated without his consent. They say that they went to the legislature and obtained compulsory powers for a special public purpose, and that in fixing the fair value to be paid for the exercise of their compulsory powers they are entitled to say that the special purpose cannot be carried out because they do not assent to the land being used for that purpose. This appears to me to be a suicidal argument. The Board here say: "We admit that we should have to pay the adaptability value but for the fact that we own part of the site, and can prevent the construction of the reservoir; but you must assume that the possibility of the site being wanted for that purpose does not exist because we own part of the site, and we do not consent." It is true that in determining the question whether there is a possible market for the site the statutory purchase is not to be considered. For that purpose I must exclude the fact that the Board have obtained statutory powers. But it does not follow that for the present purpose I am to assume that the Board, who want the land for a purpose, will refuse to carry out that purpose. In *Re Countess Ossalinsky and Manchester Corpn.* (1) GROVE, J., says:

D "You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under Parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument."

E It is one thing to say that the statutory power of purchase is to be set out of consideration, in the sense that, to use VAUGHAN WILLIAMS, L.J.'s expression, the possibility and not the realised possibility is the material factor, and another thing to say that the possibility is converted into an impossibility by the fact that the person who has obtained the statutory power owns part of the site, and that for purposes of compensation he is going to set up that he forbids the very use for which he has obtained statutory power to buy. Suppose that the intending purchaser were not one of the three owners, but were a fourth party, he would have to pay each of the three owners the adaptability value. But the Board argue that the value for compulsory purchase varies according as the owner of part of the site is or is not the statutory purchaser for that purpose, and varies in favour of the person who obtains the compulsory powers. The argument is that in acquiring compulsorily for the special purpose the owner of part of the site is at liberty to deny that he is going to carry out the purpose. I think the argument quite unsound. From the judgment of COLLINS, M.R., in *Re Gough and Aspatia, Silloth and District Joint Water Board* (2) I quote the following ([1904] 1 K.B. at p. 423):

H "To exclude the element of adaptability it would be necessary, as it seems to me, to show that there is no reasonable possibility of the site coming into the market. The value of the possibility, if it exists, is a question entirely for the arbitrator."

I The facts here are that not only is there a reasonable possibility of the site coming into the market, but that the site is wanted for the particular purpose, and is being acquired under compulsory powers for that purpose. The land is so situate in proximity to the reservoirs already existing that within a reasonable time it is reasonably certain that it will be required for this special purpose, with the result that it has acquired an enhanced value. That was a matter for the arbitrator to take into consideration. To effectuate that purpose the Board must necessarily concur so far as they are owners of part of the site. In this state of things there is nothing to exclude the element of adaptability. The umpire, however, assumed (as both sides agree, erroneously) that under s. 40 of the Act of 1895 the rural

district council had power to acquire the works of the Board. He was thus assuming that there was in existence another possible statutory purchaser. Further, as VAUGHAN WILLIAMS, L.J., has pointed out, it is the possibility, and not the realised possibility, of the site being required for the purpose for which it is specially adaptable which ought to be considered. Under these circumstances it may be, although I do not say that it is the case, that the amount at which he has assessed the compensation ought to be varied with reference to these circumstances, and I agree that under these circumstances the matter ought to go back to him.

Case remitted to umpire.

Solicitors: *Shipton, Hallett & Co.*, Chesterfield; *Stevens, Son & Parkes*, for *J. Middleton*, Chesterfield.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

REPUBLIC OF BOLIVIA *v.* INDEMNITY MUTUAL MARINE ASSURANCE CO., LTD.

[COURT OF APPEAL (Vaughan Williams, Farwell and Kennedy, L.J.J.), January 27, 28, 1909]

[Reported [1909] 1 K.B. 785; 78 L.J.K.B. 596; 100 L.T. 503;
25 T.L.R. 254; 53 Sol. Jo. 266; 11 Asp.M.L.C. 218;
14 Com. Cas. 156]

Insurance—Marine insurance—Piracy—Vessel boarded and cargo seized by revolutionary troops—Seizure on non-tidal river.

By a policy of marine insurance on cargo on a voyage up the Amazon from Para to Puerto Alonzo and/or other places on the river Acre and/or in that district the insurers were made liable for all risks of or incidental to the carriage of the cargo arising from "men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detachments of all kings, princes, and people of what nation, condition, or quality soever; barratry of master and mariners, and of all other perils, losses, and misfortunes" damaging the cargo, and piracy was excepted from an f.c. and s. clause. The cargo carried by the ship was stores and provisions which were shipped, by an arrangement between the Brazilian and Bolivian governments, by the latter to provision their troops who were in the district of El Acre for the purpose of resisting an organised expedition which was seeking to overthrow the Bolivian government in that district and to establish a republic of their own. The organisers of the expedition fitted out two armed ships which intercepted the vessel carrying the goods for the Bolivian government when she was on a tributary of a tributary of the Amazon, and seized the goods. In an action on the policy,

Held: the word "piracy" as used in the policy meant piracy in a popular or business sense, and applied to persons who plundered indiscriminately for their own ends and not to persons who simply operated against the property of a particular State for a public end; the ejusdem generis rule could not be applied to bring the case within the words "all other perils, losses, and misfortunes" in the policy; and, therefore, there had not been a loss by piracy within the meaning of the policy or by a cause akin to piracy.

Quære whether piracy could be committed on a non-tidal river.

- A** **Notes.** Considered: *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Co.* (No. 2), [1938] 3 All E.R. 80. Referred to: *Pesquerias y Secaderos de Bacalao de España S.A. v. Beer*, [1949] 1 All E.R. 845, n.

As to insurance against loss by pirates, see 22 HALSBURY'S LAWS (3rd Edn.) 81; and for cases see 29 DIGEST 219.

- B** Cases referred to:

- (1) *Nesbitt v. Lushington* (1792), 4 Term. Rep. 783; 100 E.R. 1300; 29 Digest 218, 1740.
- (2) *Palmer v. Naylor* (1854), 10 Exch. 382; 2 C.L.R. 1202; 23 L.J.Ex. 323; 24 L.T.O.S. 83; 18 Jur. 961; 2 W.R. 621; 156 E.R. 492, Ex. Ch.; 29 Digest 220, 1761.

- C** Also referred to in argument:

R. v. Dawson (1696), 13 State Tr. 451; 15 Digest (Repl.) 870, 8379.
A.-G. for Colony of Hong Kong v. Kwok-A-Sing (1873), L.R. 5 P.C. 179; 42 L.J.P.C. 64; 29 L.T. 114; 37 J.P. 772; 21 W.R. 825; 12 Cox, C.C. 565, P.C.; 14 Digest (Repl.) 145, 1074.

R. v. Allen (1837), 7 C. & P. 664; 1 Mood. C.C. 494, C.C.R.; 14 Digest (Repl.) 152, 1145.

- D** *R. v. Anderson* (1868), L.R. 1 C.C.R. 161; 38 L.J.M.C. 12; 19 L.T. 400; 33 J.P. 100; 17 W.R. 208; 11 Cox, C.C. 198, C.C.R.; 14 Digest (Repl.) 150, 1124.

Boehm v. Combe (1813), 2 M. & S. 172; 105 E.R. 347; 29 Digest 130, 821.

Dean v. Hornby (1854), 3 E. & B. 180; 2 C.L.R. 1519; 23 L.J.Q.B. 129; 22 L.T.O.S. 222; 18 Jur. 623; 2 W.R. 156; 118 E.R. 1108; 29 Digest 220, 1764.

- E** *R. v. Tivnan* (1864), 5 B. & S. 645; 122 E.R. 971; sub nom. *Ex parte Tirnan*, 4 New Rep. 225; sub nom. *Re Ternan*, 33 L.J.M.C. 201; 28 J.P. 548; 11 Jur.N.S. 34; 9 Cox, C.C. 522; sub nom. *R. v. Tivnan*, 10 L.T. 499; sub nom. *Re Turnan*, 12 W.R. 858; 24 Digest (Repl.) 996, 44.

- F** *Larsen v. Sylvester & Co.*, ante p. 247; [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 24 T.L.R. 640; 11 Asp.M.L.C. 78; 13 Com. Cas. 328, H.L.; 41 Digest 306, 1682.

Appeal by the plaintiffs, the assured under policies of insurance issued by the defendant company, from a decision of PICKFORD, J., at the trial of the action without a jury, reported 99 L.T. 394.

- G** The action was brought by the republic of Bolivia, alternatively upon two policies of marine insurance, the one of which was effected to cover the risks which were excepted from the other. The first policy, dated Nov. 20, 1900, was a policy for £375, part of an insurance of a larger amount, and was declared to be

- H** "upon goods and/or merchandise valued at £7,500 (say A. M. 1775 packages provisions, preserves, and merchandise so valued belonging to the Bolivian government) . . . by vessel called the *Labrea* and conveyances . . . at and from Para to Puerto Alonzo and/or other places on the river Acre and/or in that district. To include all risks of or incidental to inland carriage by land/or water and/or by any conveyances whatsoever . . . including the risk of craft to and from the vessel. . . . Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

The second policy was subscribed by the defendants for £7,500, and was expressed to be an insurance against war risk only, to cover such risks as are excluded from original marine policies. Each policy contained the following clause:

"And touching the adventures and perils which the company is made liable unto or is intended to be made liable by this assurance, they are of the seas,

men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this assurance or any part thereof."

On Dec. 21, 1900, during the course of the insured voyage, the *Labrea* was stopped at Caqueta by an armed vessel called the *Solimoes*, which was manned by revolutionary forces, and was flying the flag of and acting under the revolutionary Junta of El Acre. Those on board the *Solimoes* compelled the *Labrea* to come alongside the *Solimoes*, and removed from the *Labrea* the whole of the insured goods. The plaintiffs claimed that by reason of these facts they had sustained a total loss under the risks covered by the second policy; in the alternative they alleged that the above facts constituted a loss by piracy within the terms of the first policy. The defendants denied that the goods had been lost by perils insured against, and, further, they alleged that the policies were void by reason of the non-disclosure of material facts which were known to the plaintiffs—viz., that an expedition was being organised, and that an expedition had been and was being fitted out by Rodrigo Carvalho to stop supplies for El Acre, and that he had enlisted men and had two vessels for that purpose.

The matter arose out of a certain state of affairs which occurred in a territory called Colonias, which was afterwards described as the Free Republic of El Acre, and which was on the borders of Brazil and Bolivia. The facts were stated by PICKFORD, J., in his judgment to have been as follows. In 1867, by a treaty between Brazil and Bolivia, the territory of Colonias was either ceded or assured to Bolivia. That treaty between Brazil and Bolivia decided that that territory was Bolivian territory, but there was, however, no demarcation of the frontier until 1898, when a commission of delimitation was appointed by the two governments and a frontier line was fixed, called the Cunha Gomes line, at a place called Puerto Alonzo, which is just on the Brazilian side of that line, and situated on a river called both the Aquiry and the Acre, a tributary of a tributary of the Pursus, which, in its turn, is a tributary of the Amazon. Bolivia had not before 1898 exercised any effective jurisdiction in this territory, but there was valuable property there, rubber of considerable value being produced, and both Brazilians and Bolivians, but chiefly Brazilians, had settled there and traded in rubber. What the exact nature of the government of that territory was in those days was not quite clear, but there was a Custom House at Manaos, on the Amazon, a very considerable way down, and another at Para, at the mouth of the Amazon, and customs were exacted in respect of goods coming down the Amazon from the territory of Colonias. But there was no Bolivian Custom House or government set up there, and if there was any government exercised at all it was exercised apparently by magistrates appointed by the Brazilian government, some of whom may have been stationed on what is now the Bolivian side of the frontier line. After the demarcation of the frontier was effected, the Bolivian government were minded to take effective possession of the territory and to establish proper Bolivian government there, and the first step they took was to establish a Custom House at or near Puerto Alonzo; but the representatives sent there were turned out and apparently one of them was killed by certain persons, chiefly Brazilians, but there may have been some Bolivians among them who were discontented with the state of affairs that would produce a Bolivian government there, and had joined in establishing what they called the Free Republic of El Acre. One of the leading spirits was one Galvez. About the same time as the establishment of the Custom House at Puerto Alonzo and the establishment of the Free Republic of El Acre, the Bolivian government sent an expedition from La Paz, the capital of Bolivia, under the command of one Munoz in order to take possession. It was a long and difficult march from La Paz, and the expedition was several

A months on the way, but it did eventually arrive within the territory, and then the Free Republic of El Acre, for a time at least, disappeared. It was suggested that Galvez went to Buenos Aires, and, according to the evidence of the representative of the Bolivian government, he took with him, no doubt for safe custody, the contents of the republican treasury. Where the rest of the republicans went, he did not know, but some of them crossed the Brazilian frontier, and in B Brazilian territory set themselves to work either to re-establish the original Free Republic of El Acre or to establish a government of their own—at any rate, to oust the Bolivian government. The Brazilians near the frontier line seemed to have been very much in sympathy with the republic, or, at any rate, those persons who were resisting the establishment of the Bolivian government. That appeared quite clearly from a speech of the governor of Manaos, which is the C capital of the province of Arizoonas, the Brazilian province next adjoining this territory. The Bolivian expedition, although it had arrived at, and taken possession of, the territory, was in rather a difficult position; it was a very long way from the base or from the capital, and it was very difficult to supply the expedition with provisions and stores. It could not very well get them from the Brazilian D side of the frontier, because the Brazilians were not well affected to this taking possession by the Bolivian government, and it was very difficult to get provisions from the Bolivian capital because the distance was so great, and the means of getting them to the place so difficult. Accordingly it was arranged between the Brazilian and Bolivian governments that the expedition should be provisioned from Brazil by sending the stores and provisions up the Amazon from Para, and E this was done on a vessel called the *Labrea*. At that time the Bolivian government was represented in England by Señor Aramayo, and a firm named Suarez, Hermanos & Co. were their agents here. This firm had a house in Para, and there they acted for the Bolivian government in conjunction with an agent named Ballivian—who had been sent for the purpose of seeing to the sending up of the provisions to the Bolivian government, the ordinary representative F De Silva probably acting in conjunction with them also. The head of the firm of Suarez, Hermanos & Co. at Para was a Don Nicolas Suarez, and he owned a place from which rubber was obtained in Acre, and also in other parts.

One of the persons who had been concerned in the Free Republic of El Acre was a gentleman of the name of Carvalho. He had been manager in Acre for Don Nicolas Suarez, and, when the republic was set up, Carvalho was said to have used the property of Don Nicolas Suarez for the purposes of the G republic or for his own purposes, and to have destroyed a considerable part of the place. Carvalho alleged that Galvez was responsible for this. He was called to account for what he had done when he got to Para. It was important for him that the Bolivians should not establish any stable government in Acre, and he started or assisted in a movement either for the purpose of the re-establishment of the Free Republic of El Acre or the establishment of another H republic on his own account. At all events he and others fitted out an expedition to Para to intercept the stores that were being sent up for the Bolivian force, and he intended to intercept them at or near Puerto Alonzo, and, having got possession of the stores, to make himself master of the place and establish a government there if he could. With that object they fitted out either two or three I vessels, which were armed, one of them, the *Solimoes*, being fitted with a quick-firing gun and carrying armed men. This expedition went up the Amazon and got somewhere into the neighbourhood of Puerto Alonzo, and there they stopped a number of steamers, but they did not interfere with any except the *Labrea*. They did not take goods from any of the others when they ascertained that they were not carrying goods for the Bolivian government. When, however, the *Labrea* arrived, they stopped her, and, finding she was carrying goods for the Bolivian government, they took possession of her. The *Solimoes* was flying a flag which the persons on board the *Labrea* thought to be the Acre flag; the witnesses described it differently, but they took it to be the flag of the Republic of El Acre.

Those on the *Solimoes* took the stores and then crossed the Bolivian frontier and attacked or were attacked by the Bolivian forces, with the result that the revolutionary force was defeated and disappeared. Where Carvalho went to did not appear. The main question in the action was whether, in these circumstances, the loss of the plaintiffs' goods occurred by piracy. PICKFORD, J., gave judgment for the defendants. He held, in the first place, that the policy for £7,500 was void by reason of the concealment of a material fact, and, as regards the policy for £375, he was of opinion that there had not been a loss by "piracy" within the meaning of the policy. The plaintiffs appealed against the latter finding, and contended that there had been a loss by "piracy," and that the defendants were liable on the policy.

Scrutton, K.C., and F. D. MacKinnon for the plaintiffs.

J. A. Hamilton, K.C., and D. C. Leck for the defendants.

VAUGHAN WILLIAMS, L.J.—In my opinion, this appeal fails. I have the judgment of PICKFORD, J., before me, and I entirely agree with what has been said by the learned judge as to the meaning of "piracy." He says in his judgment:

"As I have said, I think you have to look at what is not a very good expression, but the popular meaning of the word 'pirates.' I do not know that it takes us much further, but I might say the business meaning of the word 'pirates.' I do not know that that can be better expressed than it is in HALL ON INTERNATIONAL LAW (5th Edn.), at p. 259, where he says this:

'Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State.'

That, I think, expresses what I have called the popular or business meaning of the word 'pirate' and I find that several of the definitions which are cited in a note at p. 260 of HALL ON INTERNATIONAL LAW (5th Edn.), contain words which carry out that idea, but by no means all of them do."

The first one cited, which is from MOLLOY (book 1, chap. 4, s. 1) is "a sea thief, a hostis humani generis, who, to enrich himself, either by surprise or open force, sets upon merchants or other traders by sea." A writer with whom I confess I am not acquainted, RIQUELME, is cited in the same note, and he says that a pirate is a person who is preying by force contra los buques de todos los pueblos. And ORTOLAN, cited in the same note, says he is a man who is pillaging by arms les navires de toutes les nations. Those two definitions (I have not read the whole of them) seem to be either taken from the same source, or the one copied from the other, and there are other definitions which embody the same idea. No doubt there are definitions which do not embody that idea, but that, I think, is the common and ordinary meaning—to adopt the words of PICKFORD, J.:

"... a man who is plundering indiscriminately for his own ends and not a man who is simply operating against the property of a particular State for a public end, the end of establishing a government, although that act may be illegal, although that act may be criminal, and although he may not be acting on behalf of a society which is, to use the expression in HALL ON INTERNATIONAL LAW, politically organised. It may be piracy within the meaning of the doctrines of international law, but, in my opinion, it is not piracy within the meaning of a policy of insurance, because, as I have already said, I think you have to attach to 'piracy' a popular or business meaning, and I do not think, therefore, that this was a loss by piracy. There is another passage in

A HALL ON INTERNATIONAL LAW (5th Edn.), at p. 262, which throws some light upon the matter; that is speaking of

'Depredations committed at sea upon the public or private vessels of a State, or descents upon its territory from the sea by persons not acting under the authority of any politically organised community, notwithstanding that the objects of the persons so acting may be professedly political,'

B and he says such acts as those are, within the meaning of international law, piratical. But he goes on to say this:

C 'Sometimes they are wholly political in their objects, and are directed solely against a particular State, with careful avoidance of depredation or attack upon the persons or property of the subjects of other States. In such cases, though the acts done are piratical with reference to the State attacked, they are for practical purposes not piratical with reference to other States, because they neither interfere with nor menace the safety of those States nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction.'

D I think the meaning of 'piracy' in a policy of insurance is what is called in this book piracy in its coarser sense, and, therefore, I do not think this is a loss by piracy within the meaning of this policy."

E I adopt that statement of PICKFORD, J.'s as the basis of my judgment.

It was said on behalf of the plaintiffs that the learned judge had given no specific definition of what he held to be the meaning of piracy in this particular policy. I do not agree. I think that in the passages from his judgment which I have read he does give a most plain definition both in affirmative and in negative words, and he expressly disclaims any intention of deciding what is the meaning of piracy in international law. He takes the present policy and says that the word "piracy" as used here means piracy in a popular or business sense. If that is the true meaning of the word it was for the learned judge to construe the document and find the facts, and then to decide whether the facts so found came within the definition laid down by him. If his definition is right, the facts do not come within it, and the facts are not really in dispute here.

G I ought to say a few words on the policy itself. The clause containing the affirmative words of the policy is as follows:

"And touching the adventures and perils which the company is made liable unto, or is intended to be made liable unto, by this assurance, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this assurance of any part thereof."

H I The enumeration which I have just read includes the words "pirates," and the general words "all other perils." The first contention raised on behalf of the plaintiffs is that their loss was covered by the policy, inasmuch as the persons who caused it come within the words "pirates" in that clause. In my opinion, it is not so covered for the reasons I have given.

But then it is said that, although it is not strictly piracy, the general words at the end of the clause so plainly include matters which, though not strictly piracy, are ejusdem generis therewith that I ought to say that this risk was covered by this policy. As to that contention there is the difficulty that the policy contains

a free of capture clause, which is in the following terms:

"And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

It seems to me that, although piracy is excepted from the warranty clause set out above it is piracy only, and not other things like piracy, which is excluded. And that I say because there are several things here not unlike piracy which are expressly mentioned in the clause as things for which the defendants are not to be liable, which are left part of the subject-matter of the policy, such things as riots, civil commotions, hostilities, or warlike operations. Under these circumstances I think it is impossible for the plaintiffs to rely on the doctrine of *ejusdem generis*, because in the free of capture clause among the things left are "riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war," which are an extremely near description of the very events which took place in this case, and which are events *primâ facie* not piracy, but *ejusdem generis*. But for that clause these things would be left within the operation of the policy, and are the very things sought to be covered by the *ejusdem generis* doctrine.

The only other matter to be noticed is that at the end of the clause which sets out the perils insured against there are the words:

"And of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this assurance or any part thereof."

Having regard to the free of capture clause, it is impossible to say that these words cover the present case. PICKFORD, J., has decided this case, expressly leaving out of determination all definitions of piracy for the purposes either of international or municipal law. He has decided the case merely on the meaning of the word "piracy" in this particular policy. Although I have not got to decide it, I do wish to say, in case of any difficulty arising hereafter as to the judgments here or below, that there is no justification for calling this that happened on the borders of Brazil and Bolivia piracy for purposes of international law. In the first place, I do not think that the place where this happened, which was not on that part of the Amazon where it runs into the ocean, but on a branch river running into another branch river of the Amazon, is a place where piracy could be committed at all. After all, this is a policy of marine insurance, and the loss sought to be covered is alleged to be a loss by piracy or something *ejusdem generis* with piracy. In my opinion, whatever the definition of piracy may be, it is a maritime offence, and what took place on the river far up country on the borders of Brazil and Bolivia did not take place on the ocean. It is not the theatre on which piracy could be committed. It is a place which cannot be said to be, like the ocean, under the jurisdiction of no particular Power. This particular place is under the jurisdiction of either the one or the other Power. This part of the river is not the highway of the world where the ships of all nations go protected only by the law of nations. Ships here go into a river running through occupied land under the government of specific nations which exercise jurisdiction there. I only wish to say one word distinguishing between piracy *jure gentium* and piracy by municipal law. Whatever other limitation there may be in this policy, it only extends to piracy *jure gentium*, and not to robbery on a river which at that point has been running through land for a long distance, and had to run for a further distance through land both banks of which belong to Brazil. I am quite satisfied with PICKFORD, J.'s judgment, and do not propose to go through the various reasons which he has given. In my judgment, this appeal fails, and must be dismissed with costs.

- A FARWELL, L.J.**—I also am of opinion that the conclusion at which PICKFORD, J., has arrived is correct. I desire to express no opinion on the last point which VAUGHAN WILLIAMS, L.J., has mentioned—namely, whether this is or is not a piracy in the abstract. I neither express dissent from, nor do I express assent to, his proposition, and I should like to consider it further when the question arises. It is a subject with which I am not at all familiar. The question which
- B** we have to consider here is whether in this policy the word “piracy,” contrasted as it is with “riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war,” can possibly be extended so as to comprehend within it such acts and misdeeds as the learned judge has found were taking place on the borders of Bolivia and Brazil. It is quite plain, when one considers the acts named, that they run on a sort of narrow border line, and that some
- C** of the acts might easily be described under the head of some of the others. One can see very well that there may be hostilities by pirates, and there may be riots by pirates, and so on, but a hard-and-fast line here is drawn so as to insure against piracy, and the company is also expressly exempted from liability in respect of other things named. This really answers the argument founded on the “all other perils” clause, the generality of which is restricted, as is pointed out
- D** in r. 12 of the rules for the construction of policies contained in Sched. 1 to the Marine Insurance Act, 1906: 13 HALSBURY’S STATUTES (2nd Edn.) 14, which provides that the term “all other perils” includes “only perils similar in kind to the perils specifically mentioned in the policy.” It is impossible under any rule of construction to hold as included in a class brought in ejusdem generis with a specific subject-matter other acts or things which are actually specified in the
- E** document itself as included in another category. However it might be if there were no such specifically excluded category, it is impossible on the face of the express terms of that category to say that any act therein included can be brought in under general words as ejusdem generis with the particular acts.
- That being so, the only thing remaining is to consider whether the acts which the learned judge has found do or do not come within the words “riots, civil
- F** commotions, hostilities, or warlike operations, whether before or after declaration of war.” I do not desire to put it on any ground which could suggest that there is anything approaching war or belligerency in the sense of there being two hostile States. I do not think that is in the least necessary. The facts show that the piece of land in question which had been delimited to Bolivia on paper in 1867 had never been effectively occupied till 1898, but had been in the tenure
- G** and in the employment of a number of Brazilians and was subject to Bolivia. When the Bolivian army advanced towards the spot, the Brazilians moved over the frontier into their own country, and they there attempted to make the life of the Bolivian army intolerable in the piece of land which they had had in occupation, and they did this in Brazil by what I can only call stirring up civil commotion. It really was as much a revolution against their own government, which
- H** had made the delimitation, and which was giving effect to it, as it was against Bolivia, who had taken over the territory under the bargain Brazil had given them. It appears to me that this is very much like the commencement of all these intestine troubles. What PROFESSOR MOUNTAGUE BERNARD, a great authority on this subject, says on p. 91 of his book, *THE NEUTRALITY OF GREAT BRITAIN DURING THE AMERICAN CIVIL WAR* (Edn., 1870), in a note which sums up a variety
- I** of other matters, is this:

“Civil war is never formally declared; it becomes such by its accidents, the number, power, and organisation of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organised armies, have commenced hostilities against their former Sovereign, the world acknowledges them as belligerents, and the contest as a war.”

The incidents come about long before you know the first serious step has been taken, and, as the learned author points out, you may commence by a riot and follow it up by civil commotion, and, to my mind, this is the stage at which these incidents had arrived. Had the rest of the Federated States which adjoin this strip of vacant land joined with the adventurers, it might have very well developed into a civil war. I think, myself, it is plain that it is within the words "civil commotion," and that brings it within the express terms of the exception. I think, therefore, the judgment of PICKFORD, J., was quite right.

KENNEDY, L.J.—In this case the learned judge sitting as judge and jury, has decided both law and fact, and I cannot find any ground for saying that he was wrong either in law or in fact. The policy here is a policy of insurance upon:

"Goods and/or merchandise . . . belonging to the Bolivian government . . . by vessel called the *Labrea* . . . at and from Para to Puerto Alonzo, and/or other places on the river Acre and/or in that district."

The policy upon its face in regard to both the port of departure and the port of arrival is a riverine policy for the carriage of goods, not by sea, but by river in the sense in which that word is commonly used, Para being the port at the mouth of the Amazon, which is very large indeed at that point, and no doubt narrower upwards, but I believe for thousands of miles, certainly for hundreds, it is one of the largest, if not the largest, river in the world. None the less, the persons who entered into this contract on behalf of the insurance company were accepting an insurance which they knew to be a riverine insurance in respect of a voyage in which at no part does the vessel go to the high seas, and though I suppose there would be a point at Para of union of sea and river, it being an estuary, at the very point of starting, and higher up for a mile or two, yet the place in question was not merely up the river itself, but on a tributary of a tributary of the river. The word upon which the action turns is the word "piracy," and I, speaking to the best of my judgment for myself, think that the view which my brother PICKFORD was prepared to take, though he clearly refrained from deciding it—namely, that it might be a loss by piracy under this policy, if it was covered, though it was not on the open sea, and not within the jurisdiction of the Admiralty—was right, and that the mere fact that the seizure took place on a river would not prevent the insurance company from being held liable. It cannot be said that piracy meant something which can only happen during a voyage on the high seas, and, as is clear upon the arguments which were referred to and the judgments which have been cited, piracy is a word which is open, at any rate, to various shades and differences of meaning. Even as a legal term, strictly used, it may be used differently when looked at from the point of view of the international lawyer or from the point of view of the criminal lawyer. This is a policy made in London, in respect of a river transit, and I think, in construing its terms, that whatever shade of meaning would make them applicable to the present case ought to be adopted. I do not at all myself mean to indicate that I differ from the view which has been taken and expressed by MR. CARVER at s. 94 of his invaluable work on the LAW OF CARRIAGE OF GOODS BY SEA (4th Edn.), p. 117—namely, that piracy, it is generally true to say, is forcible robbery at sea, whether committed by marauders from outside the ship, or mariners, or passengers within it. The essential element, however, is the voluntary dispossessing of the master and afterwards carrying away the ship itself, or the whole or part of the cargo, with felonious intent. That the word "piracy" meant piracy at sea, to my mind, is one of those things which for the purposes of this policy I am content to say is not the view of the term which the assured or insurers must be taken to have had in mind, because it could not apply to this particular voyage.

Assuming that is so, the question remains as to what was done in this case. But before we get to what was done, as has already been pointed out by VAUGHAN WILLIAMS, L.J., and FARWELL, L.J., no doubt the judge must direct himself, if he

- A is sitting alone, as to what piracy means, and as to how he is to regard the piracy in the case of the particular contract with which he is concerned. Piracy has been regarded by my brother PICKFORD, I think, from the right point of view—as a word which has to be construed in the sense in which it would be construed in a business document of this kind by business men, and I think, from that point of view, what he has said is correct. Certainly I find nothing to quarrel with
- B when he says that that business sense would be the sense in which a man would understand the word when speaking of a person as a pirate plundering indiscriminately for his own ends, and not a man who is simply operating upon the property of a particular State for such ends. I will not say more than that. In this case the end that these people were labouring for and endeavouring to achieve was the taking of the goods out of this ship, the *Labrea*. If there had been a
- C jury I am not prepared to say that it would have been wrong to have ascertained the business meaning of “piracy” in a business document by asking the question of the jury. While, of course, it is for the judge to construe the document, it is, or may be, and often is in mercantile cases, within the province of the jury, where there are special terms of a business nature and having possibly special business meanings, to give the judge the benefit of their findings as to the meaning of a particular term, and if it has (and if there is evidence to support it) a special business meaning. The judge has to construe the contract. The meaning of a special word or trade term in that contract may be properly left to the jury. In this case the learned judge has asked himself the question as he tells us, and he has given an answer which I think myself does not entirely fit the facts. To my mind, to speak of these people, however wrong they may be, however lawless
- E they may be, as regards the laws of Brazil, as pirates within this policy is, to my mind, without using a more forcible word, fantastic, because, though it is obviously, and speaking very seriously, a most noble argument, yet it is one which certainly seems to be an entire misuse of terms when it says that what these people were doing was, as VAUGHAN WILLIAMS, L.J., has put it in one word, filibustering. They took out the cargo in order to carry out their political venture
- F in the other country. I do not believe that any business man would say that in this document and in this contract when the word “piracy” is used it means that which comes much more nearly under the capture and seizure definition. Civil commotion or hostilities for warlike operations is not work done by pirates for the purposes of this policy.

- For that reason, therefore, I do not think one need express an opinion as to
- G those cases which are certainly covered by MR. CARVER's definition to which he refers in the note, such as *Nesbitt v. Lushington* (1) and *Palmer v. Naylor* (2). He covers it in his own statement of the law by saying:

“Piracy is forcible robbery at sea, whether committed by marauders from outside the ship or by mariners or passengers within it.”

- H The matter may possibly have to be reconsidered further, but I think myself that the plaintiffs in this case have gone further than I should at any rate be prepared to go. Considering the policy of insurance in regard to piracy, I think it did not create any right in all nations, so to speak, to treat the persons in question here as pirates, as *hostes humani generis*, but be that as it may, and assuming that the full statement of the law covers all cases of marauding from without,
- I and all cases of risings within, here I should clearly say that it would cover the present case, because it might have been their express purpose to loot the vessel and carry her off. Whether that be a safe general statement or not, I am clearly of opinion in this particular case that the learned judge has given the right judgment on the facts, and also that he is right on the law.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.; Waltons, Johnson, Bubb & Whetton.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re INNES. INNES v. INNES

[CHANCERY DIVISION (Parker, J.), November 19, 1909]

[Reported [1910] 1 Ch. 188; 79 L.J.Ch. 174; 101 L.T. 683]

Gift—Incomplete gift—Completion by appointment of donee as executor—Promise by testator to pay allowance to donee—No identification of sums of money in question and separation from estate.

Where an alleged gift is a mere promise by a testator to give on a future occasion periodical sums of money which have not been sufficiently identified to enable them to be separated from the rest of his estate, that gift is not perfected by the appointment of the donee as an executor of the estate.

By a document in writing a testator promised the plaintiff, a daughter acting as his housekeeper, that after a certain future date she would receive £2 a week. The testator died without altering this intention and by his will appointed the plaintiff an executrix. The plaintiff had drawn money only occasionally by virtue of the document and claimed the balance from the estate either because she was entitled as a creditor of the estate by reason of acting as the testator's housekeeper, or because the gift had been perfected by her appointment as executrix.

Held: the plaintiff was not, in the circumstances, a creditor of the estate as there was no contract that she should serve the testator but merely an agreement that she should be given an allowance; nor was the gift perfected by her appointment as executrix.

Strong v. Bird (1) (1874) 18 Eq. 315, and *Re Stewart, Stewart v. McLaughlin* (2), ante p. 133, considered.

Per PARKER, J.: If the principles of *Strong v. Bird* (1) and *Re Stewart, Stewart v. McLaughlin* (2) are to be applied there must be certain definite property which a donor has attempted to give to a donee, but has not succeeded in giving. There must be in every case a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfecting of that gift by the appointment of the donee, who takes the legal estate by virtue of the executorship conferred on him. It would be exceedingly dangerous by the appointment of an executor to try to give effect to what at most are merely statements of what a man intends to do in the future, and not real gifts by him at the present, which fail on technical consideration, and may be subsequently perfected.

Notes. Considered: *Re Freeland, Jackson v. Rodgers*, [1952] Ch. 110.

As to incomplete gifts, see 18 HALSBURY'S LAWS (3rd Edn.) 396 et seq., and for cases see 25 DIGEST 533 et seq.

Cases referred to:

- (1) *Strong v. Bird* (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 22 W.R. 788; 25 Digest 538, 263.
- (2) *Re Stewart, Stewart v. McLaughlin*, ante p. 133; [1908] 2 Ch. 251; 77 L.J.Ch. 525; 99 L.T. 106; 24 T.L.R. 679; 25 Digest 539, 274.
- (3) *Vavasour v. Vavasour* (1909), 25 T.L.R. 250; 25 Digest 529, 200.

Also referred to in argument:

Re Griffin, Griffin v. Griffin, [1899] 1 Ch. 408; 68 L.J.Ch. 220; 79 L.T. 442; 15 T.L.R. 78; 48 Sol. Jo. 96; 25 Digest 539, 273.

Originating Summons.

A testator, John Innes, had five children, of whom two were sons and three daughters. The plaintiff was the eldest daughter, and kept house for the testator from 1884 till 1907, when he died. In 1895 he settled property on all his daughters. The plaintiff was unmarried, but the other daughters married in 1896

A and 1897 respectively. From the date of the settlement the plaintiff had only her share of the income of the settled property wherewith to provide herself with clothes and pocket money; and she asked the testator for a salary. He agreed, and on July 21, 1902, gave her the following document:

B "From James Smith & Co., wine merchants, 83, High Street, Birmingham, July 21, 1902. I, J. I., hereby determine and declare that from and after Sept. 30 next [the plaintiff] shall receive from the business of James Smith & Co. . . . the sum of £2 per week or about fifty-two sums of equal amount per annum; and also an additional sum of the same amount per week or per annum, the latter amount of cash to remain in the business of James Smith & Co. at 5 per cent. per year, to be withdrawn by her, if necessary, after an investment lasting for five years with increase of 5 per cent. per annum."

C The document was signed by the testator and witnessed. The plaintiff drew money only occasionally in virtue of this document, and in 1905 the testator asked her to give him back the document that he might consult a solicitor and see that there should be no doubt of her getting the money. The document was found among his papers at the date of his death. The testator by his will made in 1894 appointed D the plaintiff and one of his sons to be his trustees and executors, and divided his residue equally among all his children. The estate was worth about £80,000. It was held in another summons that the shares of the daughters in the residue were adeemed pro tanto by the property settled on them in 1895.

E This was a summons brought by the plaintiff against her brothers and sisters asking for declarations (inter alia) that the plaintiff was by virtue of the above-mentioned document, in consideration of acting as the testator's housekeeper, entitled as a creditor of the testator's estate to have paid to her out of the estate the amounts specified in the document, or, in the alternative, that the gift of the document by the testator, taken with the circumstances under which it was given and the appointment of the plaintiff as executrix of the testator, was a complete gift by the testator to the plaintiff of the amounts specified in the document.

F *Grant, K.C.*, and *Whitty* for the plaintiff.
Romer, K.C., and *Byrne* for the defendants.

PARKER, J.—The questions raised by the summons are in effect two. First, the plaintiff says she was a creditor of the estate of the testator for sums amounting in all to some £900 to £1,000, and she raises that claim as a creditor by virtue G of what happened in 1902, when a certain document was given to her by the testator. It appears that the plaintiff was one of three daughters who had originally lived at home with their father. Two of them married, and the plaintiff was left at home, and under these circumstances, as was not unnatural, she assumed the position of mistress of the testator's house, and did the housekeeping and looked after matters generally, as daughters, I am thankful to say, generally H do under those circumstances. The testator made a settlement on his daughters, and a certain income came to them under that settlement. The plaintiff did not think that the income she got under that settlement was a sufficient allowance, having regard to all the circumstances of the case, and she was continually, according to her own account, asking her father for an increased allowance; and, when I asking her father for the increase, she pointed out the difference between her position and the position of her married sisters. She was living at home, and she was managing her father's house, and she had only what was payable to her under the settlement, whilst her married sisters had their husbands to look after them, and were not in such need of an allowance from their father as she personally was. She told him, among other things, that she thought he ought to allow her a salary for acting as his housekeeper. In answer to that the testator said that no doubt she ought to have more than her sisters under the circumstances. Then at a later date the testator produced a document. [His LORDSHIP

read the document, and continued:] This is signed by the testator. He put it in A an envelope and apparently gave it to his daughter, who received it, read it, and said to him—I am quoting from the plaintiff's affidavit—

“‘Do you really mean it, father?’ as I was very much surprised to get such an allowance after speaking to him so many times on the subject. My father seemed rather hurt by my remark, and said, ‘I do not do these things unless I mean it.’ I thanked him, and said I was very pleased, and it was a good deal more than I expected. He told me not to mention it to my brothers and sisters, and I said I would not.” B

The plaintiff kept the document for some years, and a year or two before the death of the testator it was handed back to him apparently with the intention that he should consult his solicitors whether anything more was required, or whether she could rely on it as it was. That is the effect of the evidence, and, as there is no evidence filed on the other side, I will take what the plaintiff says as a correct description of everything that occurred which is material on the point. It appears to me that on that evidence I cannot find that there was a contract by the plaintiff to serve her father as his housekeeper, or a contract on his part to pay her this sum. The fact that she acted as his housekeeper is put forward by her as a reason for increasing her personal allowance, and it is a question between father and daughter, but not a contract at all. He recognises that she is in a position where a larger allowance would have been justifiable, and he, therefore, writes a letter, and by that letter he promises her certain advantages. In my opinion there is no contract there. He simply and solely promised to grant her an allowance. As a matter of fact the promise was never acted on to its full extent, though she did from time to time draw upon the business for certain sums. Under these circumstances in my opinion it is impossible to hold that the plaintiff is a creditor of the estate. C D E

That part of my decision turns really upon a question of fact, but the second point which is raised is one partly of fact and partly of law. It has been held in the case of *Strong v. Bird* (1) that where a testator has attempted to forgive a debt by telling his debtor that the debt has been forgiven, though that cannot at law operate as a release, yet there is a present intention of giving which, if the debt is subsequently released, may be effectual, and that the appointment of the debtor subsequently as an executor is a sufficient release at law to give validity to the gift which was otherwise imperfect. That is a decision of SIR GEORGE JESSEL in 1874, and it has been acted upon, I think, ever since, and recently has been somewhat extended by a decision of NEVILLE, J., in *Re Stewart, Stewart v. McLaughlin* (2). The way in which the principle enunciated by SIR GEORGE JESSEL has been extended is that it has been made, according to NEVILLE, J.'s decision, applicable not only to the release of a debt, but in order to perfect an imperfect gift of specific property. In *Re Stewart, Stewart v. McLaughlin* (2) the testator had given his wife certain bonds and other securities, as to which there was no doubt of their identity, and those securities had been enumerated in a document at the foot of which the testator had written in pencil, “Coming in next year, £1,000,” and on the evidence NEVILLE, J., considered that writing to be an announcement of an intention to give a further £1,000 to his wife next year. It appears that one of the bonds which had been handed over was paid off, and £500 came in respect of it into the hands of the testator. In reinvesting that amount next year he added rather over £1,000 to it, and bought three further bonds. He took the contract note for those three further bonds to his wife, and he handed it to her in an envelope with the broker's letter announcing the purchase, and he said, “I have bought these for you.” NEVILLE, J., held that that was a present intention to give which would have operated as a gift but for the fact that certain things remained to be done which were not done, so that the gift was imperfect; but the testator subsequently died, having appointed his wife his executrix, and NEVILLE, J., held that the principle of *Strong v. Bird* (1) was F G H I

A applicable, and that there having been an actual attempted gift, imperfect though it might have been, the subsequent appointment of the lady as executrix perfected that gift by vesting in her the legal property in the estate which was the subject of the action.

B It is attempted here to extend the doctrine of those cases still further. In the first place, it is attempted to extend it to what, if there was a gift at all, was a gift of money without that money being identified, or sufficiently identified, to enable it to be separated from the rest of the estate of the testator; and, in the second place, it is attempted to extend the principle of the earlier cases, not only to an actual attempted gift, which as a matter of fact, is imperfect, and therefore would not take effect unless it was subsequently perfected, but to a mere promise to give on a future occasion. In my opinion the principles of *Strong v. Bird* (1) and *Re Stewart, Stewart v. McLaughlin* (2) cannot be so extended. If we are to apply those principles, we must have certain definite property which a donor has attempted to give a donee, but has not succeeded in giving. There must be in every case in my opinion a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfecting of that gift by the appointment of the donee, who takes the legal estate by virtue of the executorship conferred on him. It seems to me that it would be exceedingly dangerous by the appointment of an executor to try to give effect to what at most are merely statements of what a man intends to do in the future, and not real gifts by him at the present, which fail on technical consideration, and may be subsequently perfected. I think I ought to say that a case has been called to my attention—*Vavas seur v. Vavas seur* (3)—when apparently CHANNELL, J., took the same distinction between a promise to give in future and an attempted actual gift in the present, which I have taken in the course of my judgment. [His LORDSHIP also found that the testator did not make a declaration of trust in respect of the amount mentioned in the document.]

F Solicitors: *Needham, Tyer & Barrow*, for *Alfred Caddick & Son*, West Bromwich; *Helliwell, Harby & Evershed*, for *Charles E. Innes*, Birmingham.

[Reported by R. C. CARTER, Esq., Barrister-at-Law.]

Re CURRIE'S SETTLEMENT. Re ROOPER. ROOPER v. WILLIAMS

[CHANCERY DIVISION (Joyce, J.), December 1, 1909, January 14, 1910]

[Reported [1910] 1 Ch. 329; 79 L.J.Ch. 285; 101 L.T. 899;
540 Sol. Jo. 270]

Will—Residue—Gift to daughter to be held on trusts of marriage settlement—Ultimate trust for testator—Death of daughter without issue—Devolution of share on daughter's representatives.

By his will, made in 1854, a testator devised and bequeathed his residuary estate to trustees on trust for all his children (except the eldest son) who should survive him and attain twenty-one years as tenants in common. He also provided that the shares of daughters married at his death should be paid to the trustees of their respective marriage settlements to be held on the same trusts, or such of them as should be subsisting and capable of taking effect, as had previously been declared in such settlements. The testator died in 1855 leaving twelve children, including C., a married daughter. C. died in 1909 without issue. Under her marriage settlement the ultimate trust in default of issue was for the testator, his executors, administrators and assigns.

Held: by the will there was a clear absolute gift to C. of a share of the residuary estate of the testator and in the events which happened there was no valid effective trust declared of that share; therefore, on C.'s death without issue the share devolved on her legal representatives.

Lassence v. Tierney (1) (1849), 1 Mac. & G. 551 applied.

Notes. Considered: *Re Powell, Bodvel-Roberts v. Poole*, [1918] 1 Ch. 407. Applied: *Re Harrison, Hunter v. Bush*, [1918-19] All E.R.Rep. 285. Considered: *Re Hickman's Will Trusts, Re Playfair, Palmer v. Playfair*, [1950] 2 All E.R. 285. Referred to: *Re Benett-Stanford Settlement Trusts, Atwood v. Benett-Stanford*, [1947] 1 All E.R. 888.

As to lapse of a testamentary gift, see 34 HALSBURY'S LAWS (2nd Edn.) 134 et seq.; and for cases see 44 DIGEST 492 et seq.

Cases referred to:

- (1) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; sub nom. *Lassence v. Tierney, Lassence v. Lescher*, 14 Jur. 182, L.C.; 44 Digest 554, 3715.
- (2) *Culsha v. Cheese* (1849), 7 Hare 236; 18 L.J.Ch. 269; 13 Jur. 802; 68 E.R. 97; 44 Digest 494, 3133.
- (3) *Elliott v. Davenport* (1705), 1 P.Wms. 83; 2 Vern. 521; 24 E.R. 304; 44 Digest 496, 3152.
- (4) *Stone v. Evans* (1740), 2 Atk. 86; 26 E.R. 453; 44 Digest 499, 3191.
- (5) *Maybank v. Brooks* (1780), 1 Bro.C.C. 84; 28 E.R. 1000; sub nom. *Mabank v. Brooks*, 2 Dick. 577 L.C.; 44 Digest 493, 3129.
- (6) *Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482; 84 L.T. 163; 70 L.J.Ch. 114; 49 W.R. 203, C.A.; affirmed sub nom. *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 43 Digest 644, 792.

Also referred to in argument:

Re Palmer, Palmer v. Answorth, [1893] 3 Ch. 369; 62 L.J.Ch. 988; 69 L.T. 477; 42 W.R. 151; 37 Sol. Jo. 701; 2 R. 619, C.A.; 44 Digest 392, 2251.

Adjourned Summons.

By a marriage settlement, dated Sept. 17, 1834, John Bonfoy Rooper covenanted to transfer to the trustees thereof the sum of £3,000; and it was declared that the trustees should stand possessed of that sum upon trust to pay the income thereof

A to his daughter Caroline Currie (then Caroline Rooper) during her life for her separate use, and after her death to pay such income to James Currie during his life, and after the death of the survivor of them to hold the sum and the income thereof in trust for the children of the then intended marriage of James Currie and Caroline Currie, and in case there should be no children or child of such marriage or, there being any such, he, she, or they should die under the age

B of twenty-one years, then in trust for John Bonfoy Rooper, his executors, administrators, and assigns. By the same indenture of settlement, James Currie and Caroline Currie covenanted to transfer to the trustees of the settlement all their interest in certain moneys, stocks, funds, and securities secured by an indenture of settlement dated May 12, 1810, and which by the trusts thereof were made payable in certain events. And it was declared that the trustees should stand possessed of the moneys, stocks, funds, and securities so covenanted to be transferred

C by James Currie and Caroline Currie upon the same trusts and with the like ultimate remainder to John Bonfoy Rooper, his executors, administrators, and assigns as were thereinbefore declared with respect to the sum of £3,000 covenanted to be transferred by John Bonfoy Rooper, and that as fully and effectually as if the same were there repeated and upon no other trust whatsoever.

D By his will dated July 28, 1854, John Bonfoy Rooper devised all his real and chattel real estate to trustees upon trust for sale, and it was declared that they should stand possessed of the residue moneys arising therefrom upon the same trusts as were afterwards declared concerning the moneys to arise from the sale and conversion of his residuary personal estate. And the testator bequeathed his residuary personal estate to his trustees upon trust for sale and conversion and to stand possessed of the residuary proceeds thereof after payment of debts and specific legacies in trust for all his children (except his eldest son) who should be living at his death and who should attain twenty-one years as tenants in common. And the testator directed that the share or shares of the trust funds which under the provision last mentioned would belong to any daughter or daughters of his who at the time of his decease should be or have been married

E should go and be paid to the trustees for the time being of the settlement or respective settlements made on the marriage or respective marriages of such daughter or daughters and should be held by such trustees upon the same trusts as in such settlement or settlements respectively were declared concerning the moneys thereby settled by the testator upon such his daughter or daughters or such of them as should be subsisting and capable of taking effect.

F

G John Bonfoy Rooper died on Mar. 11, 1855, leaving twelve children, including Caroline Currie, surviving. James Currie died in December, 1860, and Caroline Currie died in February, 1909. There was never any issue of their marriage.

The question raised by the summons was, who, in the events which had happened, were entitled to the share of Caroline Currie in the residuary estate of John Bonfoy Rooper.

H *Austen-Cartmell* for the plaintiff.

Hughes, K.C., and *P. Wheeler* for Mrs. Currie's executor.

Younger, K.C., and *Ashton James* for the legal personal representatives of one of the testator's residuary legatees.

E. Beaumont for the representatives of the testator's eldest son.

I

Cur. adv. vult.

Jan. 14, 1910. **JOYCE, J.**, read the following judgment.—The testator in this case, by his will which was made in 1854, bequeathed the residue of his personal estate to his trustees upon trust for sale and conversion, and declared and directed that his trustees should stand possessed of the moneys that arose from such conversion, the moneys belonging to him at the time of his death, and also the moneys to arise from the sale directed in the earlier part of the will of his real estate upon trust, in the first place, to pay debts, testamentary expenses and

legacies, and subject thereto upon trust for all his children (except his eldest son), A who should be living at his decease and who should attain the age of twenty-one years, as tenants in common. Then there is a provision for the issue living at the testator's decease of any child who should die in his lifetime. Stopping at that point, we have a clear gift in effect absolute of an aliquot share of the residue of the testator's estate to each child, whether a daughter or son, who attains the age of twenty-one years and survives the testator. Mrs. Currie was such a B daughter. This was a fair, equal, and equitable distribution of his estate among his children. But then there follows a proviso that the share or shares of the trust funds which under the trust would belong to any daughter or daughters who at the time of the testator's decease should be or have been married shall go to the trustees of the settlement or respective settlements made on the marriage or respective marriages of such daughter or daughters and be held by such trustees C upon the same trusts as if such settlement or settlements respectively were declared concerning the moneys thereby settled by the testator upon such his daughter or daughters or such as should then be subsisting and capable of taking effect.

The will, as I have said, was made in 1854, and the testator died in 1855. Mrs. Currie survived the testator more than fifty years—namely, until 1909, when she died without having had issue. Her husband, Mr. Currie, also survived the D testator, but predeceased Mrs. Currie in 1860. At the date of the testator's death Mrs. Currie might, I suppose, have had issue by her then husband or she might have married again. Under Mrs. Currie's marriage settlement the ultimate trust of the fund settled by the testator upon Mrs. Currie, in default of issue of Mrs. Currie, was for her father—the testator—his executors, administrators, and assigns. If this ultimate limitation had been simply for some person, "A," who E was living at the date of the will but afterwards died in the lifetime of the testator, it is clear, I think, that the trust for "A," under the will created by reference to the trusts of the settlement, must have failed by lapse; and if authority for this is wanted, it is, I think, to be found in the case of *Culsha v. Cheese* (2), before VICE-CHANCELLOR WIGRAM. I think the result would be the same if the ultimate trust under the will, though limited by reference to the settlement, had been for F "A," his executors, administrators, and assigns. A devise to "A. and his heirs" lapses by the death of "A." in the lifetime of the testator. In a conveyance or bequest to "A., his executors, administrators, and assigns," the words "and assigns" are superfluous, and the words "his executors and administrators" are mere words of limitation denoting or emphasising the fact that an absolute interest is given. A bequest to "A., his executors and administrators," becomes G inoperative, and fails or lapses by the death of "A." in the testator's lifetime. See *Elliott v. Davenport* (8); *Stone v. Evans* (4); *Maybank v. Brooks* (5). A bequest by a testator of a share of residue, either immediately or after preceding limitations, to himself, or to himself, his executors, administrators, and assigns, would, in my opinion, be unmeaning and inoperative for any purpose. No rational H testator or draftsman ever intentionally framed such a provision. No one can take under a will who does not survive the testator. The trusts limited by the testator's will of Mrs. Currie's share are the trusts in the settlement declared concerning the moneys thereby settled by the testator upon Mrs. Currie or such of them as shall be then—that is, at the testator's death—subsisting and capable of taking effect. I come to the conclusion that, in the events which have happened, there is no valid effective trust declared by the testator's will of Mrs. Currie's aliquot share I of residue upon or after her death without having issue.

Returning to the proviso. If this, instead of providing that the share of Mrs. Currie should go and be paid to the trustees of her marriage settlement, had merely required the trustees of the will to retain the share and hold it upon the trusts in the settlement declared concerning the moneys thereby settled by the testator on Mrs. Currie, or such of them as should be subsisting and capable of taking effect, then it appears to me tolerably plain that upon Mrs. Currie's death without issue she, or rather her representatives, under the rule in *Lassence v.*

A *Tierney* (1) would have been absolutely entitled to the trust funds constituting her aliquot share of the residue under the testator's will. In *Hancock v. Watson* (6) LORD DAVEY, in his judgment says ([1902] A.C. at p. 22):

B "It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of-kin, as the case may be."

C And see UNDERHILL ON WILLS (2nd Edn.) at p. 178. The actual proviso, however, did not merely direct the trustees of the will to retain Mrs. Currie's share, but directed that it should go and be paid to the trustees of her settlement. Does the D circumstances of these trustees being the trustees of the share, instead of the trustees of the will, in the result make any difference? They are to be merely trustees with no beneficial interest. Looking at the substance of the matter, and without attaching undue importance to the mere form, I think the circumstance that the trustees to hold Mrs. Currie's share are the trustees of the settlement, and not merely the trustees of the will, makes no real difference. E Moreover, the fund settled by means of the proviso is provided out of a share which, but for the settlement, belonged to the daughter, Mrs. Currie, absolutely. So that if there were any case or any question of a resulting trust, that resulting trust should be, in my opinion, not for the testator, in the circumstances of this case, but for Mrs. Currie. If there be no complete, effective disposition of Mrs. Currie's share after her death, except in the original gift to her, she ought to take under *Lassence v. Tierney* (1). If and so far as not otherwise disposed of, she ought to have it. I hold, therefore, that, according to the true construction of the testator's will, and in the events that have happened, Mrs. Currie's share of the residue devolved, upon her death, without issue, upon her legal representatives.

F Solicitors: *Rooper & Whately; Currie, Williams & Williams.*

[Reported by VALE NICOLAS, Esq., Barrister-at-Law.]

HIGGINS v. SEARLE

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.J.J.), February 8, 1909]

[Reported 100 L.T. 280; 73 J.P. 185; 25 T.L.R. 301;
7 L.G.R. 640]

Animal—Highway—Animal straying on—Domesticated animal—Sow—Damage to user of highway—Liability of owner of animal.

The owner of cattle or other animals (e.g., a sow) which stray on to the highway is not liable for damage caused to any person on the highway, although he may be liable to the owner of the soil of the highway for damage done to that soil. Whether the straying animal is tame or not is immaterial, as a person on the highway is exposed to the ordinary risks taken by those using the highway, and if an accident happens owing to those risks no legal consequence follows.

Cox v. Burbidge (1) (1863) 13 C.B.N.S. 430 and *Hadwell v. Righton* (2), [1907] 2 K.B. 345, at p. 349, applied.

Notes. Considered: *Ellis v. Banyard*, [1911-13] All E.R.Rep. 303. Considered and applied: *Heath's Garages, Ltd. v. Hodges*, [1916-17] All E.R.Rep. 358. Referred to: *Searle v. Wallbank*, [1947] 1 All E.R. 12.

As to trespass by animals on the highway, see 1 HALSBURY'S LAWS (3rd Edn.) 670 et seq.; and for cases see 2 DIGEST (Repl.) 316 et seq., 26 DIGEST (Repl.) 490, 491.

Cases referred to:

- (1) *Cox v. Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, 187.
- (2) *Hadwell v. Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 23 T.L.R. 548; 51 Sol. Jo. 500; 5 L.G.R. 881; 2 Digest (Repl.) 320, 191.

Also referred to in argument:

Baker v. Snell, post p. 398; [1908] 2 K.B. 825; 77 L.J.K.B. 1090; 99 L.T. 753; 24 T.L.R. 811; 52 Sol. Jo. 681; 21 Cox, C.C. 716, C.A.; 2 Digest (Repl.) 380, 554.

Fletcher v. Rylands (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest (Repl.) 328, 215.

Appeal from a decision of LAWRENCE, J., in an action brought to recover damages to the plaintiff's motor car alleged to have been caused by the defendant's negligence in allowing a sow of which he was the owner to stray on the highway.

A sow, having escaped from her sty, lay on the roadside waste and rose suddenly from the side of the hedge just as a horse and van which were proceeding along the highway were about to pass the plaintiff's motor car. The result was that the horse was frightened and shied across the highway in front of the motor car, and the plaintiff in endeavouring to avoid the horse and van ran his motor car into collision with a stone wall and the car was seriously damaged.

The plaintiff put his case on the ground (i) of obstruction; and (ii) of negligence. The defendant denied the alleged obstruction and negligence, and pleaded that the car was being driven at an excessive speed, and that the damages were too remote to be recoverable in law. The action was tried before LAWRENCE, J., and a special jury at Bodmin, and the learned judge was of opinion that the case ought to be allowed to go to the jury. Accordingly the following were the questions left to the jury and their findings: (i) was the defendant guilty of negligence in allowing the sow to be on the road?—No. (ii) Did the sow cause

A the horse to shy?—Yes. (iii) Assuming the sow to be lying on the road as described, was the probable result that the horse would shy?—Yes. (iv) Was the driver of the car guilty of contributory negligence?—The jury could not agree on this point. On further consideration before the learned judge on an application to enter judgment on these findings, LAWRENCE, J., was of opinion that the case was complicated by the fact that the jury had found that the sow was likely to cause the horse to shy, which took the case out of the principle of *Cox v. Burbidge* (1); that the question was whether that finding entitled the plaintiff to bring his action; that that finding did entitle the plaintiff to bring his action; but that judgment could not be entered for the plaintiff as there was an issue on which the jury had disagreed. His Lordship also refused to enter judgment for the defendant. The defendant appealed.

C J. A. Hawke for the defendant.

G. C. Rankin (*Walter E. Lloyd with him*) for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This case comes before the court in rather a peculiar position. The plaintiff is the owner of a motor car which was travelling from Newquay to Truro, and there were a horse and van coming in the opposite direction from Truro to Newquay. Lying by the side of the road there was a sow belonging to the defendant. The driver of the motor car sounded his horn, the effect of which was that the sow got up on its legs, and the horse in the van that was coming towards the motor car shied, with the result that the motor car in trying to avoid the van ran into a wall and was damaged. This action was brought by the owner of the motor car against the owner of the sow to recover the amount of the damage done, first, on the ground of the defendant's negligence in allowing the animal to be on the highway; and, secondly, on the ground that the natural result of the sow being on the highway was obstruction of the highway whereby the plaintiff suffered damage. Counsel for the defendant submitted at the trial that there ought to be a nonsuit, but the learned judge (LAWRENCE, J.) put certain questions to the jury, which they answered by finding (i) no negligence on the defendant's part; (ii) that the sow caused the horse to shy; and (iii) that the probable result of the sow lying by the highway was that the horse would shy. On further consideration LAWRENCE, J., declined to enter judgment for either party and treated the trial as abortive. The defendant appeals, and contends that on these findings he is entitled to have judgment entered in his favour.

G In my opinion the defendant is so entitled. We have had an interesting argument by counsel for the plaintiff that a person who allows his cattle to stray on the highway without negligence is liable in damages for any consequences that may happen from such straying. No doubt that is so, but liable to whom? To the owner of the soil for damages done to him, but not for damages such as are claimed in the present case. It has never been held that cattle straying innocently on the highway not only renders their owner liable for damages caused to the soil, but also for damages caused to any person on the highway. That contention was negatived by the court in *Cox v. Burbidge* (1). In that case WILLES, J., observed (13 C.B.N.S. at p. 441):

I “Does the fact of the horse being on the highway make any difference? No doubt, if the horse was trespassing there, the owner of the highway might have an action against the owner of the horse. So, possibly, the owner of the horse might be liable to an indictment for obstructing the highway or to a fine. But that was not the cause of the mischief here. It comes round, therefore, to the question whether the owner is liable for an act of this sort done by an animal not of a naturally vicious character, and which is not found to have been accustomed to commit such mischief. I think the rule must be made absolute to enter a nonsuit.”

If further authority be wanted on this point, the law is very clearly stated by

BRAY, J., in *Hadwell v. Righton* (2) in a passage of which I approve, and desire to adopt in the present case. The learned judge observed ([1907] 2 K.B. at p. 349):

"It was said that the fowl [which had upset a cyclist] was trespassing. But the cases which were relied upon as showing that that would give a cause of action were cases in which the plaintiff was the owner of the soil on which the trespass was committed, and are consequently not in point, for here the cyclist had no interest in the soil of the highway."

Every word of that applies exactly to the present case. It was also sought to make out that there was some peculiar quality about this sow which would make it likely to frighten a horse and cause it to shy, and the jury found to some extent in accordance with that contention. But this point was not raised on the pleadings, and no evidence seems to have been given at the trial in support of it. In my opinion, LAWRENCE, J., was wrong in not entering judgment for the defendant. The appeal must, therefore, be allowed, and judgment must be entered for the defendant accordingly.

FLETCHER MOULTON, L.J.—I agree. There are two grounds upon which the plaintiff in the present case claimed. The first was negligence, and the second obstruction of the highway. Negligence is negatived by the finding of the jury. The facts of this case are very clear. The sow was lying by the side of the highway, and when the plaintiff's motor car came along she did nothing but what might have been expected—she suddenly got up. Such a thing cannot be called obstruction of the highway. The finding of the jury that the conduct of the sow would be likely to frighten horses is, in my opinion, entirely unfounded. In my opinion the action is unsustainable.

BUCKLEY, L.J.—This case raises no new question of law. The defendant's contention is that he is entitled to a verdict on the ground that there was no negligence proved. ERLE, C.J., in *Cox v. Burbidge* (1) mentions three ways in which the owner of an animal straying on the highway might be liable. First, assuming the animal to be trespassing, he might have been liable to the owner of the soil of the highway or of the herbage thereon. Secondly, if the place were a public highway he might have been liable to be proceeded against under the Highway Acts. The nearest case was when there was some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. The Chief Justice says (13 C.B.N.S. at p. 435):

"In considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff. I am also of opinion that so much of the argument which has been addressed to us on the part of the plaintiff as assumes the action to be founded upon the negligence of the owner of the horse, in allowing it to be upon the road unattended, is not tenable. To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. The simple fact is that the horse was on the highway. He may have been there without any negligence of the owner; he might have been put there by a stranger, or might have escaped from some inclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff."

Whether the animal which strays on the highway is a tame animal or not is immaterial. A person on the highway is exposed to the ordinary risks taken by

A those using the highway, and if an accident happens owing to those risks, to my mind, no legal consequence follows.

Appeal allowed.

Solicitors: *James, Mellor & Coleman*, for *Knowles & Co.*, Luton, and Newquay, Cornwall; *C. T. Price*.

B [Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

C

Re LEWIS. LEWIS v. LEWIS

D [CHANCERY DIVISION (Warrington, J.), October 14, 1910]

[Reported 103 L.T. 495; 55 Sol. Jo. 29]

Trustee—Profit from trust—Trustee given share in a partnership firm under father's will—Remuneration for services as salesman—Liability to account to trust estate.

E L. was a trustee of his father's will. His father had been one of the managing partners of a partnership firm, and by his will L. was nominated to be a partner in the firm in his place, but was to hold the share in the partnership to which he thus succeeded upon the trusts of the will. L. had, prior to his father's death, acted as salesman of the firm at a salary and continued so to act after his father's death and after his admission as a partner, under an agreement with the other members of the firm. The agreement to employ L. was made bona fide, and was for the interest of the firm, and thus of the trust estate.

F **Held:** L. received his salary as salesman by virtue of his agreement with the firm, and not by reason of the trusts of the will, and, therefore, he was entitled to retain the salary in addition to remuneration which he obtained under the will for acting as managing partner, and he need not account for the salary to the trust estate.

G **Notes.** Considered: *Re Macadam, Dallow v. Codd*, [1945] 2 All E.R. 664. Applied: *Re Gee, Wood v. Staples*, [1948] 1 All E.R. 498. Referred to: *Re Mulholland's Will Trusts, Bryan v. Westminster Bank, Ltd.*, [1949] 1 All E.R. 460.

H As to remuneration of trustees, see 33 HALSBURY'S LAWS (2nd Edn.) 277 et seq.; and for cases see 43 DIGEST 637 et seq.

Case referred to:

(1) *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65; 77 L.J.Ch. 94; 98 L.T. 31; 24 T.L.R. 52; 52 Sol. Jo. 43; 15 Mans. 51, C.A.; 9 Digest (Repl.) 484. 3166.

I **Adjourned Summons** to determine whether William North Lewis, who was a trustee under his father's will, was bound to account to the trust estate for a salary he received from the firm of George Insole & Son.

William Henry Lewis, the testator, had been a partner in the firm of George Insole & Son, the two other partners being G. F. Insole and Mrs. Aitchison. The business of the firm consisted in managing the property of two colliery companies—Insoles, Ltd., and another company—and in selling the output of these companies. W. Henry Lewis and G. F. Insole were the managing partners, and received remuneration based upon the amount of such output. Mrs. Aitchison

was a sleeping partner as far as the management was concerned. By the partnership agreement, which was made in 1901, any partner might nominate one trustee to succeed on his or her death to his or her share in the partnership, and the trustee so nominated should have the option of succeeding to the share of the deceased partner, and should become a partner and be entitled to the share of the deceased partner upon the same terms as the deceased partner would have been entitled to it had he or she lived. For many years prior to the death of the testator, his son William North Lewis had been employed by the firm to act as their salesman at a salary of £600 per annum.

By his will made in 1903 W. Henry Lewis devised and bequeathed all his real and personal estate to W. North Lewis and two other sons upon trust for sale and conversion, and to hold the residue of the proceeds upon the trusts mentioned. By cl. 14 in pursuance of the power in the partnership agreement the testator appointed his son W. North Lewis to be the trustee to succeed him in the firm, and declared that such trustee should, save as thereafter appeared, hold the share in the partnership as trustee upon the trusts contained in his will. By cl. 15, after reciting that the son acting as nominated partner would be entitled under the partnership agreements to certain sums as management fees, the testator directed that if such management fees did not reach a certain sum such nominated partner should be entitled to retain such fees, and in addition a certain amount out of the income of the trust estate, but any management fees in excess of that sum were to form part of his residuary estate. The testator died in 1905, and shortly afterwards W. North Lewis was admitted as partner in the firm in the place of his father. He continued to act as salesman of the firm at the same salary as previously, and in 1909 an agreement was entered into between him and the other partners whereby it was agreed that he should continue to act as their salesman at the salary of £600 a year in addition to the remuneration thereafter provided.

The summons raised among other things the question whether W. North Lewis was entitled to retain the salary for his own use over and above the remuneration received by him pursuant to the will, or whether he was bound to account for the salary to the trust estate. The question also was raised whether upon the true construction of the will the testator had not expressly directed that the salary should be accounted for, but that part of the case does not call for any report.

Cave, K.C., and P. M. Walters for the other trustee of the will.

James G. Wood for William North Lewis.

Henry Terrell, K.C., and W. Craig Henderson for beneficiaries under the will.

C. H. Carden Noad for other parties interested.

WARRINGTON, J., stated the facts, referred to the agreement between W. North Lewis and his co-partners for him to act as salesman, and continued: I am satisfied on the evidence that that agreement was not only absolutely bona fide, but also that it was to the advantage of the firm, and therefore the trust estate, that W. North Lewis should continue to act as salesman as theretofore, and that if he ceased so to act it might be disastrous to the firm. Under these circumstances I am asked to find that, although as between himself and his co-partners he is entitled to receive this salary, yet that he must account for it to the trust estate, I am asked to find this on two grounds—first, on the ground that by the general law regulating the relations of a trustee to his trust estate the salary is in the nature of a profit made by him by virtue of his office as trustee, and that therefore it cannot be retained by him; and, secondly, that even if he is not accountable on that ground for that salary, yet that on the true construction of the will the testator has expressly directed that he shall not retain it. For the purpose of the first point, it is not necessary to refer to the testator's will, and I propose to postpone the consideration of the construction of the will until I have disposed of the first point.

The simple facts on which the case is put as to general principles are that the gentleman in question is a trustee and he is also a partner in a firm, but as trustee;

- A and he receives this remuneration for work done for the partnership firm. It is said that that comes within the rule of law preventing a trustee from making a profit out of his trust. Now, what is the real position of Mr. W. North Lewis with regard to that salary? It may well be that if you analyse his position from a strictly legal point of view you would say that he is not a servant of the firm. But he is a person who has made an agreement with his co-partners that before
- B the profits of the firm are divided he shall receive as one of the ordinary working expenses of the firm for work done by him in earning those profits that which, as between themselves, they treat as a salary on exactly the same footing as if it were paid to an outside employee. The position of the trust estate is this. It is entitled—that is to say, the body of persons interested in that which we call the trust estate, are entitled—to a share of the profits of the firm after paying the
- C expenses of carrying on the business of the firm and earning those profits. They are further entitled on the winding-up of the affairs of the partnership to a share of the proceeds of the realisation. In law on the death of the testator such interest as he had in the actual items of property constituting the property of the firm passed to the surviving partners. That, of course, does not make any difference to the beneficial interests which the representatives of the deceased partner had in
- D equity when the affairs of the company came to be wound-up, and the property of the firm divided. Now, does this gentleman by receiving this salary receive it by virtue of his position as trustee of the estate of the testator? I am of opinion that he does not. Does he receive it by virtue of his position as a partner? In my opinion he does not. He receives it not by virtue of anything done by the testator, but by reason of the agreement which he has made with his co-partners that one
- E of the expenses of the firm should consist in the payment of this salary, and in the payment of this salary to him.

There is no authority which is precisely in point. The ordinary principles upon the relation of trustees and cestuis que trust with regard to a trustee not being allowed to make a profit out of this trust or being compelled to account to the trust for any profit he may make are well settled and require no citation of authority.

- F The only case which comes anywhere near the present case is *Re Dover Coalfield Extension, Ltd.* (1), and that case is near it. The facts there were simple. The Dover Coalfield Co. held shares in another company, and it transferred some of those shares to one of its directors, who held the shares as trustee for the company. By virtue of the qualification which those shares conferred upon him he was appointed director of the company whose shares he held; and by virtue of his
- G position as director of that company he received certain directors' fees which, it was contended, he ought to account for to the company for which he was a trustee of the shares. The Court of Appeal said that that was not so, because he did not receive those fees by reason of or by the use of that of which he was trustee, namely, those shares, but as the result of a bargain which he had made for himself with the company, of which he had been appointed director that for certain services
- H he should receive those fees. It seems to me that that case is very near the present case. Here Mr. W. North Lewis receives this salary for services performed for the firm of George Insole & Sons. It is true that his membership of the firm resulted from his appointment by the testator as a trustee, but the salary resulted not from that appointment, but from the fact that his co-partners agreed to employ him and he agreed to act in the capacity in which he earned the salary. I think
- I that the case which I have cited, although not on all fours with the present one, is in point, and supports the view to which I have come, that the salary paid to Mr. W. North Lewis is not profit derived by him from his trust, but is remuneration for work done by him independently of the trust, and done by him for the firm of G. Insole & Son. I see no reason either in law or in good sense why he should be compelled to perform his services as salesman gratuitously; that is to say, why he should be compelled to hand over to the trust estate the salary he has received from the firm, or why he should not continue to act in the future under the arrangement with his co-partners as salesman for the salary. The answer to

the first question of the summons is that he should not be required to account A
for the salary. [His LORDSHIP then dealt with the construction of the will and
held that W. N. Lewis was not required by the terms of the will to account for
the salary.]

Solicitors: *Downing, Handcock, Middleton & Lewis; Morley, Shirreff & Co.*

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.] B

COOK v. TREVENER

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Pickford and Lord Coleridge,
JJ.), October 14, 1910] D

[Reported [1911] 1 K.B. 9; 80 L.J.K.B. 118; 103 L.T. 725;
74 J.P. 469; 27 T.L.R. 8]

*Game—Live tame pheasants—Necessity for licence to deal in such game—Game
Act, 1831 (1 & 2 Will. 4, c. 32), s. 27.*

The word "game" in s. 27 of the Game Act, 1831, includes both live and E
dead birds and also birds reared in captivity. A person, therefore, not licensed
to deal in game who purchases from another person, not licensed to deal in
game, pheasants which are tame birds, commits an offence within s. 27 of the
Game Act, 1831.

Notes. Section 4 of the Game Act, 1831, has been amended by s. 10 of the F
Revenue Act, 1911 (21 HALSBURY'S STATUTES (2nd Edn.) 782) which provides: "So
much of section four of the Game Act, 1831, as makes it an offence for any person
to buy or sell or have in his house, possession or control game birds after the dates
therein specified, shall not apply where the game is live game, and the person buy-
ing, selling, or having in his house, possession, or control the game, is keeping or
intending to keep the game solely for the purpose of breeding or for sale alive, and G
either is licensed at the time to deal in game, or is a holder of a certificate or licence
to kill game in force at the time."

As to protection of game, see 18 HALSBURY'S LAWS (3rd Edn.) 118 et seq.; as
to licences to deal in game, see *ibid.*, pp. 160-164. For cases see 25 DIGEST 348
et seq., and 389-390. For the Game Act, 1831, see 10 HALSBURY'S STATUTES (2nd
Edn.) 682. H

Cases referred to:

- (1) *Harnett v. Miles* (1884), 48 J.P. 455, D.C.; 25 Digest 348, 7.
- (2) *Jenner v. Gorringe* (1879), 43 J.P. 781; 25 Digest 389, 397.
- (3) *Loom v. Bailly* (1860), 3 E. & E. 444; 30 L.J.M.C. 31; 3 L.T. 406; 25 J.P.
55; 6 Jur.N.S. 1299; 9 W.R. 119; 121 E.R. 509; 25 Digest 348, 5. I

Also referred to in argument:

Kenyon v. Hart (1865), 6 B. & S. 249; 5 New Rep. 402; 34 L.J.M.C. 87; 11 L.T.
733; 29 J.P. 260; 11 Jur.N.S. 602; 13 W.R. 406; 122 E.R. 1188; 25 Digest
367, 152.

Case Stated on an information preferred by Charles Trevener, an officer of the
Buckinghamshire County Council (hereinafter called the respondent), under the
Game Licences Act, 1860, which by s. 13 incorporated s. 27 and certain other
sections of the Game Act, 1831, against Alfred Cook, pheasant breeder (hereinafter

A called the appellant), for that he the appellant between Dec. 20 and 25, 1909, not being a person licensed to deal in game, did unlawfully buy certain game—to wit, twenty-five live hen pheasants—from one Thomas Williams, he Thomas Williams not being then and there authorised to sell game for want of a certificate to kill game and for want of a licence to deal in game.

B On the hearing of the information all the requisite appointments and directions
C were either proved or admitted, and the following facts were admitted or proved
D in evidence. The appellant did in fact purchase twenty-five hen pheasants from
E Thomas Williams as charged in the information, and neither the appellant nor
Thomas Williams was licensed to deal in game under the Game Act, 1831, or
otherwise. The appellant paid Thomas Williams the proper market price for the
pheasants—namely, 6s. each. Thomas Williams was an innkeeper and a game
farmer in a small way and he had reared the hen pheasants in question and they
were tame birds, but by reason of the cessation of his tenancy he was obliged to
sell off his stock of nigs, fowls, and pheasants. The appellant was a pheasant
breeder and game farmer carrying on such business on an extensive scale and he
bought the twenty-five live hen pheasants for the purpose of obtaining eggs in
furtherance of his business aforesaid. The business of pheasant breeding and game
farming was an important and extensive industry in the district. The appellants
stocked pheasants and sold the eggs, and whenever the carrying on of his business
rendered it necessary he sold the surplus stock of pheasants, but no house, shop,
or stall was expressly used for the sale of such surplus stock. The pheasants in a
game farm are tame birds and kept mostly for eggs and breeding purposes and
generally have their wings cut or tied, while even if their wings are uncut or not
tied they habitually return to the farm. It is essential for the carrying on of the
business that the breeders should be in possession of pheasants during the close
season as defined by s. 4 of the Game Act, 1831.

F The respondent contended: (a) That on the above facts the appellant was guilty
of the offence charged; (b) that the word “game” in respect of which a licence to
buy or sell or deal in the same was required under the said Acts included pheasants
whether alive or dead and whether tame or wild; (c) that *Harnett v. Miles* (1)
was conclusive against the contentions of the appellant hereinafter set out. The
appellant contended: (a) That s. 27 of the Game Act, 1831, did not apply to the
transaction between the appellant and Thomas Williams; (b) that the section only
G applied to poulterers or game dealers buying or selling dead game or game for
public consumption, and that the word “game” as used in that section means dead
game or game bought for the purpose of selling to the public by a poulterer or
game dealer; (c) that the word “game” in the section did not apply to tame
pheasants or to pheasants which were bought for the purpose of obtaining their
eggs for breeding and stocking purposes from a game breeder who kept them for
the same purposes; (d) that game farms and the industry of pheasant farming
H carried on by the appellant and Thomas Williams having arisen since the passing
of the Game Act, 1831, and being carried on as aforesaid, the same do not come
within the purview of that Act; and (e) that upon a proper construction of the
statutes relied upon by the respondent, and in view of the form of the dealer’s
licence set out in the schedule to the Game Act, 1831, and upon the facts set out
I in this case, the appellant was not guilty of the offence charged against him. The
justices were of opinion that having regard to *Harnett v. Miles* (1) they could not do
otherwise than convict, and that the appellant was guilty of the offence charged in
that he not being a person licensed to deal in game had bought twenty-five hen
pheasants from one Thomas Williams, who was a person not licensed to deal in
game.

By s. 2 of the Game Act, 1831:

“The word ‘game’ shall for all the purposes of this Act be deemed to include
... pheasants...”

Section 4 provides :

"If any person licensed to deal in game by virtue of this Act as hereinafter mentioned shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; or if any person, not being licensed to deal in game by virtue of this Act as hereinafter mentioned, shall buy or sell any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, or shall knowingly have in his house, possession, or control any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so bought or sold, or found in his house, shop, possession, or control, such sum of money, not exceeding one pound, as to the convicting justices shall seem meet, together with the costs of the conviction."

Section 27 provides :

"If any person, not being licensed to deal in game according to this Act, shall buy any game from any person whatsoever, except from a person licensed to deal in game according to this Act, or bona fide from a person affixing to the outside of the front of his house, shop, or stall a board purporting to be the board of a person licensed to deal in game, every such offender shall, on conviction thereof before two justices of the peace, forfeit and pay for every head of game so bought such sum of money, not exceeding five pounds, as to the said justices shall seem meet, together with the costs of the conviction."

Bernard Campion for the appellant.

H. D. Bonsey for the respondent.

LORD ALVERSTONE, C.J.—The appellant, who was not licensed to deal in game, was summoned for unlawfully buying twenty-five live pheasants from a man named Williams, who was not authorised to sell game for want of a certificate to kill game and for want of a licence to deal in game, and neither the appellant nor Williams was licensed to deal in game. The pheasants were bought by the appellant for the purpose of breeding. Now, s. 27 of the Game Act, 1881, provides [His Lordship read the section and continued:] We may take it that the appellant bought these birds for the purpose of rearing pheasants, and Williams was a pheasant breeder, and it has been contended that it was not necessary for Williams to have a licence, and that, therefore, no offence was committed by the appellant. The words of s. 27 are too strong for the argument put forward on behalf of the appellant, and we cannot give effect to either of the points taken on his behalf. Counsel for the appellant contended that the word "game" in s. 27 meant wild game, but, looking at the definition in s. 2, I cannot see any reason for that distinction; and both *Harnett v. Miles* (1) and *Jenner v. Gorringe* (2) are authorities to the contrary. In *Harnett v. Miles* (1) a pheasant breeder, who set pheasant eggs under barndoor hens in coops, cutting one wing of each bird to prevent escape and facilitate identification, sold two cock pheasants on Feb. 5 for £1 to one of the public, and it was held that he was subject to a penalty for dealing in game without a licence, and, if he was subject to the penalty, the person who purchased from him was also subject to a penalty under s. 27. The same point appears to have arisen in *Jenner v. Gorringe* (2) and it seems there the point that there was a distinction between reared pheasants and others was taken and not to have been regarded as of importance. It is true that *Harnett v. Miles* (1) was only argued on one side, but it would be a strong thing to say that the decision

A was wrong, especially after the lapse of time since that case was decided. There is, therefore, clear authority that the distinction between wild and reared pheasants which may become wild is not a good one.

Then counsel for the appellant said that the section did not refer to live but only to dead game, and that a man did not require a licence to sell live game. But that point was expressly decided in *Loom v. Bailey* (3), where WIGHTMAN, J., said

B (3 L.T. at p. 408):

C “I certainly entertain no doubt upon this question. It appears to me only to turn on the meaning to be given to the words ‘birds of game.’ Now, that is to have the same meaning throughout the whole of the section; and whatever doubt there may have been thrown on the question, that exception in the middle of the section, ‘except birds of game kept in a mew or breeding place,’ can be only applicable to live birds; and it shows that the legislature in this section contemplated both live and dead birds.”

That seems to me to be a sufficient authority to show that we ought not to limit the application of s. 27 to persons buying or selling dead game or wild game as distinguished from pheasants reared by hand. That shows that we cannot interfere and quash this conviction.

D

Of course some practical difficulty arises from the consequences of these previous decisions, but we feel bound to hold that a licence is required for dealing in live as well as dead game, at any rate during the season. A difficulty does arise from the words of s. 4, which provides that if any person licensed to deal in game shall knowingly have in his possession any bird of game after the expiration of ten days from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively, he shall be liable to a penalty. That statute was passed when this industry did not exist to the same extent as now, and it may be that new legislation is required to enable licensed persons to keep live pheasants from Feb. 10 to Oct. 1. [See now the Revenue Act, 1911, s. 10.]

E Section 4 also makes it unlawful for an unlicensed person to have possession of game more than forty days after Feb. 1 except in mews or breeding places. Probably it may have been thought that it was not desirable that persons who deal in game should possess live game. I think the justices were right, and the appeal must be dismissed.

F

PICKFORD, J.—I am of the same opinion. Section 27 makes it an offence for

G a person not licensed to buy any game from a person not licensed. Two points have been taken: first, that “game” in that section only referred to dead game; and, secondly, that it only referred to wild game. The section which requires a person who deals in game to have a licence is s. 18. Section 4 deals with persons licensed to deal in game. Section 27 deals with unlicensed persons buying from unlicensed persons. We must read “game” as meaning the same thing in ss. 4,

H 18, and 27. If that be so, there is authority that that includes live as well as dead game, namely, *Loom v. Baily* (3). Then it is said that it must apply only to wild game, but the definition in s. 2 says that “game” includes a pheasant. I do not understand why a tame pheasant is not a pheasant, for it is clear that the bird if let loose would become game. During the whole of its life it still remains a pheasant, and I can see no reason for confining the expression “game” to birds

I which are or have at any time been wild. In regard to that there is also direct authority, namely, the decision in *Harnett v. Miles* (1), and all that can be said against it is that the case was not argued for the respondent. There is no doubt that this decision may have serious consequences to this industry of pheasant farming, but according to the plain words of the Act, which we cannot disregard, this conviction was right.

LORD COLERIDGE, J.—No person may deal in game without a licence, nor may any person not having a licence to deal in game buy of any person not so

licensed. In this case the appellant bought tame pheasants from a person who had not a licence, and the question is whether tame pheasants are included in the word "game" in s. 2 of the Game Act, 1831, which says that the word "game" shall include pheasants. I think it includes pheasants tame or wild, dead or alive, and, if that be so, the appellant has committed the offence charged. It is said that s. 4 creates difficulties if "pheasant" is to include live pheasant. That may be so. It does appear from s. 4 that if you are unlicensed you may have live birds in mews during the close season. On the other hand, if you take out a licence to deal in birds you must not have them in your possession during the close season. But that cannot prevent us from holding that "game" includes a pheasant alive or dead.

Appeal dismissed.

Solicitors: *Albin Hunt & Fourmy*, Chesham; *Letts Brothers*, for *Wilkins & Son*, Aylesbury.

[*Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.*]

GADD v. THOMPSON

[KING'S BENCH DIVISION (Phillimore and Lord Coleridge, JJ.), November 30, 1910]

[*Reported* [1911] 1 K.B. 304; 80 L.J.K.B. 272; 103 L.T. 836; 27 T.L.R. 113; 55 Sol. Jo. 156]

Master and Servant—Apprentice—Infant apprentice—Restrictive covenant—Prohibition of conduct of business within specified area—Right of master to enforce covenant by injunction.

Although an action will not lie against an infant apprentice to enforce a covenant entered into by him in his deed of apprenticeship during the currency of the apprenticeship, a covenant to do or to refrain from doing something after he has ceased to be an apprentice may be enforced if the apprenticeship deed as a whole was reasonable and for his benefit.

The defendant, who was an infant, bound himself apprentice to the plaintiff in a business of an architect and surveyor carried on by him at B. By the terms of the apprenticeship deed the defendant covenanted not to carry on a similar business within ten miles of B. for a period of ten years after the expiration of his apprenticeship. Evidence was given that no architect practising in the town would take a pupil except on the terms of such a covenant. In an action against the defendant to enforce the covenant by injunction,

Held: the covenant was reasonable as the defendant could not have obtained instruction locally except on like terms, and was enforceable against him as it did not come into operation until after the deed of apprenticeship had expired.

Notes. Referred to: *Roberts v. Gray*, [1911-13] All E.R.Rep. 870; *Express Dairy Co. v. Jackson*, [1929] All E.R.Rep. 327.

As to infants' contracts of apprenticeship, see 21 HALSBURY'S LAWS (3rd Edn.) 145 et seq.; and for cases see 34 DIGEST 505 et seq.

Cases referred to:

(1) *Gylbert v. Fletcher* (1629), Cro. Car. 179; 79 E.R. 757; 34 Digest 505, 4193.

(2) *Walter v. Everard*, [1891] 2 Q.B. 369; 60 L.J.Q.B. 738; 65 L.T. 443; 55 J.P. 693; 39 W.R. 676; 7 T.L.R. 469, C.A.; 34 Digest 505, 4183.

- A** (3) *Bromley v. Smith*, post, p. 384; [1909] 2 K.B. 235; 78 L.J.K.B. 745; 100 L.T. 731; 34 Digest 43, 191.

Also referred to in argument :

- Farnham v. Atkins* (1670), 1 Sid. 446; 82 E.R. 1208; 28 Digest (Repl.) 502, 181.
De Francesco v. Barnum (1889), 43 Ch.D. 165; 59 L.J.Ch. 151; 6 T.L.R. 59;
B sub nom. *Francesco v. Barnum*, 62 L.T. 40; 54 J.P. 420; 38 W.R. 187; 34 Digest 506, 4199.
Fellows v. Wood (1888), 59 L.T. 513; 52 J.P. 822; 4 T.L.R. 645, D.C.; 34 Digest 42, 185.
Wray v. West (1866), 15 L.T. 180; 31 J.P. 37; 34 Digest 516, 4324.
Dowden and Pook, Ltd. v. Pook, [1904] 1 K.B. 45; 73 L.J.K.B. 38; 89 L.T. 688; 52 W.R. 97; 20 T.L.R. 39; 48 Sol. Jo. 50, C.A.; 43 Digest 31, 247.
C

Appeal from the decision of His Honour JUDGE INGHAM, sitting at the Broms-grove County Court.

- On May 7, 1902, an indenture of apprenticeship was entered into between the defendant Robert Thompson and his father William Thompson of the one part and the plaintiff George Henry Gadd, of Marlborough Avenue, Bromsgrove, archi-
D tect and surveyor, of the other part by which the defendant bound himself appren-tice to the plaintiff for the term of four years. By the terms of the deed the defendant's father agreed to pay a premium of £25, and there were covenants by the defendant to serve and by the plaintiff to instruct. The deed further contained a joint and several covenant by the defendant and his father in the following terms :

- “And in consideration of the premises the said William Thompson and
E Robert Thompson do hereby jointly and severally covenant with the said George Henry Gadd that he the said Robert Thompson shall not nor will at any time within ten years of the expiration of the above-mentioned term within a radius of ten miles from the Bromsgrove Townhall carry on or practise either by himself or in conjunction with any other person or persons, and either as principal clerk or assistant, the profession of an architect or
F surveyor.”

- At the time when the indenture of apprenticeship was made the defendant was between fourteen and fifteen years of age, and he attained his majority on Dec. 9, 1908. The term of his apprenticeship had expired on May 7, 1906, and in August, 1909, he committed a breach of the covenant contained in the deed of apprentice-
G ship by practising as an architect within the proscribed area. The plaintiff there-upon brought an action for an injunction to restrain the defendant from committing further breaches of his covenant.

- At the trial in the county court evidence was given by the plaintiff and the only other architect and surveyor practising in Bromsgrove to the effect that they would not have been willing to take a pupil except upon the terms of some such restrictive
H covenant as that contained in the deed under which the defendant was bound apprentice. It was contended on behalf of the defendant that he could not be sued upon a covenant contained in a deed of apprenticeship entered into whilst he was an infant. The learned county court judge held (i) that the rule that an infant cannot be sued upon the covenants contained in an apprenticeship deed applied only to acts done in the course of the apprenticeship, and not to a covenant fixing
I the relations of the parties after the apprenticeship had come to an end; and (ii) that the covenant was fair and reasonable, and the apprenticeship deed was for the benefit of the infant. He accordingly granted the injunction asked for. The defendant appealed.

R. A. Willes for the defendant.

V. G. Milward for the plaintiff.

PHILLIMORE, J.—This action is brought against a young man to enforce a covenant which he purported to enter into under an apprenticeship deed. When

he entered into the deed he was about fourteen years of age, and as it was to last for four years he would still be an infant when it expired. The deed contained the usual clauses to be found in an apprenticeship deed, and there was a provision for a small premium. There was also a clause by which the apprentice covenanted, after the expiration of his apprenticeship, not to practise within a certain radius of the town of Bromsgrove for a certain period. He fulfilled the terms of his indenture, served his time, went into some other employment, and then came of age and went into practice. It is admitted that there were breaches of his covenant committed by him, sufficient to support an order for an injunction restraining further breaches if that covenant was valid and enforceable. The county court judge has taken the view that the covenant was valid and enforceable, and he has granted an injunction against the young man. It is quite clear that for reasons which may perhaps be somewhat out of date, but which still exist, no action can be brought against an apprentice whilst he is still an apprentice upon his covenants in the apprenticeship deed. Apparently that would be the case whether he was a minor or of full age. It has been suggested that that rule of law has been done away with because the reasons for it, where there were other remedies open to the master, have disappeared with the disappearance of such other remedies. I am not certain that the existence of these other remedies was the occasion of the rule of law, nor am I clear that the other remedies of the master have gone. Be that as it may, the rule refers only to proceedings during the existence of the apprenticeship to enforce the covenant by action against the apprentice. Such remedies as the master has were the remedies contemplated in the old case of *Gylbert v. Fletcher* (1) or the remedy of refusing further to teach or nourish the apprentice. But a contract of apprenticeship may be entered into in which the inducement to the master is something to be done either late in the apprenticeship or even after it is finished. In *Walter v. Everard* (2) the benefit for which the master was suing was a benefit which was to be given to him three years after the apprenticeship had begun, whilst it was still running, and apparently when the apprentice was under the age of twenty-one. That was a reversionary payment to be made to the master, this mode of payment being arranged because the apprentice at the time the deed was executed was possessed of slender means, but had expectations in the future. That case establishes that the consideration moving from the apprentice to the master may be a future payment which the apprentice binds himself to pay to the master. But if an infant apprentice may bind himself to pay during the apprenticeship, he may equally bind himself to pay afterwards when both apprenticeship and infancy have come to an end. If a young man of seventeen desires to bind himself an apprentice and will not be possessed of funds until he is, say, twenty-five, he may well so bind himself and be apprenticed for four or seven years upon the terms that he is to pay a larger premium than he otherwise would when he comes into his money. If he may bind himself to pay sums of money in the future which are not to be paid until after the apprenticeship is over, and if that covenant can be enforced by action, why may he not bind himself to give a reversionary advantage of another kind to his master? For instance, suppose his master had some very large undertaking on hand, such as the building of the Liverpool Cathedral or the erection of the new County Hall for London, it would be a reasonable stipulation by the master to say that after the apprenticeship was over the apprentice should attend once a week or once a fortnight at his master's office to assist with the drawings, specifications, or other work in connection with those undertakings. I see no reason why such a covenant should not be enforced. It could not be enforced specifically, but it could be enforced by an action for damages for breach of covenant. It is only going a stage further to say that, if the apprentice may covenant to pay money or to do something, he may also covenant negatively not, for instance, to avail himself of his master's secrets learned whilst he was an apprentice. I think there would be no objection to such

A a covenant. The old cases do not deal with such a question. They only say that there is no remedy open to the master upon a contract of apprenticeship whilst the apprenticeship lasts. But none of the cases say that if an apprentice has secured the advantage he is to receive in return for a covenant in futuro in the master's favour, the master should be prohibited from getting his quid pro quo.

B Therefore, I think that in this case such a covenant as exists here can be enforced and that there is no reason for making any distinction in this respect between contracts of apprenticeship and contracts of service, and if a minor, in order to secure good employment, can bind himself not to practise in a particular district after a period of service is over, so can an infant apprentice bind himself not to practise within a particular distance of the place where he has been an apprentice. In the old days, no doubt, in many cases the apprentice carried on his business in C the same town in which he had been an apprentice, but at the present time there is no reason why a man should not learn such a business as that of an architect at a particular place and it yet be worth his while to bind himself not to practise in that particular district.

I agree that covenants of this character must be reasonable if they are to be enforced. What do we find in the present case? The apprentice was taught his business in a comparatively small town, and there are two architects there, and two only. Both of these in giving evidence said that they would not take an apprentice except upon the terms which we find in the present case. That is their price, and I quite agree with what CHANNELL, J., said in *Bromley v. Smith* (3) as to the reasonableness of such a price when the instruction cannot be got on any other terms. For the reasons I have given I am of opinion that the judgment of E the county court judge was right, and that this appeal must be dismissed.

LORD COLERIDGE, J.—The question in this case is whether an apprentice who was an infant at the date of the apprenticeship deed can be bound, after his deed of apprenticeship has expired, by a restrictive covenant in the apprenticeship deed. No doubt an infant apprentice can in general when he attains his majority F avoid the apprenticeship deed. That, however, is not so in every case. Where he has received instruction in consideration of a covenant in the deed by which he has bound himself, he may continue to be so bound by certain covenants—as, for example, a covenant to pay a premium upon attaining his majority as in *Walter v. Everard* (2). A deed of apprenticeship is, no doubt, partly for the benefit of the master and partly for the benefit of the apprentice, but the case may arise G where the infant could not have obtained the benefit of apprenticeship without entering into a covenant not to practise in a particular locality; and suppose in such a case the apprentice has received the benefit of the apprenticeship as consideration for entering into such a covenant, what follows? In such a case the question is whether the restrictive covenant may not be taken to be in the nature of a premium or the price of the apprenticeship, and so to fall under the law H applicable to a covenant to pay a pecuniary premium. I think it may.

A further question is whether the restriction is unreasonable. *Bromley v. Smith* (3) is applicable to the present case, and I desire to adopt the words of CHANNELL, J., where he says:

1 "There is abundant authority that contracts for service may be binding on infants although they contain restrictive terms. A contract which contains the only terms on which an infant can reasonably expect to get employment must, I think, be for his benefit."

The learned county court judge has held the restrictive covenant in this case to be reasonable, and in my opinion he was entitled so to hold. I also agree that the covenant was entered into for the benefit of the apprentice, and that he has received consideration for it. He was therefore bound by it, and the learned judge was right in granting an injunction. The only remaining question is this. Does the special procedure applicable to apprenticeship deeds oust the jurisdiction of

this court whenever remedies may exist under such jurisdiction? I think it would A
do so during the continuance of the apprenticeship, but after the expiration of the
term I think there would be no such ouster of the jurisdiction.

Appeal dismissed.

Solicitors : *J. Horton*, Bromsgrove; *S. Roberts*, Bromsgrove.

[*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.*] B

FAITHFULL v. KESTEVEN

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy,
L.JJ.), July 2, 6, 11, 1910]

[*Reported 103 L.T. 56*] C

*Solicitor—Negligence—Pecuniary damage to client—Need to establish crassa
negligentia.*

It is not sufficient in an action for negligence for a client to prove that a
solicitor acting on his behalf gave him wrong advice on a doubtful point.
Something more than an error of judgment is necessary in order to constitute
actionable negligence, for the solicitor is not liable unless crassa negligentia E
can be established, whereby the client has suffered damage.

Notes. As to a solicitor's liability for negligence, see 36 HALSBURY'S LAWS (3rd
Edn.) 99 et seq.; and for cases see 42 DIGEST 91 et seq.

Case referred to :

- (1) *Hunter v. Caldwell* (1847), 10 Q.B. 69; 2 New Pract. Cas. 160; 16 L.J.Q.B. F
274; 9 L.T.O.S. 73; 11 Jur. 770; 116 E.R. 28; on appeal sub nom. *Cald-
well v. Hunter* (1848), 10 Q.B. 83; 12 Jur. 285; 42 Digest 109, 1039.

Appeal from a decision of the Divisional Court (DARLING and A. T. LAWRENCE,
JJ.).

The facts of the case, taken from the judgment of the Master of the Rolls, are G
as follows : A wife lent money out of her separate estate to her husband, a licensed
victualler, who was being pressed by creditors. His wife desired to protect herself,
and he was very willing to assist, as far as he could, without breaking up their
home. A solicitor had acted for him in April, and was aware that creditors were
pressing, though he was not aware that bankruptcy was imminent. The solicitor
was sent for in May and a writ was issued, and served upon the husband in the H
wife's presence. No appearance was entered, and judgment was signed and execu-
tion issued. All this was done by arrangement. Before that step was taken both
husband and wife asked if it would be necessary that a man should come into the
house, and the solicitor said that as soon as possession was taken by the sheriff a
public sale might be avoided and a private sale to the wife carried through under
an order of the court if the husband would sign assent. This was done, and the I
wife purchased the goods for £328, the amount of the valuation. This sum, less
about £30 for costs and charges, was returned to the wife. The inventory with
receipt was not registered under the Bills of Sale Acts. In August the husband
became bankrupt, and the goods were claimed by the trustee in bankruptcy as
being within the order and disposition of the bankrupt, and this claim could not be
disputed.

The wife's case was based upon two grounds. In the first place, it was con-
tended that the solicitor was negligent in not registering the receipt and inventory

A under the Bills of Sale Acts, which would have protected the goods against execution creditors and also against the trustee in bankruptcy. But there was no seizure by execution creditors, and therefore no loss, and it was ultimately admitted by counsel that there was considerable doubt whether s. 20 of the Bills of Sale Act, 1878, would have availed to protect the goods, and that liability for negligence could not be established on such a doubtful point of law. In the next place, it was
B contended that the advice, which was undoubtedly given, that the goods should be sold by the sheriff by private treaty was bad advice, as it left the goods at the risk of the order and disposition clause of the Bankruptcy Act, 1883; that the costs were thrown away; and that he ought to have advised an absolute registered bill of sale by the husband to the wife. Proceedings were taken in the county court by the solicitor in which the wife counter-claimed against the solicitor to recover
C damages for his alleged negligence in giving wrong advice and in omitting to give good advice to her. The county court judge found on the evidence that there was no actionable negligence on the part of the solicitor. The wife appealed to the Divisional Court (DARLING and A. T. LAWRENCE, JJ.). It was decided by the Divisional Court, affirming the judgment of the county court judge, that the counterclaim of the wife could not be supported. From that decision the wife now
D appealed to the Court of Appeal.

Rawlinson, K.C., and Walter Stewart for the wife.

Sylvain Mayer and Blaiklock for the solicitor.

Cur. adv. vult.

July 11, 1910. The following judgments were read.

E **SIR HERBERT COZENS-HARDY, M.R.**—This is an appeal from an order of the Divisional Court dismissing an appeal from the county court. The question, on a counterclaim, is whether Mr. Faithfull, a solicitor, is liable in damages for negligence in giving wrong advice, and in omitting to give good advice, to his client, Mrs. Kesteven. Now, it is not sufficient to allege and prove that the solicitor
F gave wrong advice on a doubtful point. He is not liable unless *crassa negligentia* can be established, and, of course, it must be shown that the client has suffered damage by reason of the negligence. [His LORDSHIP stated the facts as above set forth, and continued:] But the circumstances were very special. The parties contemplated, and the solicitor advised, a transfer of the licence from the husband to the wife, which would probably have removed all danger. Moreover, the registra-
G tion of an absolute bill of sale from the husband to the wife would have been a highly suspicious transaction, and would almost certainly have created trouble with the brewers. The learned county court judge has held that there was no actionable negligence, and the Divisional Court agreed. I am not prepared to say that advice which two courts have held not to have been bad advice under the peculiar circumstances was so bad as to justify a charge of gross negligence. I
H think the appeal must be dismissed with costs.

I **FARWELL, L.J.**—I am of opinion that we cannot interfere with the decisions of the county court judge and of the Divisional Court. The solicitor was first called on to advise (as appears from his bill of costs) after the sheriff was in possession. The debtor and his wife were living together in amity; he was in a critical state of health, and he has since died. He was in difficulties, but was not thought by the solicitor to be in danger of bankruptcy. The solicitor was told that he was possessed of the equity of redemption in 120 freehold houses worth £25 each. It is true that a registered bill of sale was not mentioned, and I do not think that the necessity for registration ever occurred to the solicitor. But the consequences of registration are serious, and the county court judge has found as a fact that the risk of the goods being in the order and disposition of the husband if he became bankrupt was "a risk that could be properly incurred." It is not a case of a

solicitor advising a client who is a mere creditor how best to get security, but of A
 advising a wife living on good terms with her husband as to the best course to be
 adopted under the circumstances of a difficult position. Counsel for the wife's
 strongest point, in my opinion, is the private sale by the sheriff. The solicitor's
 letter of June 10, 1909, shows that he was under a complete misapprehension as to
 the effect of that sale, and, if I could come to the conclusion that the sale could B
 in no circumstances serve any useful purpose, I should think that the wife was
 entitled to recover the costs of that sale. But it must be remembered that this
 was a claim of wife against husband; that the husband was in a very precarious
 state of health; and that a private arrangement between husband and wife might
 very well have been challenged after his death by the Crown claiming duty or by
 the husband's administrator if he died intestate. On the whole, I have come to C
 the conclusion that there is not enough negligence to amount to that crassa negli-
 gentia necessary to support an action against a solicitor, and that this appeal fails.

KENNEDY, L.J.—In this case the court is asked by a wife to overrule the
 decision of the Divisional Court which affirmed the judgment of the county court
 judge on a question which is partly one of fact and partly one of law—namely, the
 question of negligence on the part of a solicitor, causing, as the wife alleges, D
 pecuniary damage to his client. **LORD DENMAN, C.J.**, in *Hunter v. Caldwell* (1),
 said this (10 Q.B. at pp. 81, 82):

“On the third ground, we think the question of negligence by not complying
 with the practice of the court was a question of fact for the jury, although,
 like many others which turn on matters of law, it was proper to direct the
 jury positively as to the premises from which they were to draw their
 conclusion. Thus it was the province of the judge to inform the jury for what
 species or degree of negligence an attorney was properly answerable, and what
 duty in the case before them was cast upon him either by the statute or the
 practice of the court; but, having done this, it was right to leave to them to
 say, considering all the circumstances, and the evidence of the practitioners,
 whether, in the first place, the attorney had performed his duty, and, in the
 second, in case of non-performance, whether the neglect was of that sort or
 degree which was venial or culpable in the sense of not sustaining or sustaining
 an action.” E F

I do not think that the learned judge misdirected himself as to the law. If there
 was evidence which, if believed by the judge, would sustain the judge's finding in
 favour of Mr. Faithfull, it was not open to the Divisional Court, and it is not open
 to this court, to reverse the finding of the county court. Now, in the present case
 there is no doubt that, in the result, the services of the solicitor have been worse
 than unprofitable to the wife, and I agree with **DARLING, J.**, that, if the learned
 county court judge had drawn from the facts proved before him the conclusion that
 this result was due to actionable negligence on the part of the solicitor, such a
 finding could not properly have been disturbed. On the other hand, the case with
 which the solicitor was called upon to deal was not the simple case of a creditor
 seeking professional advice in order to get payment or the equivalent of payment
 from his debtor. The debtor was the husband of Mr. Faithfull's client, the
 creditor. He was in ill-health, and she was no doubt not desirous that he should
 be treated without consideration of that fact. The only available asset was the
 stock-in-trade of a publican—that is to say, beers, wines, and spirits. The main-
 tenance of the business of the public-house was her interest as well as his, and the
 registration of a bill of sale and even an application to the brewery company for
 its consent to a transfer of the licence, might and probably would have jeopardised
 that interest. And, although the debtor was in a position of some pecuniary diffi-
 culty, bankruptcy does not appear to have been apprehended at the time. The
 consideration of these circumstances must not be omitted, when it is urged by the
 wife that in view of the operation of the order and disposition clause of the Bank- I

A ruptcy Act, 1883, if bankruptcy should ensue, the solicitor was negligent in not advising the registration of a bill of sale or the necessity of a transfer of the licence from the debtor to his wife. Possibly there was an error of judgment on the solicitor's part; but something more than that is necessary in order to constitute actionable negligence. I cannot say that in the particular circumstances of this case the learned county court judge was wrong in holding that the wife had failed
 B to prove to his satisfaction that the solicitor had shown such a want of professional care and skill as must be proved in order to make good a charge of negligence against a solicitor. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: J. W. Browne; Harry Watkins.

C [Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

D

CONSOLIDATED TEA AND LANDS CO. v. OLIVER'S WHARF

E [KING'S BENCH DIVISION (Hamilton, J.), April 6, 1910]

[Reported [1910] 2 K.B. 395; 79 L.J.K.B. 810; 102 L.T. 648;
 26 T.L.R. 388; 54 Sol. Jo. 506; 15 Com. Cas. 212]

Carriage of Goods—Carriage of goods by warehousemen from ship to carriers' warehouse—Liability for damage.

F The defendants, who were warehousemen, arranged with certain of their customers to transport tea from ships coming into port to their (the defendants') warehouses by means of barges supplied by a firm of barge owners under a sub-contract for such transit. This service was only available to customers using the defendants' warehouses.

G **Held:** as the carriage of the goods was ancillary to the defendants' business as warehousemen and was only undertaken as an inducement to customers to use their warehouses, the defendants were not liable as common carriers for damage caused while goods were in transit, although they might be liable for negligence.

Notes. Considered: *Travers & Sons v. Cooper*, [1914–15] All E.R.Rep. 104. Referred to: *Aslan v. Imperial Airways, Ltd.*, [1933] All E.R.Rep. 567; *Adler v. Dickson*, [1954] 3 All E.R. 397.

H As to common carriers, see 4 HALSBURY'S LAWS (8rd Edn.) 130 et seq.; and for cases see 8 DIGEST (Repl.) 8 et seq.

Cases referred to:

- (1) *Liver Alkali Co. v. Johnson* (1874), L.R. 9 Exch. 338; 43 L.J.Ex. 216; 31 L.T. 95; 2 Asp.M.L.C. 332, Ex. Ch.; 8 Digest (Repl.) 10, 38.
- I (2) *Chattock & Co. v. Bellamy & Co.* (1895), 64 L.J.Q.B. 250; 15 R. 340; 8 Digest (Repl.) 9, 34.
- (3) *Maving v. Todd* (1815), 1 Stark. 72; 4 Camp. 225, N.P.; 8 Digest (Repl.) 9, 33.
- (4) *Ingate v. Christie* (1850), 3 Car. & Kir. 61, N.P.; 8 Digest (Repl.) 9, 37.
- (5) *Hill v. Scott*, [1895] 2 Q.B. 713; 65 L.J.Q.B. 87; 73 L.T. 458; 12 T.L.R. 58; 8 Asp.M.L.C. 109; 1 Com. Cas. 200, C.A.; 8 Digest (Repl.) 9, 31.

Action tried by HAMILTON, J., in the Commercial Court without a jury.

The plaintiffs' claim was for the loss of a cargo of tea which occurred during its carriage from an import steamer to the defendants' warehouse. The defence was a total denial of liability. The point for the decision of the court was whether the defendants were common carriers or undertook the liabilities of common carriers with regard to the tea in question. The facts and arguments are sufficiently stated in the judgment.

Scrutton, K.C., and Leck for the plaintiffs.

Hume Williams, K.C., and H. G. Robertson for the defendants.

HAMILTON, J.—The barge *Delta*, having on board two parcels of tea, one the property of the Consolidated Tea and Lands Co., and the other the property of Octavius Steel & Co., was on Jan. 29, 1909, run down in the Thames, and the tea greatly damaged. The tea was on board the *Delta* because it had been collected by the defendants from the import steamer in the Tilbury Docks, and was being taken in the *Delta*, in which they had placed the tea, to one or other of the defendants' warehouses. To save the trouble and expense of coming to trial prepared to deal with the issue that there was a loss by the negligence of someone for whom the defendants were responsible in any event, an order was made that a preliminary issue should be tried as to whether the defendants were common carriers, or undertook the liabilities of common carriers with regard to the tea in question in this action.

The facts do not appear to be in dispute to any material extent. The defendants for a long time past have been in the habit of making an offer to importers of tea the terms of which, so far as they are expressed, appear to be represented by a schedule of charges which they circulate, and in the present case one of the plaintiffs by an express request for the services to which this schedule of charges applies, and the other by an implied request which at once arises from the course of business, had requested the defendants to deal with their tea upon the terms of their management rate, which is a rate per package varying according to the weight of the package, and is 2s. 7d. in the case of the heaviest of these packages. The services which it is admitted were to be rendered for that management rate consisted of presenting the bill of lading to the import ship, collecting the tea, causing it to be transported to one of the defendants' bonded warehouses, and there performing various services in the nature of warehousing and otherwise, until the time for the delivery of the tea to its owners arrived. I was told that out of the charge of 2s. 7d. the sum that would represent the cost of transporting the tea by water would be 2d.; and, although it is not admitted, it is not contended that the charge per package of 200lb. and upwards for transporting it by water would be a large proportion of the 2s. 7d. It is common ground that the defendants carry on this course of business incidentally to their business as warehousemen. It is no doubt convenient to their customers, and may sometimes imply a good deal of trouble and sometimes comparatively little, that the customers' tea should be collected for them from the ship; but it is only for those customers who desire to have their tea warehoused in the defendants' warehouse that the defendants under their management rate procure the tea to be carried at all. They have an alternative rate under which they offer warehousing at similar charges, leaving the customer to cause his tea to be transported to the warehouse for himself. The commodity in respect of which this kind of service is rendered by the defendants is principally tea, though I was told that there are also two others—coffee and rubber—as to which, to some extent, I do not know what, they have a somewhat similar practice. They do not carry from one destination to another without consideration of what those destinations are; they do not carry except to their own warehouse, and, as I understand, only from the import ship; they do not own any barges; they do not offer any barges generally for hire; but, as a matter of fact, by means of a sub-contract with lightermen they arrange for the performing of that service, under the management rate, which is involved in transporting the tea from the steamer to the warehouse. These facts have been stated and accepted

A without proof, and they sufficiently illustrate the nature of the defendants' business.

The liability of the defendants in respect of the transport of tea by water rests upon the rule which was established after much discussion in *Liver Alkali Co. v. Johnson* (1), and the gist of that decision is that if the defendants were exercising the public employment of carrying goods by water, which was a question of fact, then there would be attached to that employment and to their business the obligation to be with regard to the goods under the same liability as the law imposes for the safety of goods upon common carriers. It is quite clear from the expression of BLACKBURN, J. (L.R. 9 Exch. at p. 340) that the existence of this obligation upon those who exercised public employment appeared to him to be much more a matter of inveterate practice than of intrinsic justice; and I think it is clear also that CHARLES, J., in *Chattock & Co. v. Bellamy & Co.* (2) was equally reluctant to say this obligation got beyond the limits of that settled practice. The question whether the defendants exercised the public employment of carrying goods by water is one which I think on the facts must be answered in the negative. They owned no flats or barges, and, although I do not think it is essential to this liability that there should be ownership, yet it appears to me that the fact that the defendants provide themselves either by sub-contract or hire with the requisite vehicles for carrying goods is a large part of the foundation of the business to which this exceptional liability attaches. In *Liver Alkali Co. v. Johnson* (1) the defendants, who were found to exercise this public employment, not only owned the flats, but sent them out under the care of their own servants, plying about to or from places in the Mersey, apparently indifferently both as to the points of departure and as to the points of arrival; and, although they always carried goods for one person at a time, and made express agreement with that person for the voyage, it is clear that everyone who had goods to be carried was a possible customer for the defendant; and, although the defendant, not being a common carrier, was not compellable by law to take his goods because he was the first comer, the defendant was in the ordinary course of business holding himself out as likely to do business with all and sundry, and, no doubt, was extremely glad to get any kind of remunerative carriage from anybody who was prepared to pay. So far, the facts are widely different from the present case. It appears to be manifest upon the present facts that the carriage by water is purely ancillary to the warehousing business, and is a relatively small part of it; that it is undertaken by the defendants principally as an inducement to persons who have tea delivered to them at considerable distances to allow it to go into their bonded warehouses instead of going into some nearer warehouse; and, so far from the defendants exercising the public employment of carrying goods by water, they appear to me to carry on the business of warehousemen, and confine themselves to a limited clientèle with respect to a limited class of goods, and to rendering a subsidiary service, not for the purpose of making that service a branch of their business, but for the purpose of procuring customers for the business that they substantially carry on. No case has been cited to me which approaches to the present in which liability has been imposed upon the defendants. One case somewhat similar—*Chattock & Co. v. Bellamy & Co.* (2)—has been referred to in which the decision was in favour of the wharfinger, who was there held, under circumstances not dissimilar to the present, not to carry on as a public employment or to undertake to carry the goods of everybody who asked him, or to hold himself out as being ready to do so. Reference has also been made to *Maving v. Todd* (3), in which it is admitted that LORD ELLENBOROUGH purports to have said something which is bad law unless you postulate the existence of facts which the reporter has carefully omitted to record. I believe the classical thing to say of such a report is that the report is unsatisfactory; and the fact that LORD CAMPBELL does not report the dictum, presumably because he does not accept it, and does not report the facts to support it, presumably because they did not exist, lead one to think that LORD CAMPBELL's report is the better and STARKEY's the worse of the two. At any rate, I cannot found a decision upon that case. With regard to the

other cases cited in *Ingate v. Christie* (4) and *Hill v. Scott* (5), they only appear to me to emphasise the rule laid down in *Liver Alkali Co. v. Johnson* (1) directing special attention to the distinction between being willing to serve everyone who asks, and being willing to serve only particular or favoured persons, and the distinction between carrying on a public employment for the purpose of carrying, and that of merely occasionally, by no means necessarily, and I dare say not as a thing that they much desire to do, rendering to the customer of the warehouse the subsidiary convenience of collecting and carrying goods from the import steamer. The decision, therefore, upon the preliminary question must be that they did not come under the liability of common carriers in respect of the cargo of tea in question.

[The learned judge's statement of the facts was subsequently corrected by it being pointed out and agreed that the rates charged were (i) for landing and housing and (ii) the management rate; and that management included landing and housing, and some things more, but that the first rate included landing. This correction made no difference to the decision.]

Solicitors: *Ballantyne, McNair & Clifford; Ashurst, Morris, Crisp & Co.*

[Reported by L. C. THOMAS, Esq., Barrister-at-Law.]

REID v. BICKERSTAFF

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), May 13, 14, 18, 19, 27, 1909]

[Reported [1909] 2 Ch. 305; 78 L.J.Ch. 753; 100 L.T. 952]

Sale of Land—Building scheme—Need of community of interest and reciprocity of obligation between purchasers over defined area—Purchaser to know extent of burden and benefit—Restrictive covenant—Land sold subject to covenants—Further land subsequently sold to other purchasers subject to similar covenants—No knowledge of previous covenants—Enforcement of covenants by successors in title to purchasers.

In order to establish a building scheme it is essential for there to be community of interest and reciprocity of obligation between the purchasers extending over a defined area. The nature and particulars of the scheme must be sufficiently disclosed for a purchaser to know both the extent of his burden and the extent of his benefit.

If on a sale of part of an estate the purchaser covenants with the vendor, his heirs and assigns, not to deal with the purchased property in a particular way, a subsequent purchaser of another part of the estate does not take the benefit of the covenant unless he is an express assignee of the covenant, as distinct from assignee of the land, or the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed either by the deed containing the covenant or by some subsequent instrument executed by the covenantee, does not pass as an incident of the land on a subsequent conveyance.

By a deed executed in 1840 the defendant's predecessor in title bought a plot of land which was part of a larger estate, and covenanted with the vendors for himself, his heirs and assigns, to observe certain restrictive covenants relating to the user of the land. The vendors subsequently sold other parts of the

A estate to the plaintiffs' predecessors in title who entered into similar covenants restricting the user of their land. They were, however, ignorant of the covenants of 1840 and their purchase deeds neither mentioned nor assigned those covenants. In an action to enforce one of the covenants of 1840,

B **Held:** (i) the plaintiffs had failed to establish the defined area and the reciprocal obligations between purchasers essential to a building scheme; (ii) as they were unaware of the existence of the covenants of 1840 the plaintiffs were not assignees of the benefit of them and there was nothing in the deed or in any other document to annex the covenants to the particular land bought by them.

C Per COZENS-HARDY, M.R.: A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers.

Notes. Considered: *Milbourn v. Lyons*, [1914] 2 Ch. 231; *Kelly v. Barrett*, [1924] All E.R.Rep. 503. Followed: *Re Sunnyfield*, [1931] All E.R.Rep. 837. Considered: *Newman v. Real Estate Debenture Corpn., Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131. Referred to: *Mayner v. Payne*, [1914] 2 Ch. 555; *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225; *Lawrence v. South County Freeholds, Ltd.*, [1939] 2 All E.R. 503; *Newton Abbot Co-operative Society, Ltd. v. Williamson and Treadgold, Ltd.*, [1952] 1 All E.R. 279.

As to building schemes, see 14 HALSBURY'S LAWS (3rd Edn.) 565 et seq.; and for cases see 40 DIGEST (Repl.) 333 et seq.

Cases referred to:

- E (1) *Keates v. Lyon* (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.J.J.; 40 Digest (Repl.) 343, 2780.
 (2) *Spicer v. Martin* (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 37 W.R. 689, H.L.; 40 Digest (Repl.) 336, 2744.
 (3) *Osborne v. Bradley*, [1903] 2 Ch. 446; 73 L.J.Ch. 49; 89 L.T. 11; 40 Digest (Repl.) 362, 2897.
 F (4) *Elliston v. Reacher*, post, p. 612; [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701, C.A.; 40 Digest (Repl.) 337, 2749.
 (5) *Renals v. Cowlishaw* (1878), 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 503; affirmed (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9, C.A.; 40 Digest (Repl.) 346, 2796.
 G (6) *Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest (Repl.) 340, 2769.
 (7) *Master v. Hansard* (1876), 4 Ch.D. 718; 46 L.J.Ch. 505; 36 L.T. 535; 41 J.P. 373; 25 W.R. 570, C.A.; 19 Digest (Repl.) 47, 254.
 (8) *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 343, 2781.

H **Appeal** by the defendant from a decision of JOYCE, J., holding on the evidence that certain restrictive covenants entered into by various purchasers of parts of an estate were imposed in pursuance of a scheme for the regulation of building on the estate, and that it must have been intended and understood that these covenants should enure for the mutual benefit of all.

I P. O. Lawrence, K.C., Younger, K.C., J. Rutherford, and B. B. Benas for the defendant.

Hughes, K.C., Buckmaster, K.C., and Somers Browne for the plaintiffs.

Cur. adv. vult.

May 27, 1909. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—This is an appeal from the judgment of JOYCE, J., who has held that the plaintiffs are entitled to enforce against the

defendant restrictive covenants contained in a deed of Nov. 20, 1840. The defendant claims through the purchaser of 1840. The plaintiffs are owners of land and houses purchased from the same vendors in 1843 and 1846, and the lands so purchased are adjacent to, or not far distant from, the defendant's land. The case of the plaintiffs rests upon two alternative propositions, either of which, if established, will entitle them to the relief they claim. They say (i) there was a building scheme affecting the estate of the common vendors, and each purchaser came under an implied covenant or obligation to every other purchaser to conform to and obey the provisions of the scheme, which included the restrictive covenant in question; (ii) that, apart from any building scheme, the plaintiffs, or some of them, are entitled to the benefit of the restrictive covenants which were entered into with the common vendors, their heirs and assigns, they being assigns of the land for whose benefit the covenants were entered into. Different considerations apply to these two propositions, and it will be convenient to deal with them separately.

As to the first, what are some of the essentials of a building scheme? In my opinion, there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not to be identical. For example, there may be houses of a certain value in one part, and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area. *Keates v. Lyon* (1), *Spicer v. Martin* (2), *Osborne v. Bradley* (3), and *Elliston v. Reacher* (4) seem to me to bear out what I have said.

As to the second point. If on a sale of part of an estate the purchaser covenants with the vendor, his heirs and assigns, not to deal with the purchased property in a particular way, a subsequent purchaser of part of the estate does not take the benefit of the covenant unless (a) he is an express assignee of the covenant, as distinct from assignee of the land or (b) the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser. In the case of (a) of course the subsequent purchaser can sue. In the case of (b) the benefit of the covenant passes to the purchaser, whether he knew of its existence or not. It is in the nature of an easement attached to his property as the dominant tenement. But unless either (a) or (b) can be established, it remains for the vendor to enforce or abstain from enforcing the restrictive covenant. For example, I sell a piece of land with a covenant that no public-house shall be erected thereon. I sell the adjoining lot to a purchaser who is ignorant of the existence of the covenant. I am at full liberty to release the covenant, or to assign the benefit of it to any particular purchaser, or to deal with the rest of my land as I think fit. It is irrelevant to urge that the performance of the covenant would be greatly for the benefit of the adjoining land. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed either by the deed containing the covenant or by some subsequent instrument executed by the covenantor, does not pass as an incident of land on a subsequent conveyance. *Renals v. Cowlishaw* (5) and *Rogers v. Hosegood* (6) seem to me to bear out what I have said.

It remains to apply the principles deduced from the above authorities to the present case. I do not propose to state the facts in detail. Suffice it to say that the plaintiffs have wholly failed to define the area of the scheme. In the statement of claim they alleged three separate schemes of different parts of the estate of sixty-four acres. This has been abandoned, and they now contend for one scheme affecting the whole estate of sixty-four acres. There is no evidence of any such scheme, and there is ample evidence against any such scheme. No plan either

- A before 1840, which is the critical date, or since 1840, has been produced. No conveyance has been produced in which reference is made to covenants entered into by other purchasers, with the exception of a terrace of four houses known as Fairfield Terrace, as to which four houses there was undoubtedly a scheme. The maxim *expressio unius* applies with great force here. There is no uniformity in the covenants in conveyances of different lots. There is, no doubt, a certain family likeness in this respect, that most of the conveyances contain covenants as to the building of private houses of varying values, from cottages to large dwelling houses. There is nothing to show that the purchaser of 1840 was aware that any of the earlier purchasers had entered into restrictive covenants of any kind, or that the purchasers of 1843 and 1846 were aware of the covenants entered into in or prior to 1840, or that the vendors were under any obligation as to the mode in which they would deal with the rest of the estate. I think, therefore, that the plaintiffs have failed in so far as they seek to establish a building scheme involving reciprocal obligations between all the purchasers.

- As to the second proposition the plaintiffs have a more plausible case, but I think they fail in establishing it. It is plain that they are not assignees of the covenant, of the existence of which they were not aware. It is equally plain that there is nothing in the deed of 1840, or in any document prior or subsequent thereto, to indicate that the covenant was entered into for the benefit of the particular parcels of which the plaintiffs are now owners. I cannot hold that the mere fact that the plaintiffs' land is adjacent and would be more valuable if the covenant were annexed to the land suffices to justify the court in holding that it was so annexed as to pass without mention by a simple conveyance of the adjacent land. The learned judge seems to have thought he could infer a building scheme from the fact that the vendors, who were trustees, at various times from 1833 onwards sold portions of the estate until the whole was disposed of in 1847. But with great respect, that does not suffice. Nor do I feel able to infer that the benefit of the covenant passed to the predecessors of the plaintiffs as assignees. In my opinion this appeal must be allowed, and the action dismissed.

- F **BUCKLEY, L.J.**—By a deed, dated Nov. 20, 1840, one Rollo, the defendant's predecessor in title, for himself, his heirs, executors, administrators and assigns covenanted with his vendors, the Falkner trustees, in the terms of certain restrictive covenants relating to the user of the land which he purchased. Subsequently in 1843, 1847, and 1848 the plaintiffs' predecessors in title became purchasers from the same vendors of certain other pieces of land lying within a short distance of the plot which in 1840 had been conveyed to Rollo. The plaintiffs' predecessors in title likewise entered into certain restrictive covenants affecting the parcels conveyed to them. There is no question but that the defendant as successor in title to Rollo is bound by the restrictive covenants contained in the deed of 1840. The question in this action is whether the plaintiffs are persons entitled to enforce those covenants. When the plaintiffs' predecessors in title purchased they were not aware of the existence of the covenant of 1840. Their purchase deeds neither by way of recital nor in any other way referred to Rollo's purchase, and the plaintiffs' predecessors in title were, of course, under these circumstances not expressed to be the assigns of Rollo's covenant. They do not seek to make any case based upon their being entitled to the benefit of the covenant as assigns of the covenant. They rest their case upon either one of two grounds. First, the doctrine of *Spicer v. Martin* (2) that there was a building scheme; or, secondly, in the alternative, upon a contention based upon *Rogers v. Hosegood* (6) that Rollo's covenant had become annexed to the other land of the common vendors which the vendors retained when the conveyance of 1840 was made, and that the plaintiffs' predecessors in title became entitled to the benefit of Rollo's covenant as a thing annexed to the land, a thing which passed to them with the land as annexed to the land, and none the less because they did not know of its existence. I shall deal with these two contentions separately.

First, as to the existence of a building scheme and the application of the doctrine of *Spicer v. Martin* (2). For the application of the principle of that case it is, I think, essential to establish as a matter of fact the following state of things. That the vendor expressly or by implication contracted with the defendant in the action or his predecessor in title (whom I will call the purchaser) upon the footing that at the date of that contract the vendor told the purchaser that he was proposing to deal with a defined estate in a defined way, and that he offered to sell to the purchaser a plot forming a part of that defined estate on the terms that the purchaser should enter into such restrictive covenants relating to his plot as the scheme contemplated, upon the footing that the purchaser should reciprocally have the benefit of such restrictive covenants relating to the other plots on the estate as were indicated by the scheme. There can be no building scheme unless two conditions are satisfied—namely, first, that defined lands constituting the estate to which the scheme relates shall be identified; and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate with the reciprocal advantage that he shall, as against such other purchasers, be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them. Compliance with the first condition identifies the class of persons as between whom reciprocity of obligation is to exist. Compliance with the second discloses the nature of the obligations which are to be mutually enforceable. There must be as between the several purchasers community of interest and reciprocity of obligation. On the facts of this case there was in my opinion no such building scheme. I find it impossible to say either, first, what were the lands to which the building scheme extended; or, secondly, what was the point of time at which a building scheme relating to those lands was adopted; or thirdly, what were the respective restrictions to be imposed upon the several plots of land lying within that estate. On Nov. 20, 1840, was there any, and if so, what building scheme; what benefit was Rollo reciprocally to enjoy and as against what other parties for the restriction which according to the respondent was imposed upon him for the benefit of other purchasers from the common vendor? I find it impossible to answer those questions. Before 1840 there had been many sales. In one particular case, Fairfield Terrace, there was a building scheme extending over defined plots and expressed in defined terms. As regards the rest of the estate I find nothing of the kind. There were a number of detached sales at intervals with restrictive covenants of which nothing more can be said than that they have some features in common. There was an attempt or proposed sale by auction in 1835. Nothing is known as to the conditions then imposed, or whether among them there were contained any restrictive conditions. No sale was made at the auction. Subsequently sales were made of the nature above described. In that state of facts came the deed of 1840. On the face of that deed there is not a trace of any building scheme. Its language is in effect inconsistent with a then existing building scheme or with any intention that the restrictive covenants in that deed should enure for the benefit of any or which other plots on any and what other lands of the vendors. The mere fact that the vendors of that deed had other adjoining lands is quite insufficient to establish that the covenant which they took was a covenant imposed for the benefit of purchasers of adjoining lands. For this proposition it is sufficient I think to refer amongst the numerous cases to *Master v. Hansard* (7) and *Renals v. Cowlishaw* (5). In this case JOYCE, J., who saw the witnesses says that it is not proved that the sales were in pursuance of a building scheme, but only that he has no doubt whatever that it was so, and that he feels no serious difficulty in inferring that there is enough to satisfy him that a general scheme existed. On the question of fact I cannot doubt that the evidence of the documents and dealing in this case falls very far short of establishing and indeed in my opinion does not tend in any way to establish the existence of a building scheme within *Spicer v. Martin* (2).

- A** But, secondly, was Rollo's covenant so annexed to the adjoining or other lands of the vendors as that on their subsequent sale to the plaintiff's predecessors in title the covenant passed with the land as something annexed to the land? In *Rogers v. Hosegood* (6), the deed containing the covenant sought to be enforced, expressed upon its face that the covenant was entered into with the intent that it might bind the premises conveyed into whomsoever's hands the same might come, and might enure to the benefit of others claiming under the vendors all or any of their lands adjoining or near to the premises. In other words, the deed expressed that the covenant was taken not for the benefit of the vendor, but for the benefit of the other lands of the vendor. On this point the language of HALL, V.C., in *Renals v. Cowlishaw* (5) seems to me perfectly plain. The plaintiffs in this case cannot as assigns of the common vendor claim the benefit of Rollo's restrictive covenant unless it appears that the plaintiffs' predecessor in title acquired his property with the benefit of Rollo's covenant. HALL, V.C., says (9 Ch.D. at p. 180) that for that purpose
- B**
- C**

"it must appear that the benefit of the covenant was part of the subject-matter of the purchase"

- D** made by the plaintiffs' predecessor in title. JAMES, L.J., said in *Renals v. Cowlishaw* (5) (11 Ch.D. at p. 867):

"is there any case to show that if the owner of 100 acres sells an acre, taking a restrictive covenant, and sells the remainder in lots of an acre each, every one of the ninety-nine purchasers can enforce the covenant against the purchaser of the first acre?"

- E** This was an interlocutory observation. In giving judgment his language is as follows (*ibid.* at p. 868):

"To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into."

- F** Where a vendor takes from a purchaser a restrictive covenant it may be that he takes it for purposes of his own, or it may be that he takes it for the benefit of the land which he is retaining after the sale on which the restrictive covenant is entered into. If the vendor is subsequently selling all the retained land it may be that this is an element which may lead to the inference that he intended to pass with that land the benefit of the restrictive covenant. But this even does not follow, for it was pointed out by SELWYN, L.J., in *Keates v. Lyon* (1) it may be that he intended the restrictive covenant to enure for his own benefit so as to protect other land to which he was not at the time, but expected afterwards by inheritance or purchase to become, entitled, and for whose protection the restrictive covenant would be valuable. It is not necessary, however, in the present case to deal with the question as it arises where the vendor sells the whole of the retained land. The plaintiffs were but intermediate purchasers of certain plots in the course of sales which the Falkner trustees were from time to time making of portions of the land retained when Rollo bought. There was nothing to annex Rollo's covenant to the land such as there was in *Rogers v. Hosegood* (6). The
- G**
- H**
- I** plaintiffs' predecessors in title did not know of the existence of the covenant. Under these circumstances *Renals v. Cowlishaw* (5) is, I think, a plain authority that the plaintiffs here cannot succeed unless they show that the benefit of Rollo's covenant was part of the subject-matter of the purchase made by their predecessors in title. There is, of course, nothing to show anything of the kind. For these reasons I think that the plaintiffs cannot sustain either of these two contentions to which I have referred, and that they are not entitled to sue in respect of Rollo's covenant. It follows that this action in my opinion fails, and that the appeal ought to be allowed.

KENNEDY, L.J.—It is not, I think, improbable that if we knew all the facts in regard to this case as they happened, the judgment under appeal would be justified. The lapse of sixty and more years since the predecessors of the plaintiffs and the defendant respectively bought from the trustees of the Falkner estate has no doubt done its natural work in blurring or in part effacing the history of the material epoch. From the evidence as it stands, I do not feel myself entitled to draw the inference which JOYCE, J., was obliged to draw in order to justify his conclusion in favour of the plaintiffs. In differing from it I do so with some regret. The result of the defendant's success in this action opens the door to serious inroads upon the comfort and the material interests of a large number of persons who either as owners of house property or as tenants benefit by the amenity of the Falkner estate which, as a whole, with the principal exception of the outlying strip along the Prescott Road, has been developed as a residential area with dwelling-houses for the most part built thereon in accordance with restrictions, though by no means uniform restrictions, which were imposed upon the original buyers by the Falkner trustees. But we are bound to deal with the case upon the evidence as it stands and to shun conjecture, however plausible and attractive, by keeping carefully within the bounds of legal inference; and, after scrutinising that evidence with the valuable help of the argument of counsel on both sides, I find myself forced to the conclusion that the plaintiffs' proof falls short of that which is requisite in order to establish the existence of reciprocal obligations, such as come into being in the case of the sale of land in lots under a building scheme, according to the law, as stated by LORD ESHER, M.R., in the *Nottingham Patent Brick and Tile Co. v. Butler* (8), and in the judgments in the earlier case of *Keates v. Lyon* (1) and *Renals v. Cowlishaw* (5) and the recent case of *Elliston v. Reacher* (4); and also in regard to the plaintiffs' alternative case, it falls short of establishing such an annexation of the benefit of the restrictive covenant imposed by the vendor upon the defendant's predecessor in title to the lands of the vendor afterwards sold by him to the plaintiffs' predecessors in title, as must be established by the plaintiffs in order to succeed upon the principle of the decision of the Court of Appeal in *Rogers v. Hosegood* (6). In other words, the plaintiffs have failed to satisfy me either that (i) there was a known general building scheme relating to a definite area, and including the lands now held by the plaintiffs and the defendant, and in part execution of which the original sales of the Falkner trustees to the plaintiffs' and the defendant's respective predecessors in title took place, and it is upon this basis that I understand the judgment of JOYCE, J., to proceed; or (ii) that we can properly find in the evidence proof of a sufficient legal link such as in the absence of a building scheme must be established by the plaintiffs if they are to succeed in this action to connect the restrictive obligation imposed by the Falkner trustees upon the defendant's property when they sold it to the defendant's predecessor with the rights—whatever they are—which the plaintiffs' predecessors acquired by virtue of the conveyance to them when they subsequently became purchasers of other adjoining lands of the same vendors, but not assignees of the restrictive covenant by which the plaintiffs' predecessor in title bound himself to the common vendors. I agree that this appeal must be allowed.

Solicitors: *Woodburn & Holme*, Liverpool; *J. F. Read & Brown*, Liverpool.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

A

CHING v. SURREY COUNTY COUNCIL

[COURT OF APPEAL (The Earl of Halsbury, Fletcher Moulton and Farwell, L.JJ.),
March 11, 1910]

[Reported [1910] 1 K.B. 736; 79 L.J.K.B. 481; 102 L.T. 414;
74 J.P. 187; 26 T.L.R. 355; 54 Sol. Jo. 360; 8 L.G.R. 369]

B

*Negligence—School—Non-repair of playground—Injury to pupil—Liability of
education authority.*

By s. 7 (1) of the Education Act, 1902 [repealed], the local education authority was under a duty to "maintain and keep efficient all public elementary schools within their area". . .

C

The plaintiff was a pupil at a public elementary school provided by the defendants as the local education authority. While lawfully in the playground of the school the plaintiff caught his foot in a hole in the asphalt paving and fell, breaking his arm. The head teacher at the school and the school caretaker knew of the existence of the hole, but did not think it was dangerous. In an action for damages for personal injuries brought by the plaintiff, suing by his father as next friend, against the defendants as the local education authority, the jury found that the injury was caused by the negligence of the defendants.

D

Held: the defendants were under a statutory duty to keep and maintain in proper condition the playground which formed part of the school; they were in breach of that duty in failing to exercise proper care and control; and, therefore, they were liable to the plaintiff in damages.

E

Notes. The Education Act, 1902, has been repealed. The current law on education is now contained in the Education Acts, 1944–1959. Before 1944 local education authorities were under a statutory duty in certain circumstances to "maintain and keep efficient" the public elementary schools in their area. There was no corresponding statutory duty in the Education Act, 1944. The occupiers of school premises are subject to the same liability in respect of the condition of those premises as are occupiers of other premises. They are therefore subject to the provisions of the Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 832) and will owe the "common duty of care" to all their visitors to see that the visitors will be reasonably safe in using the premises.

F

Followed: *Morris v. Carnarvon County Council*, [1910] 1 K.B. 840. Referred to: *Smith v. Martin and Kingston-upon-Hull Corpn.*, [1911–18] All E.R.Rep. 412; *Woodward v. Hastings Corpn.*, [1944] 2 All E.R. 565.

G

As to a local education authority's liability for accidents, see 18 HALSBURY'S LAWS (3rd Edn.) 621 et seq.; and for cases see 19 DIGEST (Repl.) 612 et seq.

H

Case referred to in argument:

Tozeland v. West Ham Union, [1907] 1 K.B. 920; 76 L.J.K.B. 514; 96 L.T. 519; 71 J.P. 194; 23 T.L.R. 325; 5 L.G.R. 507, C.A.; 34 Digest 220, 1823.

Appeal by the defendants from a decision of BUCKNILL, J., reported [1909] 2 K.B. 762, on further consideration after the trial of the action with a jury.

I

The plaintiff, a lad about nine years old, suing by his father as next friend, claimed damages against the defendants, the Surrey County Council, for personal injuries sustained by him through the alleged negligence of the defendants, who were the local education authority for the county.

The boy was, at the time when he was injured, a scholar in the provided elementary school at Maybury, in the district of Woking. On July 9, 1908, he was in the school playground at the eleven o'clock interval for play, and, whilst he was being chased by another schoolboy, he fell, through his foot being caught in a hole in the asphalt floor of the playground, and a bone of his left arm was broken. The alleged negligence was the unsafe condition of the playground floor,

which it was contended the defendants were bound to keep in repair. It was alleged in the statement of claim that the defendants were liable to maintain and keep efficient the school and premises, and to preserve the same in a condition safe for the use of the pupils attending the school. The defendants by their defence, whilst denying that the floor of the playground was out of repair, pleaded that if it was, and if they were liable to maintain and keep efficient the school, such liability was part of the administrative duties imposed on them by the Education Acts, 1870 to 1907, [repealed] and that they appointed proper managers and officers to carry out the said administrative duties and were not liable in damages for injuries occasioned to any pupil attending a school provided by them in pursuance of such statutory duty by the negligence, if any (which was denied), of such managers or officers.

At the trial, which took place with a common jury at the assizes held at Guildford on Mar. 5, 1909, it was agreed that the only question to be decided by the jury should be one of fact, leaving it to the learned judge to decide on further consideration, in the event of the jury deciding against the defendants, if on such finding the plaintiff was entitled to judgment. It was argued that there was no evidence of negligence causing the accident, and that, if there was, no action would lie against the defendants in respect of such negligence. Evidence was given at the trial that the floor of the playing shed where the plaintiff fell was paved with tar paving, and that on the day of the accident there were two or three holes in it, one of which was near a vaulting horse which was used for gymnastics, and in which the plaintiff's foot caught and threw him down whilst he and another scholar were being chased by two older boys from the vaulting horse on which they had been playing. The hole was known to the plaintiff to have been there for some six months, but on this occasion he had not noticed it when trying to escape from his pursuers. No contributory negligence was charged against the plaintiff. There was evidence that this hole was 3 in. to 4 in. deep and as large as a boy's cap in circumference. The caretaker of the school-house, who was one of the defendants' witnesses, admitted that there were two holes in the floor of the playing shed which had been there some three or four weeks before the accident, and which he had been in the habit of filling up daily with fine gravel to level them with the floor. Those holes he did not report to the managers or the head teacher because he did not consider them dangerous. The head teacher at the school, one of the defendants' witnesses, said he had known of these holes four or five weeks before the accident, and that they were getting worse. He had told the plaintiff's mother after the accident that they would be repaired in the August holidays. He made no report about the holes because he did not think they were dangerous so long as the caretaker filled them in as he described. On the day of the accident, but after it happened, the clerk of the works to the Surrey Education Committee inspected the playing shed and saw two holes in the floor. He reported the matter on his return to Kingston, and repairs were done to the floor during the summer holidays. In cross-examination he admitted that it was his duty to inspect provided school premises from time to time and to report direct to the defendants what was requisite to be done by way of repairs, and that all repairs to the asphalt floors of playgrounds of such schools were invariably carried out by the education committee of the defendants and not by the school managers, and were paid for by the defendants.

The jury at the trial gave a verdict for the plaintiff for £83 19s. 6d. damages. On further consideration BUCKNILL, J., held that the defendants were liable, as the obligation was imposed on them to keep the playgrounds of provided schools in proper order for the use of scholars who had to attend them and had to use them at certain times, whether for duty or recreation. The defendants appealed.

By s. 5 of the Education Act, 1902:

"The local education authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the

A Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them; and school boards and school attendance committees shall be abolished."

By s. 6 (1):

B "All public elementary schools provided by the local education authority shall, where the local education authority are the council of a county, have a body of managers consisting of a number of managers not exceeding four appointed by that council, together with a number not exceeding two appointed by the minor local authority."

And by s. 7 (i):

C "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers, but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with: (d) the managers of the school shall provide the school-house free of any charge . . . to the local education authority for use as a public elementary school, and shall out of funds provided by them keep the school-house in good repair."

Avory, K.C., and *Guy Lushington* for the defendants.

P. St. Gerrans and *Nolan* for the plaintiff.

E **THE EARL OF HALSBURY**—In this case on the facts found no question seems to me to arise beyond this, that undoubtedly the boy was injured, and upon the findings, which we are not disposed to disturb, it was found that the injury was caused by that which by proper care might have been avoided. A hole was left in the asphalt floor of the playground upon which it was intended that the boys should play. The boy was playing, and it has been found by F the proper tribunal of fact that the injury was due to negligence on the part of those whose duty it was to keep and maintain in proper condition the playground which formed part of the school. It is very obvious that anybody who was charged with that duty ought to take care when boys are expected to play there—the place being intended for recreation, and it being intended that they should G play there as scholars—that they should not have unnecessary dangers put in their way; and it is enough to say that certainly no one would reasonably contend that a hole such as this was described to be was a proper thing to be left there, or that a hole in the playground over which boys were expected to play and to run should be left in such a condition as that that might occur which has occurred; and the boy has been injured by reason of the hole which was left there, and H which, by hypothesis, ought not to have been left there, because it was there by reason of the absence of proper care and control.

The real question which arises in this case is not a question of fact at all, but a question of law. Assuming somebody or other is responsible for what I have pointed out as the negligence which caused the injury, the question is who are the persons responsible. I am of the opinion that no doubt can arise on that I question, because I think that question has been determined by the Education Act, 1902. [His LORDSHIP held that the words "maintain and keep efficient" applicable to a school must necessarily mean not only what has been described as the scholastic system which is to be enforced, but must also refer to the question as to when, where, or how the duty is to be performed by those who are under the main duty of keeping the school efficient for the scholars and continued:] It is enough for me, in my opinion, to say that the action was well founded here, and was brought against the proper persons who are by law made responsible as principals for the discharge of their duty. It appears to me also immaterial

to go into the question of machinery and how far this, that, or the other person is pointed out to do the act. The person on whose behalf the duty is to be done is the county council, and it appears to me that the duty is upon them, and that the neglect of that duty is a liability for which they are responsible. It may be as between themselves and others that there are questions to be determined as to who was to be made responsible, and as to what means are to be taken to compel them to perform their duty more efficiently; but that is quite outside this question. A person injured has a right to go to the person upon whom the duty is cast and who has neglected that duty (whether by reason of the absence of proper machinery, or what is not, is immaterial), and to bring his action against that person. I am of opinion that that person is the county council, and that this action was properly brought against them.

FLETCHER MOULTON, L.J.—I am of the same opinion, and for the same reasons. [His LORDSHIP held that s. 5 of the Education Act, 1902, placed on the county council the duties formerly thrown upon the school board and there was a clear statutory duty on the defendants to keep a provided school in repair, and continued:] It was sought to be argued that children in the school for whom this playground was primarily intended were somehow or other excluded from their rights as members of the public. I can see no ground for the suggestion. They are not only permitted to be there, and invited to be there, but they are directed to be there, and certainly if by the neglect of a statutory duty with regard to a place where they are expected to play they receive an injury they, as members of the public being rightfully there, are entitled to hold responsible the persons on whom the statutory duty is placed, and, as the president has said, that is undoubtedly the county council.

FARWELL, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *John W. Barton; Wyatt & Co., for T. W. Weeding, Kingston-on-Thames.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

A

R. v. NORTON

[COURT OF CRIMINAL APPEAL (Lord Alverstone, C.J., Pickford and Lord Coleridge, JJ.), June 13, 1910]

B

[Reported [1910] 2 K.B. 496; 79 L.J.K.B. 756; 102 L.T. 926; 74 J.P. 375; 26 T.L.R. 550; 54 Sol. Jo. 602; 5 Cr. App. Rep. 65]

Criminal Law—Evidence—Statement made in presence of accused—Complainant not called as witness—Admission of statement dependent on admission of truth by accused.

C

Criminal Law—Appeal—Dismissal under Criminal Appeal Act, 1907, s. 4 (1), proviso—Misdirection—Court to be satisfied that conclusion of jury the same if properly directed.

On a charge preferred against the accused of carnally knowing a girl under the age of thirteen years, although the girl was not called as a witness, evidence was given of statements made by her in the presence of the accused and of his answers to them.

D

Held (i) the contents of such statements should not be given in evidence unless the judge is satisfied that there is evidence fit to be submitted to the jury that the accused by his answers to them, whether given by words or conduct, acknowledged the truth of the whole or part of them; if there be no such evidence, the contents of the statement should be excluded, but, if there be such evidence they should be admitted and the question whether the answer of the accused, by words or conduct, did or did not amount to an acknowledgment of their truth, left to the jury: (ii) if the statements are in fact admitted in the above circumstances the proper direction to the jury is that they might take the statements, or so much of them as were acknowledged to be true, into consideration as evidence, not because the statements afforded evidence of the matters contained in them, but solely because of the accused's acknowledgment of their truth, and unless there was such acknowledgment they should disregard the statement altogether.

F

Held, further: the court will not dismiss an appeal under the Criminal Appeal Act, 1907, s. 4, on the grounds of a misdirection, unless it is satisfied that the jury would have come to the same conclusion if properly directed.

G

Notes. This case was discussed in *D.P.P. v. Christie* ([1914–15] All E.R.Rep. at pp. 69–70, 71–72) by LORD MOULTON and LORD READING, C.J. The latter says (at pp. 71, 72) that a statement made in the presence of the accused may be given in evidence against him at his trial but “in general such evidence can have little or no value in its direct bearing on the case unless the accused, upon hearing the statement, . . . acknowledged the truth of the statement in whole or in part, or did or said something from which the jury could infer such acknowledgment. . . .”

H

HIS LORDSHIP refers to the judgment of PICKFORD, J., in the present case where he says (post at p. 311): “If there be no such evidence [of acknowledgment] then the contents of the statements should be excluded; if there be such evidence then they should be admitted,” and continues: “If it was intended to lay down rules of law to be applied whenever such a statement is tendered for admission, I think the

I

judgment goes too far; they are valuable rules for the guidance of those presiding at trials of criminal cases when considering how the discretion of the court, with regard to the admission of such evidence, should be exercised, but it must not be assumed that the judgment in *R. v. Norton* exhausts all the circumstances which may have to be taken into consideration by the court when exercising its judicial discretion. . . . I come to the conclusion that the rules formulated in *R. v. Norton*, and followed in this and other cases, must be restricted in their application as above indicated, and cannot be regarded as strict rules of law regulating the admissibility of such evidence.”

Applied: *R. v. Hickey* (1911), 27 T.L.R. 441. Referred to: *R. v. Atherton* A (1910), 5 Cr. App. Rep. 223; *R. v. Stroud* (1911), 7 Cr. App. Rep. 38; *R. v. Christie*, [1914-15] All E.R. Rep. 63; *R. v. Adams* (1922), 17 Cr. App. Rep. 77.

As to statements made in the presence of accused, see 10 HALSBURY'S LAWS (3rd Edn.) 475, 476; and for cases see 14 DIGEST (Repl.) 446 et seq.

Cases referred to:

- (1) *R. v. Smith* (1897), 61 J.P. 120; 18 Cox, C.C. 470; 14 Digest (Repl.) 448, B 4354.
- (2) *R. v. Stoddart* (1909), 73 J.P. 348; 25 T.L.R. 612; 53 Sol. Jo. 578; 2 Cr. App. Rep. 217, C.C.A.; 14 Digest (Repl.) 650, 6616.

Appeal against conviction by SCRUTTON, J., sitting as a Commissioner of Assize at Leeds Assizes.

Louis Hoare for the appellant.

Waddy for the Crown.

June 13, 1910. **PICKFORD, J.**, read the following judgment of the court.—The appellant in this case was tried at the Leeds Assizes on Mar. 17, 1910, before SCRUTTON, J., then sitting as a Commissioner of Assize, on a charge of carnally knowing a girl called Margaret Truman, she being then under the age of thirteen years. He was convicted and sentenced to ten years' penal servitude, and now appeals against that conviction on the ground that the learned commissioner mis-directed the jury as to the effect of certain evidence given on the trial.

The evidence against the prisoner was entirely circumstantial with the exception of that relating to the statements of the girl and the answers of the prisoner to which reference is made below. The child was not called at the trial, but evidence was given of statements made by her in the presence of the prisoner, and his answers to them, and it is in relation to this evidence that the question of mis-direction arises. The evidence was to the effect that, on being asked by the prisoner who had done it, she said, "You," and, on being asked by another person, she said, "Stevie Norton," and pointed to the prisoner; that the prisoner said, "No, Madge, you are mistaken," and that then she said, "You have done it, Stephen Norton," and pointed to him again. According to one witness, he then lifted his arms and said: "If I have done it I hope the Lord will strike me dead," and, according to another witness, "If you says so I might as well put my clothes on and go home." There was therefore nothing in his answers necessarily amounting to an admission of the girl's statements. The direction of the learned commissioner as to the effect of this evidence is as follows:

"One starts with the fact that Maggie Truman comes back from that awful night at nine o'clock the next morning. Something is seen trying to get over the wall of that field, and Travis runs up and brings her down to her mother. The prisoner is brought into the house, and then there comes the dramatic scene which is so dramatic that one is afraid that it takes away one's power of accurately estimating it, in which the man solemnly swears that he did nothing to the little girl, and the little girl twice or thrice points at him and says, 'Stevie Norton, you did it.' Gentlemen, you must consider that remark carefully. It is for you entirely, and anything I say as to fact you are to disregard if it does not agree with your own views. You are the judges of fact, and not I. You must consider this. Do you think, first of all, that after what she had gone through that night the little girl was in a condition to accurately remember. Gentlemen, at any rate the fact that the little girl did say so renders it necessary to very carefully consider what evidence is tendered on behalf of Stephen Norton."

Later on the learned commissioner says:

"You have then got him telling lies as to where he was, and you will probably think if that is the position that confirms very much what the little girl says,

- A because, if he were the guilty man he would be very likely to try and explain where he was at a material time by making some statement which must have been untrue, because, if he were the guilty man, he was in the wheat field and not in some other place. Gentlemen, you have to consider all these matters, and you have to consider what weight is to be attached to the statement of the little girl."
- B Objection was taken to this direction on the ground that it directed the jury to take into consideration the girl's statement as evidence of the facts contained in it, and to consider whether, looking at all the circumstances, they accepted it or the prisoner's denial, whereas they ought to have been directed that the statements were not evidence of the facts stated, and that, as they were denied by the prisoner, the jury should disregard them.
- C We are of opinion that this was a misdirection, indeed, the counsel for the Crown did not contend that it was not, but relied in support of the conviction on the proviso to s. 4 of the Criminal Appeal Act, 1907. We think it well, however, to state the grounds of this admissibility of such statements in evidence, and our reasons for considering the direction erroneous. As a general rule, statements as to the facts of a case under investigation are not evidence unless made by witnesses
- D in the ordinary way, but to this rule there are exceptions. One is that statements made in the presence of a prisoner upon an occasion on which he might reasonably be expected to make some observation, explanation, or denial, are admissible under certain circumstances. We think it is not strictly accurate and may be misleading to say that they are admissible in evidence against the prisoner, as such an expression may imply that they are evidence of the facts stated in them and must
- E be considered upon the footing of other evidence. Such statements are, however, never evidence of the facts stated in them; they are admissible only as introductory to or in explanation of the answer given to them by the person in whose presence they are made. Such answer may, of course, be given either by words or by conduct—e.g., by remaining silent on an occasion which demanded an answer. If the answers given amount to an admission of the statements or some part of them,
- F they or that part become relevant as showing what facts are admitted. If the answers be not such an admission the statements are irrelevant to the matter under consideration and should be disregarded. This seems to us to be correctly and shortly stated in TAYLOR ON EVIDENCE, s. 814 at p. 574:
- "The statements only become evidence when by such acceptance he makes them his own statements."
- G No objection was taken in this case to the admission of the statements in evidence, but as the prisoner may be tried again on an indictment on which that question may arise, we think it well to state in what cases such statements can be given in evidence. We think that the contents of such statements should not be given in evidence unless the judge is satisfied that there is evidence fit to be submitted to
- H the jury that the prisoner by his answer to them, whether given by word or conduct, acknowledged the truth of the whole or part of them. If there be no such evidence then the contents of the statements should be excluded; if there be such evidence then they should be admitted, and the question whether the prisoner's answer by words or conduct did not in fact amount to an acknowledgment of them left to the jury. In trials of prisoners on indictment, in which the most numerous
- I and important of these cases arise, there is, as a rule, no difficulty in deciding whether there be such evidence or not, as the prisoner's answer appears upon the depositions, and the chance that the evidence with regard to it may be different on the trial is so small that it may be disregarded. When, however, the evidence of the prisoner's answer does not appear, there does not seem to be any practical difficulty in applying the rule above stated. The fact of a statement having been made in the prisoner's presence may be given in evidence, but not the contents, and the question asked what the prisoner said or did on such a statement being made. If his answer given either by words or conduct be such as to be evidence

from which an acknowledgment may be inferred then the contents of the statement may be given, and the question of admission or not in fact left to the jury; if it be not evidence from which such an acknowledgment may be inferred, then the contents of the statement should be excluded. To allow the contents of such statements to be given before it is ascertained that there is evidence of their being acknowledged to be true must be most prejudicial to the prisoner, as whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds. It is, perhaps, too wide to say that in no case can the statements be given in evidence when they are denied by the prisoner, as it is possible that a denial may be given under such circumstances and in such manner as to constitute evidence from which an acknowledgment may be inferred, but, as above stated, we think they should be rejected unless there is some evidence of an acknowledgment of their truth. When they are admitted, we think the following is the proper direction to be given to the jury. That if they come to the conclusion that the prisoner had acknowledged the truth of the statement whole or in part of the facts stated they might take the statement, or so much of it as was acknowledged to be true (but no more), into consideration as evidence in the case generally, not because the statement standing alone afforded any evidence of the matter contained in it, but solely because of the prisoner's acknowledgment of the truth (*R. v. Smith* (1)), but unless they found as a fact that there was such acknowledgment, they ought to disregard the statement altogether. In this case the direction above set out is not that the jury should disregard the statement, but that they should take it into consideration and examine whether it was likely to be accurate, and whether it was confirmed by the other evidence. For the reasons given above we think this was erroneous, and it was a misdirection upon a point very material to the issue.

It was, however, contended that the conviction might be supported under the proviso to s. 4 of the Criminal Appeal Act, 1907, which enables the court to dismiss the appeal if they consider that no substantial miscarriage of justice has occurred. We do not think that we can come to this conclusion. The principle on which the court acts in such cases is laid down in *R. v. Stoddart* (2), i.e., in order to support the conviction we must come to the conclusion that if the jury had obeyed the direction and disregarded the girl's statement they would—not might—have come to the same conclusion. As we have pointed out, the evidence without the girl's statement was entirely circumstantial, and there were considerations in favour of both a conviction and an acquittal, and we do not think we can say that the jury would necessarily have come to the same conclusion. We cannot either altogether put out of sight the fact that the prisoner had previously been tried on this indictment, and the jury had disagreed, showing that to some minds, at any rate, there seemed to be doubts in the case.

Conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by G. DODSON, Esq., Barrister-at-Law.*]

A

Re MOSES. MOSES v. VALENTINE

[CHANCERY DIVISION (Swinfen Eady, J.), June 4, 18, 1908]

[Reported [1908] 2 Ch. 235; 77 L.J.Ch. 783; 99 L.T. 519]

B

Conflict of Laws—Will—Bequest of leaseholds in foreign country—Determination of validity by lex loci rei sitae.

A testator, domiciled in England, made an English will by which he bequeathed to his wife property including long leaseholds in the Transvaal.

Held: the validity of a testamentary disposition of leaseholds was governed, not by the law of the testator's domicile, but by the *lex loci rei sitae*, which in the present case was Roman-Dutch law.

C

Notes. Considered: *Philipson-Stow v. I.R.Comrs.*, [1959] 3 All E.R. 879.

As to *lex loci rei sitae*, see 7 HALSBURY'S LAWS (3rd Edn.) 50-53; and for cases see 11 DIGEST (Repl.) 389-393.

Cases referred to:

D

(1) *Howe v. Earl of Dartmouth*, *Howe v. Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, 265.

(2) *Pickering v. Pickering* (1839), 4 My. & Cr. 289; 8 L.J.Ch. 336; 3 Jur. 743; 41 E.R. 113, L.C.; 44 Digest 201, 302.

(3) *Re Pitcairn*, *Brandreth v. Colvin*, [1896] 2 Ch. 199; 65 L.J.Ch. 120; 73 L.T. 430; 44 W.R. 200; 44 Digest 208, 368.

E

(4) *Re Hubbuck*, *Hart v. Stone*, [1896] 1 Ch. 754; 65 L.J.Ch. 271; 73 L.T. 738; 44 W.R. 289; 40 Sol. Jo. 257, C.A.; 40 Digest (Repl.) 762, 2470.

(5) *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461; 21 W.R. 835; 11 Digest (Repl.) 392, 500.

(6) *In the Goods of Gentili* (1875), 9 I.R.Eq. 541; 11 Digest (Repl.) 390, *244.

Also referred to in argument:

F

Duncan v. Lawson (1889), 41 Ch.D. 394; 58 L.J.Ch. 502; 60 L.T. 732; 53 J.P. 532; 37 W.R. 524; 5 T.L.R. 402; 11 Digest (Repl.) 389, 486.

Pepin v. Bruyère, [1902] 1 Ch. 24; 71 L.J.Ch. 39; 85 L.T. 461; 50 W.R. 34; 46 Sol. Jo. 29, C.A.; 11 Digest (Repl.) 366, 336.

Adjourned Summons.

G

A testator, domiciled in England, made a will in English form on Jan. 25, 1904, and after appointing executors, gave, devised, and bequeathed all his real and personal estate both in England and South Africa to his wife for her widowhood, with remainders over. The testator died on Oct. 21, 1904, and his will was proved in England in December, 1904, and the executors took out letters of administration in South Africa in February, 1907. Part of the testator's estate consisted of long leaseholds in the Transvaal, and the question arose whether they ought to be converted according to the rule in *Howe v. Earl of Dartmouth* (1). The opinion of Advocate Gregorowski (formerly Chief Justice of the South African Republic) was taken. He advised (*inter alia*):

H

I

"It is not necessary to discuss the usage of the Chancery Court in England. The leading case is *Howe v. Earl of Dartmouth* (1), which has been since followed by *Pickering v. Pickering* (2). It is also the practice of the court to evenly adjust the rights of the tenant for life and the remaindermen by apportioning the estate so that what is income going to the tenant for life and what is capital devolving on the remaindermen is neatly and accurately balanced: *Re Pitcairn* (3); *Re Hubbuck* (4). Questions of this kind do not usually arise in our courts because wills are couched in different language, and estates are usually disposed of in a different way to what they are in England. The estate is not entailed as a whole, but only as regards specific portions, usually the land. When there is a usufruct of farm stock or the like,

the intention clearly appears not to convert, but that the usufructuary shall enjoy the specific property and hand it over on his death. For this he gives security. There are thus no decisions on apportionment between income and capital, nor are there decisions as to wasting or depreciating assets, such as leaseholds running out, as affecting the respective rights of life tenants and remaindermen. These are modern considerations unknown to the exigencies of either the Roman or the Roman-Dutch law: (vide *QUASI-USUFRUCT OF THINGS CONSUMED BY USE*, VOET, 7, 5, 3). The idea of conversion of perishable assets into permanent investment does not occur in the authorities except in the form of security to return the articles as they are impaired by use. The usufructuary was not bound to restore the value except in the case of fungibles consumed by use. When a usufruct is left of the estate, as in the present case, the practice is to leave the estate as it is after payment of debts, and the sale and distribution only takes place after the death of the usufructuary, when it becomes necessary to divide."

The opinion stated that the remaindermen could not take any proceedings in the Transvaal Court until the executors took some step, such as proceeding to sell, which was detrimental to their interest, when they could obtain an interdict, and institute an action for a declaration of rights.

This summons was issued by two of the adult remaindermen against the executors to determine (i) what part of the rents, profits, and income of such part of the testator's estate as consisted of securities not authorised by law for the investment of trust funds should be treated as capital or otherwise apportioned between the parties successively interested in the testator's estate, and how and as from what date; and (ii) what steps, if any, the executors ought to take with regard to the getting in, conversion, and sale of the Transvaal leaseholds.

Ward Coldridge for the plaintiffs.

Mossop for the widow.

Hodge for the infant remaindermen.

Israel for an executor.

SWINFEN EADY, J.—In *Freke v. Lord Carbery* (5) LORD SELBORNE, L.C., decided that the validity of a testamentary disposition of an English leasehold was governed by the law of England—i.e., the *lex loci rei sitæ*—and not by the law of the testator's domicile. The same principle was applied in *In the Goods of Gentili* (6), and is applicable here. The testator, domiciled in England, has devised and bequeathed all his real and personal estate, including long leaseholds in the Transvaal, to his wife for her widowhood, with remainders over. The Roman-Dutch law is applicable to these leaseholds. It appears that the usufructuary is entitled to enjoy the rents in specie, and that, if the executors were to attempt to realise them, the usufructuary or the residuary legatees could obtain an interdict. It also appears that the usufructuary of immovables is entitled to enjoy them in specie without giving security that they shall be of the same value at the end of his term, the practice of giving security being confined to *res fungibiles quæ ipso usu consumuntur*. The widow is accordingly entitled to enjoy the leaseholds in specie during her widowhood.

Solicitors: *Upton & Britton*; *D. A. Romain*.

[Reported by G. B. HAMILTON, Esq., Barrister-at-Law.]

Re RODES. SANDERS v. HOBSON

[CHANCERY DIVISION (Parker, J.), March 31, April 1, 6, 1909]

[Reported [1909] 1 Ch. 815; 78 L.J.Ch. 484; 100 L.T. 959]

B *Settled Land—Tenant for life—Surrender of lease—Consideration distributable with remaindermen—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 13 (1), s. 53.*

An equitable tenant for life accepted the surrender of a lease which she had granted under the powers of the Settled Land Acts, and received from the lessee a certain sum as consideration for accepting the surrender.

C **Held:** under the Settled Land Act, 1882, s. 53, the tenant for life was a trustee; if he accepted a surrender, he must do so for the interests not only of himself, but for those of the remaindermen, and, if he received a consideration for accepting it, a court of equity would distribute the money between the tenant for life and the remaindermen on principles which it thought fair.

D *Re Hunloke's Settled Estates, Fitzroy v. Hunloke* (1), [1902] 1 Ch. 941, distinguished.

Notes. The Settled Land Act, 1882, ss. 6, 13 (1), 53 have been repealed. See now the Settled Land Act, 1925, ss. 41, 52 (1), 107 (1), 23 HALSBURY'S STATUTES (2nd Edn.) 108, 128, 229.

E Distinguished: *Re Lacon's Settlement, Lacon v. Lacon*, [1911] 2 Ch. 17; *Re Wix, Hardy v. Lemon*, [1916-17] All E.R. 1096.

As to income and capital receipts from settled land, see 34 HALSBURY'S LAWS (3rd Edn.) 623 et seq.; and for cases see 40 DIGEST (Repl.) 707 et seq.

Case referred to:

(1) *Re Hunloke's Settled Estates, Fitzroy v. Hunloke*, [1902] 1 Ch. 941; 71 L.J.Ch. 530; 86 L.T. 829; 40 Digest (Repl.) 713, 2075.

F Also referred to in argument:

Brigstocke v. Brigstocke (1878), 8 Ch.D. 357; 47 L.J.Ch. 817; 38 L.T. 760; 26 W.R. 761, C.A.; 40 Digest (Repl.) 712, 2074.

Originating Summons for directions as to the distribution of the consideration for the surrender of a lease between the tenant for life and the remaindermen.

G W. H. de Rodes by his will made in February, 1883, devised his real estate to trustees upon trust for his daughter, the plaintiff, Sophy Felicité Sanders, for life, with remainder to her daughter, Felicité Locker Lampson, in tail, and directed that the rents and profits should be accumulated during the minority of any tenant for life; and the testator gave the trustees power to grant leases and accept surrenders of any part of the estate. The testator died in 1883, and an action was **H** commenced for administration of his estate. On Mar. 22, 1896, the plaintiff attained the age of twenty-one, and, by an order of court made on Aug. 3, 1896, she was let into possession of the estate. In 1905 she married Mr. G. L. T. Locker Lampson.

I On June 30, 1906, Mrs. Locker Lampson, in exercise of her powers as tenant for life in possession under the Settled Land Act, 1882, granted a lease of a coal mine forming part of the estate for twenty-one years from July 1, 1906, at a minimum rent of £200, with royalties in addition. In September, 1906, the lessees assigned the lease to a company. In March, 1908, the company passed resolutions for voluntary winding-up. On Dec. 22, 1908, Mrs. Locker Lampson, in consideration of a sum of £1,000 paid to her by the lessees, accepted a surrender of the lease to the intent that the residue of the term should be merged in the inheritance. This was a summons taken out by the surviving trustee asking for directions as to whether Mrs. Locker Lampson was entitled to retain the £1,000, or whether some or all of it ought to be treated as capital.

By the Settled Land Act, 1882 :

"Section 13 (1). A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

Section 53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation in the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

Christopher James for the trustees.

T. T. Methold for the tenant for life.

H. B. Vaisey for the infant entitled in remainder.

PARKER, J.—The question is whether on the true construction of s. 13 (1) of the Settled Land Act, 1882, a tenant for life who accepts a surrender of a lease for a pecuniary consideration is entitled to retain that consideration for himself. *Re Hunloke's Settled Estates, Fitzroy v. Hunloke* (1) has been cited. That was a case in which a legal tenant for life accepted a surrender without reference to the Settled Land Acts; and it was held by SWINFEN EADY, J., that she was entitled to retain the moneys paid in consideration of the surrender. But, if the case be examined, it appears that the reasons for the decision were, *primâ facie*, that the position of a legal tenant for life is not fiduciary, and also that, in many cases where powers of leasing are conferred on a legal or equitable tenant for life by a deed, the power is construed as non-fiduciary, and as having no reference to the remaindermen, but solely to the interests of a tenant for life. But under s. 53 of the Settled Land Act, 1882, the tenant for life is a trustee; and, if he accepts a surrender, he must do so for the interests not only of himself, but of the remaindermen, and, if he receives a consideration for accepting it, then, on ordinary principles, a court of equity will distribute the money between the tenant for life and the remaindermen on principles which it thinks fair. That has reference to the position of the tenant for life as a trustee. In the present case it is clear that, since the tenant for life has been paid a considerable sum, it is difficult to let the property on such advantageous terms again, and so it is for the disadvantage of the remaindermen that the surrender should be accepted, unless the money paid for the surrender is so dealt with as to recoup them. The surrender money must, therefore, be paid by instalments to the tenant for life, or other the person or persons entitled, in the same way as in the preceding cases dealt with by the order of Aug. 3, 1896.

Solicitors: *Lowe & Co.; Freshfields.*

[Reported by W. HUNTER BOND, ESQ., Barrister-at-Law.]

A

NASH v. INMAN

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.J.J.), March 4, 5, 1908]

B

[Reported [1908] 2 K.B. 1; 77 L.J.K.B. 626; 98 L.T. 658;
24 T.L.R. 401; 52 Sol. Jo. 335]

Infant—"Necessaries"—*Action for goods sold—Proof of suitability for infant and requirement at date of sale.*

C

By s. 2 of the Sale of Goods Act, 1893: "... where necessities are sold and delivered to an infant ... he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant ... and to his actual requirements at the time of the sale and delivery."

In an action against an infant for goods sold and delivered the onus is on the plaintiff to prove both the matters mentioned in the latter part of the section, although proof that the goods were actually required by the infant at the date of the sale and delivery may present considerable difficulty.

D

Notes. Considered: *Elkington & Co. v. Amery*, [1936] 2 All E.R. 86.

As to "necessaries" for an infant, see 21 HALSBURY'S LAWS (3rd Edn.) 142-145; and for cases see 28 DIGEST (Repl.) 509 et seq.

Cases referred to:

E

(1) *Barnes & Co. v. Toye* (1884), 13 Q.B.D. 410; 53 L.J.Q.B. 567; 48 J.P. 664; sub nom. *Baines & Co. v. Toye*, 51 L.T. 292; 33 W.R. 15, D.C.; 28 Digest (Repl.) 512, 258.

(2) *Johnstone v. Marks* (1887), 19 Q.B.D. 509; 57 L.J.Q.B. 6; 35 W.R. 806; 3 T.L.R. 810, D.C.; 28 Digest (Repl.) 512, 259.

(3) *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch.D. 94; 59 L.J.Ch. 298; 62 L.T. 342; 38 W.R. 385, D.C.; 28 Digest (Repl.) 509, 217.

F

(4) *Ryder v. Wombwell* (1868), L.R. 3 Exch. 90; 37 L.J.Ex. 48; 17 L.T. 609; 16 W.R. 515; on appeal, L.R. 4 Exch. 32; 38 L.J.Ex. 8; 19 L.T. 491; 17 E.R. 167, Ex. Ch.; 28 Digest (Repl.) 510, 224.

Also referred to in argument:

Brayshaw v. Eaton (1839), 5 Bing.N.C. 231; 1 Arn. 466; 7 Scott, 183; 8 L.J.C.P. 153; 3 Jur. 222; 132 E.R. 1094; 28 Digest (Repl.) 510, 232.

G

Peters v. Fleming (1840), 6 M. & W. 42; 9 L.J.Ex. 81; 28 Digest (Repl.) 511, 244.

Maddox v. Miller (1813), 1 M. & S. 738; 105 E.R. 275; 28 Digest (Repl.) 510, 226.

Burghart v. Angerstein (1834), 6 C. & P. 690; sub nom. *Burkhardt v. Angerstein*, 1 Mood. & R. 458, N.P.; 28 Digest (Repl.) 511, 245.

H

Steedman v. Rose (1842), Car. & M. 422; 28 Digest (Repl.) 512, 250.

Appeal by the plaintiff from a decision of RIDLEY, J.

The plaintiff, a tailor, brought an action against the defendant to recover the sum of £145 odd, being the credit price charged for clothes supplied to him between Oct. 29, 1902, and June 16, 1903, at which time the defendant was an undergraduate at Trinity College, Cambridge. The defence was that the defendant was an infant at the time the goods were supplied, he having been born on Jan. 17, 1883, and that the goods were not "necessaries." On Dec. 10, 1907, the action came on for trial before RIDLEY, J., and a special jury. His LORDSHIP was of opinion that as a matter of law there was no case to go to the jury. He decided that no part of the clothes were "necessaries" and entered judgment for the defendant, with costs. The plaintiff appealed.

I

McCardie for the plaintiff.

Cecil Walsh (Atkin, K.C., with him) for the defendant.

SIR HERBERT COZENS-HARDY, M.R.—This case is one of difficulty, and also, I think, one of importance. In substance the position is this. The plaintiff sues the defendant for goods sold and delivered. The defendant pleads infancy at the date of the sale, and his plea is proved. What is the consequence of that? The consequence of that is that the contract may turn out to be void, for since the Infants Relief Act, 1874, all contracts for goods supplied to infants are absolutely void, subject, inter alia, to these provisions of s. 2 of the Sale of Goods Act, 1893:

“Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property: Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.”

The section then defines “necessaries” as follows:

“Necessaries in this section means goods suitable to the condition in life of such infant, or minor, or other person, and to his actual requirements at the time of the sale and delivery.”

What is the effect of that? The plaintiff, as I have already stated, sues for goods sold and delivered and the defendant pleads infancy. The plaintiff must then reply, “the goods sold were ‘necessaries’ within the meaning of the definition in s. 2 of the Sale of Goods Act, 1893.” It is not sufficient, in my view, for him to say, “I have discharged the onus which rests upon me if I simply show that the goods supplied were suitable to the condition in life of the infant at the time.” There is another branch of the definition which cannot be disregarded. Having shown that the goods were suitable to the condition in life of the infant he must then go on to show that they were suitable to his actual requirements at the time of the sale and delivery. Unless he establishes that fact either by evidence adduced by himself or by cross-examination of the defendant’s witnesses, as the case may be, in my opinion, he has not discharged the burden which the law imposes upon him.

Our attention has been called by counsel for the plaintiff in his very able and learned argument to a number of authorities, going back for a very long period, which he said established that the burden on a plaintiff who supplied goods to an infant was simply to show that the goods were of a class which might be necessaries having regard to the condition in life of the defendant, and that unless the judge withdrew the case from the jury on the ground that the articles in question could not be necessaries, it was for the jury to find as a matter of fact, aye or no, were these articles necessaries. It had never, he said, been the law that the plaintiff was required to go into the question, which might present great difficulties to him, whether the goods were actually required by the defendant at the date of the sale, or, in other words, to say—in the case of clothes supplied to an infant—what was the state of the defendant’s wardrobe at the time when the goods were ordered. I think that there is very great force up to a point in that argument. But it must be remembered that the law on this subject has been developed and altered in the course of the last century. It was until quite recently doubted whether it was even admissible to give evidence that the infant was fully supplied with goods of the class—being goods which might properly be termed “necessaries”—at the date when the contract was made, so that he really did not want any more.

It was not until the decision of the Divisional Court in *Barnes & Co. v. Toye* (1) in 1884 overruling the decision given by A. L. SMITH, J., that it could be said to be at all established that it was admissible evidence to show that the infant was already sufficiently supplied unless you went further and showed that the plaintiff knew that he was sufficiently supplied. The point arose again in *Johnstone v. Marks* (2) before what was no doubt a Divisional Court, but it was composed of the three members of the Court of Appeal, LORD ESHER, M.R., LINDLEY and LOPES, L.JJ. In that case the county court judge had rejected evidence to prove that the defendant was sufficiently supplied with clothes at the time of the sale. LORD ESHER, M.R., said (19 Q.B.D. at p. 511):

A "I am of opinion that the evidence was improperly rejected. It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessities as distinguished from that of luxuries, but that the goods supplied when supplied were necessities to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it."

B LINDLEY, J., said (*ibid.*):

"If an infant can be made liable for articles which may be necessities without proof that they are necessities, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary to him."

C Although it may be true that the language which I have just read from the judgments of LORD ESHER, M.R., and LINDLEY, L.J., goes further than was absolutely necessary for the decision of the case, yet that language is perfectly clear and unambiguous, and seems to me to be logically involved in the definition of "necessaries."

D After those two decisions we have in the Sale of Goods Act, 1893, an Act of Parliament which defines in a manner that admits of no doubt what is the proper interpretation of those "necessaries" for which and for which alone an infant can be made liable on *assumpsit*, and that definition in terms includes the second element which LORD ESHER, M.R., and LINDLEY, L.J., said was involved in the term "necessaries," and the burden of proving which they said rested on the plaintiff.

E That being so, how does the matter stand? The plaintiff called evidence to prove the delivery of the goods. It is not contended, and it could not be contended, that the infant would be liable for the credit price or for cash price, because by the terms of the statute he is only liable for a reasonable price, but that is a subsidiary point. There being no pleadings, the infancy of the defendant was not admitted, and the father was called to prove the date of his son's birth. There was

F no cross-examination as to that, and the infancy is not disputed. Then he went on to give evidence quite clear and explicit, and not shaken in cross-examination, that the infant, who was an undergraduate of Trinity College, Cambridge, and had just gone up to the university when these goods were supplied, was, in fact, supplied with clothes suitable and necessary and proper for his condition in life and for his position as an undergraduate. Speaking for myself, I should have been better

G satisfied if the learned judge upon this evidence had left the matter to the jury with such a strong direction that they would be practically compelled to find a verdict for the defendant. He did not take that course. He ruled as a matter of law that there was no evidence fit to be submitted to the jury that these articles of apparel or any of them were "necessaries" within the meaning of the definition contained in s. 2 of the Act of 1893. Thinking as I do that there was no evidence

H in support of that, which was an essential issue, I cannot say that the learned judge was wrong in the view which he took. We have scarcely heard any suggestion that there was even a scintilla of evidence to support the contention that the goods were suitable to the requirements of the infant. Nay, more, I think that if the matter had been left to the jury and the jury had found that the goods were suitable to the requirements of the infant at that time, and application had been made for a new trial, it would have been the duty of this court to grant a new trial on the ground that there was no evidence to support the verdict, and that it was perverse. Under these circumstances, it seems to me that this appeal fails, and that there is no ground for interfering with the judgment which was entered for the defendant.

FLETCHER MOULTON, L.J.—I am of the same opinion. I think that the difficulty and at the same time the suggestion of hardship to the plaintiff in this case disappear when one considers what is the true basis of an action against an

infant for necessities. It is usually considered to be a question of enforcing a contract against the infant, but I agree with the view expressed by the court in *Re Rhodes, Rhodes v. Rhodes* (3)—in the parallel case of a claim for the repayment of money disbursed for necessities supplied to a lunatic—that this language is somewhat unfortunate. An infant, like a lunatic, is incapable of making a contract; but if a man satisfies the needs of the infant or lunatic the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract, but is really an obligation which the law implies to repay in respect of needs satisfied. It is not contract by a person incapable of contracting except for necessities, but needs satisfied; and this is completely carried out by the Sale of Goods Act, 1893. Moreover, in the case of goods sold and delivered to an infant or lunatic the obligation which the legislature enacts is to pay, not the contract price, but a reasonable price for the goods, that being the measure of the services rendered to the needs of the lunatic or infant.

That nicety of legal phraseology has not been adhered to, but the common and convenient phrase is that an infant is liable for goods sold and delivered provided that they are “necessaries,” and there is no objection to that phraseology so long as its true meaning is understood. But by s. 2 of the Sale of Goods Act, 1893, there has been provided a statutory definition of what are “necessaries” which entirely removes any doubt—if any doubt previously existed—as to what that word in legal phraseology means. The section writes out in fuller language that what must be done is a satisfaction of real needs. That being so, if an action is brought by one who claims to enforce such an obligation it is obvious that the plaintiff, to prove his case, must show that the goods supplied come within this definition; and that a plaintiff has to make out his case is, I should have thought, the first lesson that anyone studying English law would learn. The elaborate argument of counsel for the plaintiff founded on the authorities of the past, going back nearly a hundred years, does not appear to me to touch the plain and obvious principle that the plaintiff has got to show that he has supplied “necessaries,” that is to say, first, that the goods supplied by him are suitable to the condition in life of the infant; and, secondly, that they are suitable to his actual requirements at the time of the sale and delivery—or, in other words, that the infant has not then got a supply from other sources. But one always likes to shelter oneself under the authority of decisions of eminent judges, and in *Johnstone v. Marks* (2) this doctrine is laid down with the greatest clearness, and it is incorporated in the Act of 1893. Therefore, there is no doubt whatever that in order to succeed in an action for goods sold and delivered to an infant the plaintiff must show that they were “necessaries” within the meaning of that term as defined by s. 2 of the Sale of Goods Act, 1893. Everything which is to be shown to bring them within s. 2 it is for him to prove.

Passing on from that general principle, let me take the facts of the present case. In my opinion, it raises no point whatever as to the duty of the judge in an action of this peculiar character as contrasted with the duty of the jury. It only proceeds on the lines of the law consistently administered by this court for many more years than I can think of, an example of which is shown by the Court of Exchequer Chamber in *Ryder v. Wombwell* (4). Questions of law are for the judge; questions of fact are for the jury. But as the court there laid down, the particular question of fact in issue in that case like all other questions of fact ought not to be left to the jury by the judge, unless there is evidence upon which they could reasonably find in the affirmative. It happened that the issue in that case was whether certain articles were suitable to the condition in life of the defendant, the infant, and the court thought that no jury could reasonably find that those articles were suitable to the condition in life of that defendant. Therefore, they said that the judge—not by reason of any peculiar rule applicable to actions of this kind, but in the discharge of his regular duties in all cases of trial by a jury—ought not to have left it the jury, because there was no evidence on which they could reasonably find for the plaintiff. We have before us a similar case, in which it happens that the

A issue is not only whether the articles in question were suitable to the defendant's condition in life, but whether they were suitable to his actual requirements at the time of the sale and delivery, and how does the evidence stand? The evidence for the plaintiff showed that a traveller in the employ of the tailor, hearing that a freshman at Trinity College, Cambridge, was spending money pretty liberally went to get an order for clothes. He sold him within eight months goods which at cash prices came to over £120, including thirteen waistcoats and a variety of things of that kind, and that is all that the plaintiff proved. The defendant's father proved the infancy, and then proved that he knew perfectly well, as he had examined into the matter, that the defendant had an adequate supply of clothes, and he stated what they were. That evidence was not contradicted by any other evidence, nor was there any cross-examination tending to shake the credit of the witness, against whom, of course, nothing could be said. On that uncontradicted evidence, the judge came to the conclusion—to use the language of the court in *Ryder v. Wombwell* (4)—that there was no evidence on which the jury might properly find that the goods in question were necessary to the actual requirements of the infant at the time of sale and delivery, and, therefore, in accordance with the duty of the judge in all cases of trial by jury he withdrew the case from the jury, and directed judgment to be entered for the defendant. In my opinion, he was justified in so doing by the practice of the court, and this appeal must, therefore, be dismissed.

BUCKLEY, L.J.—In my view, this action is brought on contract. I am sorry to say that I do not agree with some of the observations used by FLETCHER MOULTON, L.J., as regards the contracts of an infant. I understand the law before the passing of the Infants Relief Act, 1874, to be: that an infant could contract, but with the consequence that, inasmuch as he was an infant, the contract could not during infancy be enforced as against him, but, when he attained his majority, he might, if he pleased, ratify and confirm the contract and the other party to the contract would be bound. The obligation was always in contract, but it was a contract of such a kind that as against one of the parties to the contract it could not be enforced. It was what we are in the habit of calling a “voidable contract.” In that state of things the Infants Relief Act, 1874, was passed. It relates to certain contracts, and those which are mentioned in the Act are by the Act rendered for the first time void. The classes of contract which are not referred to in the Act remained as they were before. But the Act of 1874 provides:

G “All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts started with infants shall be absolutely void....”

So that the contract for necessities is left as a contract which is not void. Therefore, the plaintiff when he sues the defendant on a contract for goods supplied during infancy is suing him in contract on the footing that it was such a contract as the infant, notwithstanding infancy, could make. That rested on this, that the defendant although he was an infant had a limited capacity to contract. To maintain his action it is necessary for the plaintiff to prove that the contract sued on was within that limited capacity. I think that the modern rule as regards liability for necessities may be stated as being that an infant may contract for the supply of articles suitable for his support in his station in life if he has not already a sufficient supply. In order to render an infant's contract an enforceable contract it must satisfy two requisites—viz., that it shall be for goods suitable for his support in his station in life, and that, in addition to this characteristic, he has not already got a sufficient supply of these necessities. Then if the defence is that these goods were not necessities that will be made good by showing either that in which I may call their innate quality, having regard to the position in life of the defendant, they were such that he could not want them, or that, if the goods were capable of being necessities, he had already enough so that a further supply

was not necessary. It seems to me that if in the action it is put in issue that the goods supplied were not necessities on those two grounds, or on either of them, the onus is on the plaintiff to show that they are necessities. He is suing upon a contract which the defendant cannot make except under defined circumstances, and I think it is for him to show that the defined circumstances enabling the infant to contract existed. A

What took place here was this. The plaintiff called his traveller, who gave evidence as to the goods supplied. At the conclusion of that evidence counsel for the defendant submitted that, subject to his proving that the defendant was an infant, there was no evidence to go to the jury. He put the father in the box to prove the infancy, and then he put some further questions to the witness addressed to the point whether the boy was already sufficiently supplied with clothing, and the evidence of the father on that point was taken. I agree that the question whether or not the boy already had a sufficient supply of clothes is not a question of law, but a question of fact, and of course all questions of fact are *prima facie* for the jury. No doubt in these cases of necessities existing, the question whether the goods are or are not such is very difficult to decide. As regards the position in life of the boy you must have evidence, and you cannot even determine whether the articles from their innate quality are capable of coming under the head of "necessaries" until you know what his station in life is. Therefore, to enable the judge to determine that question of law some evidence was required. But certainly this issue whether the defendant was properly supplied or not was a question of fact, and *prima facie* that was to go to the jury. The doubt I have in this case is whether at the conclusion of the evidence the judge ought to have left the matter to the jury with a direction that they ought to find their verdict in a particular way or whether he ought to have withdrawn it as he did. I have not had much experience in these cases, but perhaps the more regular course would have been for the judge to leave the matter to the jury inasmuch as the question whether the boy was sufficiently supplied with clothes or not was a question of fact for the jury and direct them to find for the defendant on the ground that there was no evidence to justify a verdict for the plaintiff. You may put it in a way in which I have put it or you may put it in the way in which it has been put by FLETCHER MOULTON, L.J.—namely, that, there being no evidence upon which the jury might properly find for the plaintiff, a nonsuit ought to be entered. It does not appear to me to matter much which way it is put. I arrive at the conclusion in point of fact that there was no evidence to establish affirmatively that the goods were necessities, and consequently I think that the judge was right in directing judgment to be entered for the defendant. B C D E F G

Appeal dismissed.

Solicitors: *Carter & Bell; Philpot, Morrell & Hughes.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

A

LAWSON v. EDMINSON

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Bigham and Walton, JJ.),
October 13, 1908]

F

[Reported [1908] 2 K.B. 952; 78 L.J.K.B. 36; 99 L.T. 797;
72 J.P. 479; 25 T.L.R. 11; 53 Sol. Jo. 15; 21 Cox, C.C. 784]

Licensing—Offence—Permitting drunkenness—Guests of landlord after closing hours—Liquor paid for by licensee—No evidence of attempt by licensee to prevent drunkenness—Licensing Act, 1872 (35 & 36 Vict., c. 94), s. 13.

C

A licensee can be convicted under s. 13 of the Licensing Act, 1872 [now s. 136 of the Licensing Act, 1953] of permitting drunkenness on the licensed premises, even though the drunken persons are on the premises after closing hours as his private guests and are supplied with intoxicating liquor at his expense, unless he satisfies the court that he took all reasonable steps to prevent drunkenness.

D

Notes. Section 13 of the Licensing Act, 1872, has been replaced by s. 136 of the Licensing Act, 1953.

Considered: *Young v. Gentle*, [1914-15] All E.R.Rep. 1200.

As to drunkenness on licensed premises, see 22 HALSBURY'S LAWS (3rd Edn.) 680 et seq.; and for cases see 30 DIGEST (Repl.) 94 et seq. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Cases referred to:

E

(1) *Thompson v. McKenzie*, post p. 720; [1908] 1 K.B. 905; 77 L.J.K.B. 605; 98 L.T. 896; 72 J.P. 150; 24 T.L.R. 330; 52 Sol. Jo. 302; 21 Cox, C.C. 620, D.C.; 30 Digest (Repl.) 95, 712.

(2) *Kessack v. Smith* (1905), 7 F. (Ct. of Sess.) 75, J.; 30 Digest (Repl.) 96, *386.

F

(3) *Hare v. Osborne* (1876), 34 L.T. 294; sub nom. *Osborne v. Hare*, 40 J.P. 759, D.C.; 25 Digest 430, 297.

Also referred to in argument:

R. v. Pelly, [1897] 2 Q.B. 33; 66 L.J.Q.B. 519; 76 L.T. 467; 61 J.P. 373; 45 W.R. 504; 13 T.L.R. 319; 41 Sol. Jo. 455; 18 Cox, C.C. 556, D.C.; 30 Digest (Repl.) 111, 809.

G

Lester v. Torrens (1877), 2 Q.B.D. 403; 46 L.J.M.C. 280; 41 J.P. 821; 25 W.R. 691, D.C.; 30 Digest (Repl.) 111, 80.

Redgate v. Haynes (1876), 1 Q.B.D. 89; 45 L.J.M.C. 65; 33 L.T. 779; 41 J.P. 86, D.C.; 25 Digest 430, 302.

H

Case Stated on an information preferred by the appellant against the respondent, under s. 13 of the Licensing Act, 1872, that he, the respondent, on Mar. 1, 1908, at the township of Southwick, then being duly licensed to sell by retail intoxicating liquors in his house and premises there situate, unlawfully did permit drunkenness to take place on the said licensed premises.

I

The following facts were admitted or proved: The appellant is an inspector in the Durham County Constabulary, and the respondent is an alehouse keeper carrying on business at the Queen's Head Hotel, Adelaide Street, Southwick. Sergeant Rispin and Police Constable Wilson, on approaching the Queen's Head Hotel, Adelaide Street, Southwick, about 1 a.m. on Mar. 1, 1908, observed lights and heard voices in the hotel, and, having obtained admission, found therein the wife of the respondent, her father and mother, and ten other persons. The following explanation as to their presence was given to the police by Mrs. Edminson, the wife of the respondent: "My father and mother are here from Wardley Colliery, and we are having a bit of jollification. There has been no drink supplied since closing time; besides, this room is not licensed for drink. I have stood drinks round." The justices accepted this explanation as correct. Two men present

were drunk; one before becoming the private guest of the respondent, had been on the premises as an ordinary customer, but there was no suggestion that he had been drunk while there as a customer; the other came to the premises as a private guest shortly after closing time, and was drunk when he came there. The respondent, Joseph Edminson, was not himself present.

The justices found as a fact that the whole of the persons found on the premises were there as private guests, being entertained by the respondent's wife, and that the premises were in fact being used for the purpose of private premises, and not for the purpose of licensed premises. It was contended on behalf of the appellant that inasmuch as men were found drunk on licensed premises, although during the time when such premises were closed according to law, and although they may have been there as private guests of the respondent and his wife, their mere presence on the premises in a state of drunkenness was evidence upon which the respondent should be convicted of permitting drunkenness contrary to the statute. It was contended on behalf of the respondent that the mere fact that private guests of his own on his premises, during the time such premises were closed according to law, were drunk, did not render him liable to conviction for permitting drunkenness. In the absence of express authority to show that the justices were entitled upon such facts as were admitted or found by them as hereinbefore set forth to convict the respondent of the offence charged, they dismissed the information.

By s. 13 of the Licensing Act, 1872 [now repealed] :

"If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds."

Simey for the appellant.

E. Shortt for the respondent.

LORD ALVERSTONE, C.J.—I think this appeal must be allowed and the Case must go back to the justices with directions to convict. I cannot help feeling that the justices indicated that they were not very sure of their ground, for they say in the Case that :

"In the absence of express authority to show that we were entitled upon such facts as were admitted or found by us as hereinbefore set forth to convict the defendant of the offence charged, we dismissed the information."

The admitted facts are that after closing hours the wife of the respondent supplied drink to a number of persons, but did not supply them for money, and two of the people who were so given drink were found drunk subsequently on the licensed premises at 1 a.m. I attach no importance to the fact that one had been previously on the premises as a customer, because I think the justices found that all these people were after closing time the guests of the respondent's wife. This case raises again the question whether with regard to the offences dealt with by ss. 12 to 18 of the Licensing Act, 1872, the hours of closing have anything to do with the matter at all. With regard to s. 12 we are concluded by authority. One authority, at least, shows that a person may be convicted under s. 12 if found drunk on the premises after licensed hours. As to s. 13 [repealed], there is the decision in *Thompson v. Mackenzie* (1). Then if we look at ss. 14 to 18 [repealed] I can see no reason why a distinction should be drawn between the hours when the sale of drink is lawful and the case when it is prohibited. The Act of 1872 is dealing in those sections with the locus in quo where certain things are not permitted in the interests of public order. I think that the justices ought to have convicted upon this evidence unless the respondent had satisfied them in accordance with s. 4 of the Licensing Act, 1902, that he took all reasonable steps to prevent

A drunkenness. The Scottish case of *Kessack v. Smith* (2) is exactly in point. I could not come to any other conclusion without disregarding the principle laid down in *Thompson v. Mackenzie* (1).

B **BIGHAM, J.**—I am of the same opinion. It is immaterial whether the men found drunk were guests or not or entered the premises before or after closing hours. They were in fact drunk on licensed premises. The respondent was *prima facie* guilty of the offence, and no attempt was made under s. 4 of the Licensing Act, 1902, to show that he took any means to prevent the drunkenness.

C **WALTON, J.**—I agree. I wish to add that I see no distinction for the purpose of the present case between s. 17 and s. 13 [now repealed]. Section 17 refers to, *inter alia*, gaming, and it was decided in *Hare v. Osborne* (3) that a licensed person was properly convicted where he entertained others at his own expense after closing hours and allowed them to gamble. I think that that case is directly in point.

Appeal allowed.

D Solicitors: *Meredith, Roberts & Mills*, for *W. W. Moses*, Sunderland; *A. B. Sanders*, for *W. Bell & Sons*, Sunderland.

[*Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.*]

E

F

WILLÉ v. ST. JOHN

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), February 4, 1910]

[Reported [1910] 1 Ch. 325; 79 L.J.Ch. 239; 102 L.T. 383;
26 T.L.R. 405; 54 Sol. Jo. 269]

G

Land Registration—Restrictive covenant—Effect of registration under Land Transfer Act, 1875 (38 & 39 Vict., c. 87), s. 84.

Mere registration of a restrictive covenant under s. 84 of the Land Transfer Act, 1875 [see now s. 40 of the Land Registration Act, 1925], does not by itself create a valid restrictive covenant entitling one purchaser to enforce it against another purchaser or against a common vendor.

H

Notes. The Land Transfer Act, 1875, has been repealed and is replaced by the Land Registration Act, 1925. Section 84 of the Act of 1875 corresponds to s. 40 of the Act of 1925.

As to the registration of restrictive covenants, see 23 HALSBURY'S LAWS (3rd Edn.) 302 et seq.; and for cases see 38 DIGEST (Repl.) 881 et seq. For the Land Registration Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 940.

I

Case referred to:

(1) *Ground Rent Development Co., Ltd. v. West*, [1902] 1 Ch. 674; 71 L.J.Ch. 354; 86 L.T. 403; 18 T.L.R. 430; 46 Sol. Jo. 378; 38 Digest (Repl.) 881, 918.

Also referred to in argument:

Reid v. Bickerstaff, ante p. 298; [1909] 2 Ch. 305; 78 L.J.Ch. 753; 100 L.T. 952, C.A.; 40 Digest (Repl.) 341, 2770.

Appeal from an order of WARRINGTON, J. ([1910] 1 Ch. 84), in an action brought by the plaintiff against the defendant claiming a mandatory injunction requiring a church in the process of being built by the defendant and others to be pulled down on the grounds that the building was in breach of a restrictive covenant. A

In April, 1903, C. H. C. Du Cane by virtue of the powers vested in him by the Settled Land Acts, 1882 to 1890, conveyed certain land at Streatham containing fourteen acres to M. Holmes in fee simple. And by the same deed M. Holmes, for himself, his heirs and assigns, covenanted with C. H. C. Du Cane, and with certain persons parties to the deed, who were therein described as being trustees of the lands conveyed for the purposes of the Settled Land Acts, their heirs and assigns, and the owners and owner for the time being of the Du Cane family estates at Streatham, to observe the stipulations contained in the first schedule to the deed so as to bind the hereditaments thereby conveyed into whosoever hands the same should come. The first schedule contained several covenants, among which was the following: B

“(iv) No building shall be erected on any part of the land hereby conveyed other than private dwelling-houses (provided that the term ‘private dwelling-houses’ shall not include workmen’s flats), except that” C

certain parts of the land might be used for the erection of shops. In August of the same year M. Holmes caused himself to be entered upon the register of the Land Registry as proprietor of the land with a possessory title, but no notice of any of the covenants contained in the conveyance of April, 1903, was then entered upon the register. In April, 1905, M. Holmes sold to the plaintiff a small part of the fourteen acres facing the Ellison Road, and by a deed dated April 6, 1905, he conveyed the plot to the plaintiff in fee simple, at the same time executing a transfer which was entered upon the register on April 12, 1905. The conveyance contained a covenant by the plaintiff to observe a stipulation in the same terms as those of number (iv) above, as to buildings on the land contained in the conveyance of April, 1903, on the part of Holmes, and certain other stipulations not contained in that conveyance, but imposed by Holmes upon the land for the first time. These were entered upon the register with the instrument of transfer. On the same day Holmes caused restrictive conditions which were in terms the same as the negative stipulations contained in the conveyance of April, 1903, to be entered on the land register in respect of his land under s. 84 of the Land Transfer Act, 1874, as amended by the first schedule of the Land Transfer Act, 1897. D

In 1907 Holmes sold a plot, being a further part of the fourteen acres adjoining the plot sold to the plaintiff and also facing the Ellison Road, to the defendants E. St. John, P. E. Amigo, W. F. Brown, and J. Butt, and by a deed, dated June 26, 1907, which recited the covenant to observe the said stipulations on the part of Holmes contained in the schedule to the conveyance of April, 1903, he and his mortgagees conveyed the plot to these defendants in fee simple, subject to the stipulations contained in that schedule so far as such stipulations related to the plot of land conveyed and remained to be observed and performed. This was necessary as the consent of the Du Cane trustees to any relaxation of the covenants entered into by Holmes had not been obtained. By the same deed Holmes covenanted with the purchasers that he would not raise any objection or concur in any objection being raised to a church being erected by the purchasers on the piece of land thereby conveyed, with or without a clergyman’s residence, if the purchasers should think proper so to do. The defendants acquired the land for the purpose of building a Roman Catholic Church. Hearing of their proposal, the plaintiff gave them notice that he objected to their carrying it out. The defendants, however, began to build the church, and thereupon the plaintiff brought this action against them and Holmes, claiming an order directing the first-named defendants to pull down the building, and an injunction to restrain them from erecting a church or chapel, and in the alternative damages for breach of that stipulation. The plaintiff also alleged a representation and warranty by Holmes of the existence E

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A of a building scheme, and claimed damages against him in the alternative. WARRINGTON, J., held that there was no evidence of any building scheme, and also that s. 84 of the Land Transfer Act, 1875 [now repealed], did not create any liabilities upon or give any rights to the purchasers from Holmes inter se, but only gave notice to them of the negative stipulations upon the register so far as the same were already imposed and affected the land in respect of which they were registered.

Watt for the plaintiff.

Rowden, K.C., and A. Adams for the defendant, Holmes.

P. S. Stokes for the other defendants.

C **SIR HERBERT COZENS-HARDY, M.R.**—In my opinion the judgment of WARRINGTON, J., is perfectly right. The question really turns upon the true construction of s. 84 of the Land Transfer Act, 1875 [now repealed]. In order to deal with that section, one must remember that at the date of that enactment it was settled law that restrictive negative covenants could be imposed upon land which would bind not merely the covenantor, but persons claiming under the covenantor with notice of the covenant. One must remember, further, that it was also settled law that a mere covenant of that kind did not confer any rights as between purchasers from the covenantor unless what was called a building scheme was made out. Then the object of s. 84, which provides for the registration of titles, was to enable a man who buys land as to which restrictive covenants have been entered into to put notice of the conditions imposed by the covenants on the register; and ordinarily it is his duty to do so. But the suggestion that s. 84 creates a condition merely by putting something on the register is entirely without foundation, and goes altogether beyond the scope and object of the section. The section, reading it shortly, says:

F “Where any land is about to be registered or any registered land is about to be transferred to a purchaser for valuable consideration there may be annexed thereto a condition that such land or any specified portion thereof is not to be built on, or is to be or is not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land, and the first proprietor and every transferee and every other person deriving title from him shall be deemed to be affected with notice of such condition.”

G That was amended by the Land Transfer Act, 1897, Sched. 1, which says that that condition may be annexed to the land at any time. That is to say, you may have a case in which a man is a registered owner and he may enter into a covenant with his neighbour that certain things shall not be done on the land, and notice of that may be put on the register. Or, again, you may have a case in which a man who has entered into a restrictive covenant is on the register without any condition, and he may subsequently put on the register the condition imposed by the covenant as a condition annexed to the land. In the present case Holmes has entered into a restrictive covenant with the owners of the Du Cane estate. Holmes bought a plot of land of fourteen acres. In his first registration no notice was put on the register of this restrictive covenant—whether at the suggestion of the registrar I know not and care not—but Holmes, being minded to do that which, in my opinion, it was clearly right for him to do, on April 6, 1905, caused to be entered on the register the fact of the existence of the restrictive conditions, which were binding as between himself and the Du Cane trustees. That was notice that those conditions did affect the land as between Holmes and the Du Cane trustees or persons claiming under them. But to say that the effect of this registration was to constitute a building scheme, or to entitle any one purchaser from Holmes to assert against another purchaser or against Holmes that the land ought to be as between them subject to these conditions, is to go beyond anything to be found in the section, and is inconsistent with every principle of law. It would be a most serious

blot upon the Registration Acts if by merely giving notice of conditions of this kind the landowners were to produce the same consequences as would have followed in case there had been a building scheme. A

Then it is said that there is something in the judgment of KEKEWICH, J., in *Ground Rent Development Co., Ltd. v. West* (1) which assists the plaintiff. I cannot myself find anything of the kind. There upon a purchase of land certain restrictions affecting the land had been imposed by covenant upon the purchaser, and an application was made to the court under the concluding words of s. 84 of the Land Transfer Act, 1875, to release those restrictions on the ground that it would be beneficial to all parties. That case lends no colour to the suggestion that the mere entry of the fact, which is the truth, that the land was subject to those conditions as between Holmes and the Du Cane trustees was to make the land subject to the same conditions as between one purchaser and another purchaser from Holmes. B C

FLETCHER MOULTON, L.J.—I am of the same opinion. I think that s. 84 was not intended to extend the rights of one purchaser against another where there are not contractual rights between them. I think it was only intended to make an entry on the register of restrictive covenants as effective in every way as notice of the covenant would have been. D

BUCKLEY, L.J.—I agree.

Solicitors: *Webster & Webster; Clowes, Hickley & Steward; Fooks, Chadwick, Arnold & Chadwick.* E

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

R. v. BAINES and ANOTHER

[KING'S BENCH DIVISION (Bigham and Walton, JJ.), November 18, 1908] F

[Reported [1909] 1 K.B. 258; 78 L.J.K.B. 119; 100 L.T. 78; 25 T.L.R. 79; 21 Cox, C.C. 756; 72 J.P. 524; 53 Sol. Jo. 101] G

Practice—Subpoena—Setting aside—Process used for improper purpose—Witness unable to give any relevant evidence. H

The court has jurisdiction to set aside a subpoena where it is satisfied that the process of the court is being used for improper purposes. A subpoena will be set aside if the witness cannot give any relevant evidence and the process was issued, not to obtain relevant evidence, but for some improper purpose.

Per WALTON, J., "This case, however, must not be taken as a precedent for establishing a rule that persons summoned on subpoena can, by simply swearing that they can give no relevant evidence, get the subpoena set aside." I

Per WALTON, J., "Our decision will in no way interfere with the power of the judge at the assizes to make an order for the applicants to attend if anything arises at the trial to lead him to think that their attendance is necessary . . ."

Notes. As to subpoena ad testificandum in general, see 15 HALSBURY'S LAWS (3rd Edn.) 424 et seq.; and for cases see 22 DIGEST (Repl.) 414 et seq.

A Cases referred to in argument :

Steele v. Savory (1891), 8 T.L.R. 94; 36 Sol. Jo. 92; 22 Digest (Repl.) 422, 4574.

Re Mundell, Fenton v. Cumberlege (1883), 52 L.J.Ch. 756; 48 L.T. 776; 22 Digest (Repl.) 414, 4463.

B Rule Nisi calling on the defendants to show cause why certain subpoenas issued on behalf of the defence commanding the applicants, the Right Honourable Herbert Henry Asquith and the Right Honourable Herbert John Gladstone, to appear and testify at the assizes then being held at Leeds upon the trial of an indictment against Jennie Baines and Alfred Kitson for breach of the peace and unlawful assembly, should not be set aside on the ground that the issue of such writ was an abuse of the process of the court.

C The applicants for the rule were respectively the Prime Minister and the Home Secretary, and from the affidavits the facts were as follows. On Oct. 10, 1908, a large meeting was held at the Coliseum, Leeds, and the applicants were present at that meeting, occupying seats on the front of a platform about sixty feet from two doors which opened into the street. These doors, which were between four and five feet wide, had each two glass panels about a foot wide and were closed. It was alleged on behalf of the defendants that it was possible from the front of the platform where the applicants were sitting to see through the panels into the street in broad daylight. The meeting was held in daylight. The charge against the defendants was that they with other persons unlawfully assembled in the street in front of the doors at the time of the meeting. The evidence for the prosecution was that there was a rush of several hundreds of people from the street to the front door of the hall, and the defendants suggested that the applicants from the position which they occupied on the platform saw what was going on in the street, and that they must have heard what was said in the street. It also appeared that each applicant wrote to the solicitor for the defendant Baines to the effect that he did not see anything from the platform of the Coliseum which would enable him to give any relevant evidence at the trial of the defendants, and that he saw nothing of what went on in the street outside.

F In an affidavit upon which the rule was obtained, the Prime Minister said, *inter alia*, that he was wholly unable to give any evidence which could possibly be relevant to any issue which could arise upon the trial of the defendants and that he had so informed the defendant's solicitor; and that no application had been made to him by or on behalf of the defendants or their solicitor for any proof of any evidence to be given by him; and that for a long time past the defendants and others associated with them had been carrying on a public agitation in favour of the extension of the Parliamentary suffrage to women and had adopted many means of attracting attention and of obtaining notoriety, one of such means being to subject himself and other Ministers of the Crown to personal annoyance in public places and to interrupt the performance of their public duties; and that he verily believed that the subpoena had been served on him for the purposes of vexation and to bring the defendants and their agitation into further notoriety; and that his attendance at the trial would involve a serious interruption of the performance of his duties as a Minister of the Crown. Mr. Gladstone also made an affidavit in the same terms.

G I *Pethick Lawrence*, for the defendant Baines, showed cause.

E. G. Palmer for the defendant Kitson.

The Attorney-General (Sir William S. Robson, K.C.), the Solicitor-General (Sir Samuel Evans, K.C.), and Rowlatt with him, in support of the rule.

BIGHAM, J.—I think that this rule must be made absolute. There can be no doubt at all as to the jurisdiction of this court to interfere in a case where it is satisfied that the process of the court is being used for improper purposes. It must not be supposed that the positions which the applicants hold afford them

any privilege in this matter. They stand in the same position as any other
of His Majesty's subjects, but we have to consider whether the process that has
been issued against them has been issued with the object of obtaining, and with
the expectation, on reasonable grounds, of obtaining, from them evidence which
can be relevant to the charge. What are the facts? The applicants appear to
have been present at a meeting in Leeds at the Coliseum. They were seated
on the front of the platform, and were about sixty feet away from the closed
doors which formed the entrance from the street into the hall, and the doors
have been described as having glass panels in them. The charge against the
defendants was that they had caused a riot and breach of the peace in the
street during the meeting, and it is suggested that the applicants from the posi-
tions which they occupied on the platform saw what was going on in the
street, and that they must have heard what was said in the street, and upon
these grounds it is said that their evidence may be important at this inquiry
at Leeds Assizes. I do not believe, as a matter of fact, that they either saw
or could have seen or heard anything which could be relevant to the inquiry
which is to be held before the judge at the assizes. I have before me the
affidavits of the applicants, in which they both swear that they are wholly
unable to give any evidence which can possibly be relevant to any issue which
can arise at the trial. I accept that statement. I believe it to be true, and
if it is true it would be idle and a waste of time and money to require them
to go to Leeds to give evidence. They further say in their affidavits that no
application had been made to them by or on behalf of the defendants or their
solicitor for any proof of any evidence to be given by them. That statement
satisfies me that this process has not been issued for the simple and proper
purpose of obtaining evidence. It has been issued for a different purpose, a
purpose which is immaterial and one to which the process of this court ought
not to be applied. It is sufficient for me to say, first, that I am satisfied that
neither of the applicants can give any relevant evidence; and, secondly, that
this process has not been issued for the purpose of obtaining relevant evidence,
but for other purpose about which it is not necessary for me to say anything.

WALTON, J.—I agree. I think there is no distinction on this point between
civil and criminal proceedings, and there is no doubt as to the jurisdiction of
this court, as the old Queen's Bench had full jurisdiction over criminal proceedings.
This case, however, must not be taken as a precedent for establishing a rule
that persons summoned on subpoena can, by simply swearing that they can give
no relevant evidence, get the subpoena set aside. Ministers of the Crown have
no special privilege. But I am satisfied that these subpoenas are not really and
bona fide required for the purpose of obtaining any evidence which can be
relevant to any issue which may arise on the trial of the indictment against
the defendants. Our decision will in no way interfere with the power of the
judge at the assizes to make an order for the applicants to attend if anything
arises at the trial to lead him to think that their attendance is necessary, although
I cannot see how anything can arise to induce him to think so.

Rule absolute.

Solicitor: *Treasury Solicitor; W. Dodgson, Leeds; Lawrence Jones & Co.*

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

A

PLUMPTON AND ANOTHER v. BURKINSHAW

[COURT OF APPEAL (Sir Gorell Barnes, P., Fletcher Moulton and Farwell, L.J.J.),
May 21, 22, 1908]

B

[Reported [1908] 2 K.B. 572; 77 L.J.K.B. 961; 99 L.T. 415;
24 T.L.R. 642; 52 Sol. Jo. 533]

Mentally Disordered Person—Incapable of carrying on own affairs—Appointment by order of the court of person to carry on business—Personal liability of appointee for goods supplied to the business—Lunacy Act, 1890 (53 and 54 Vict., c. 5), ss. 116, 120, 124.

C

A person appointed under s. 116 of the Lunacy Act, 1890 [repealed], to carry on the business of a person who is incapable of managing his own affairs is not personally liable upon contracts made in the course of carrying on the business unless such contracts were made upon the terms that he should be personally liable.

D

Notes. The Lunacy Act, 1890, has been repealed and replaced by the Mental Health Act, 1959. The provisions corresponding to ss. 116, 120 and 124 of the 1890 Act, are to be found in ss. 100 to 121 of the 1959 Act.

Referred to: *Whinney v. Moss Steamship Co.* (1910), 15 Com. Cas. 316; *Re E.G.*, [1914] 1 Ch. 927.

As to the management of a patient's property and affairs, see 29 HALSBURY'S LAWS (3rd Edn.) 565 et seq.; and for cases see 33 DIGEST 189 et seq. For the Mental Health Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 961.

E

Cases referred to:

(1) *Burt, Boulton and Hayward v. Bull*, [1895] 1 Q.B. 276; 64 L.J.Q.B. 232; 71 L.T. 810; 43 W.R. 180; 11 T.L.R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65, C.A.; 10 Digest (Repl.) 834, 5463.

F

(2) *Owen & Co. v. Cronk*, [1895] 1 Q.B. 265; 64 L.J.Q.B. 288; 11 T.L.R. 76; 2 Mans. 115; 14 R. 229, C.A.; 10 Digest (Repl.) 821, 5366.

Also referred to in argument:

Isaacs v. Chinery (1896), 74 L.T. 320; 12 T.L.R. 302, N.P.; 33 Digest 212, 1187.

G

Appeal from an order of SUTTON, J., in an action brought by the plaintiffs against the defendant, William Parker Burkinshaw, to recover the sum of £416 the balance of the price of goods sold and delivered.

For some years prior to April 1st, 1901, Arthur Ellershaw, carried on business as J. Ellershaw & Sons, and there had been numerous dealings between him and the plaintiffs, who were a firm of oil and seed merchants. In 1901 Arthur Ellershaw became incapable of managing his affairs, and on April 1, 1901, a master in lunacy made an order under the Lunacy Act, 1890, which appointed the defendant

H

“to exercise as regards the estate of the said Arthur Ellershaw the powers of a committee of the estate, as in the case of a person of unsound mind so found by inquisition, and to carry on the business of the said Arthur Ellershaw, and for that purpose to employ the assets of the said Arthur Ellershaw, and that he be at liberty to pay the premiums payable to such guarantee society as the said masters shall accept as his security out of the estate of the said Arthur Ellershaw.”

I

On April 3, 1901, Arthur Ellershaw's solicitors wrote the following letter to the plaintiffs:

“Re Mr. Arthur Ellershaw.—Gentlemen,—We beg to inform you that, on Monday the 1st inst., Mr. William Parker Burkinshaw of this city was, subject to the completion of his security, authorised by the court to carry on the business of Mr. Arthur Ellershaw and for that purpose to employ his assets,

and to exercise as regards the estate of that gentleman all the powers of a committee of the estate." A

In pursuance of the order the defendant, who was a chartered accountant, completed his security, and carried on the business of Arthur Ellershaw, and from April, 1901, to October, 1907, the plaintiffs continued to deal with the firm of J. Ellershaw & Sons, and supplied goods upon orders given in the name of the firm, and a balance of £416 became due to the plaintiffs. The plaintiffs then brought this action against the defendant, claiming that he was personally liable to pay for the goods supplied to the business which he was carrying on under the order made in April, 1901. *Sutton, J.*, gave judgment for the defendant. B

By s. 116 of the Lunacy Act, 1890 :

"(1) The powers and provisions of this part of this Act relating to management and administration apply: (d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs. (2) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge." C

By s. 120 :

"The judge may, by order, authorise and direct the committee of the estate of a lunatic to do all or any of the following things: (e) Carry on any trade or business of the lunatic." D

By s. 124 :

"The committee of the estate, or such person as the judge approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and things shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject." E

Mark Romer, K.C., and *A. P. Longstaffe* for the plaintiffs.

Scott-Fox, K.C., and *A. Adair Roche* for the defendant. F

SIR GORELL BARNES, P.—I think that the judgment of the learned judge must be affirmed. This action was brought in these circumstances. [His Lordship having then summarised the facts and arguments and read the sections above set out, continued:] The point made on behalf of the plaintiffs is that the defendant is personally liable because he carried on this business in the name of J. Ellershaw & Sons, and that the plaintiffs who supplied goods to the firm are, therefore, entitled to sue the defendant personally. The answer to that is that, by virtue of the statute, the defendant was not personally carrying on the business so as to be personally liable, but was carrying on the business on behalf of the person incapable of managing his affairs, that is, in other words, that he was merely substituted for that person. That, in my opinion, leaves a simple point to be decided. There is no suggestion in this case that there was anything to show that the defendant expressly undertook any personal obligation. As soon as he was appointed, a circular was sent to the plaintiffs informing them that the defendant was G

"authorised by the court to carry on the business of Mr. Arthur Ellershaw, and for that purpose to employ his assets, and to exercise as regards the estate of that gentleman all the powers of a committee of the estate." H

I

- A That being so, there was a clear intimation to the plaintiffs that the defendant was only carrying on the business under the powers given by the statute and the order. The only question, therefore, is whether by the effect of the statute the defendant has incurred any personal liability by carrying on the business under the order. In my opinion the matter is plain and clear, and the defendant is in the position, not of a person who is responsible personally, but of a person who is acting for
- B and in the name of the person incapable of managing his own affairs. That view settles this case, unless there is some binding authority to the contrary. The only case relied upon for the plaintiffs is *Burt, Boulton and Hayward v. Bull* (1). That case was an entirely different one. There the defendant had been appointed by the court, in an action by debenture-holders, receiver and manager of the business of a company with various powers, and he was held to be personally liable to pay
- C for goods supplied to the business because he was not agent for anyone. The ground upon which it is said that that case covers the present case is that the words used by LORD ESHER, M.R., are wide enough to cover the present case. That language, however, was used with reference to the facts of that case where it was held that the defendant could not be said to be acting as agent only, but was acting as principal so as to render himself personally liable. Here we are dealing
- D with a case where special powers are given by the Act of Parliament to the person appointed to carry on the business of another, and it is quite distinguishable from the case referred to. This appeal, therefore, fails and must be dismissed.

- FLETCHER MOULTON, L.J.**—I am of the same opinion. This case reduces itself to a short point of law. No question has been raised of the defendant having
- E held himself out as being personally liable in respect of contracts made in the course of carrying on the business, if his legal position has not made him so liable, because the defendants were at once informed of his position under the order made under the Lunacy Act in April, 1901. We have, therefore, to consider what is the position of a person who is appointed, as the defendant was, under s. 116 of the Lunacy Act, 1890, to carry on the business of a person incapable of managing his
- F affairs. In my opinion, the provisions of s. 116 (2) and of s. 124 [now repealed] make it perfectly clear that such a person acts on behalf of the person who is incapable of managing his affairs. In other words he is really an agent appointed by the tribunal which has statutory power to do so. This case, therefore, in my opinion, belongs to the class of cases of which *Owen & Co. v. Cronk* (2) is an example, and not to the class of cases to which *Burt, Boulton and Hayward v. Bull* (1) belongs. I agree, therefore, that this appeal must be dismissed.
- G

- FARWELL, L.J.**—I agree. The cases to which reference has been made seem to me to rest upon two principles. The first principle is that it takes two parties to make a contract, and the other principle is that where a person contracts as agent for another he does not become personally liable. The first principle explains
- H the decision in *Burt, Boulton and Hayward v. Bull* (1). In that case the facts were that the defendant was appointed by the court in an action by debenture-holders, to be receiver and manager of the business of a company and was held to be personally liable for goods supplied for the purposes of the business because he was not the agent of the company, and the relation of principal and agent could not exist between him and the court. The other proposition explains the decision in
- I *Owen & Co. v. Cronk* (2) and applies to the present case. In both the contract was made by a person acting as agent for another. In such cases the elementary rule applies that an agent acting for another is not personally liable. This appeal, therefore, fails, and the judgment of SUTTON, J., must be affirmed.

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co.*, for *W. J. Stuart*, Hull; *Cunliffes & Davenport*, for *Moss, Lowe & Co.*, Hull.

[Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.]

R. v. MERIONETH JUSTICES. Ex parte KISBEY

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Sutton, JJ.),
June 2, 1908]

[Reported 99 L.T. 89; 72 J.P. 389]

Licensing—Transfer—Power of justices to order structural alteration in premises—Licensing Act, 1902 (2 Edw. 7, c. 28), s. 11 (4).

On an application for the transfer of a licence the justices had no power under s. 11 of the Licensing Act, 1902, to order structural alterations in the licensed premises.

Notes. Section 11 of the Licensing Act, 1902, has been repealed. The provisions dealing with procedure and powers on renewal of a licence are now contained in ss. 11-19, of the Licensing Act, 1953, and on transfer of a licence in ss. 20-28 of the same Act, as amended by the Licensing Act, 1961.

As to order for alteration of premises, see 22 HALSBURY'S LAWS (3rd Edn.) 558, 564; and for cases see 30 DIGEST (Repl.) 48. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142. For the Licensing Act, 1961, see 41 HALSBURY'S STATUTES (2nd Edn.) 556.

Cases referred to:

- (1) *Bushell v. Hammond*, [1904] 2 K.B. 563; 73 L.J.K.B. 1005; 91 L.T. 1; 68 J.P. 370; 52 W.R. 453; 20 T.L.R. 413, C.A.; 30 Digest (Repl.) 48, 363.
- (2) *Smith v. Portsmouth Justices*, [1906] 2 K.B. 229; 75 L.J.K.B. 851; 70 J.P. 497; 54 W.R. 598; 22 T.L.R. 650; 50 Sol. Jo. 575; sub nom. *Smith v. Couzens*, etc. *Portsmouth Licensing Justices*, 95 L.T. 5, C.A.; 30 Digest (Repl.) 48, 364.

Cause Shown against a rule nisi for a writ of certiorari to bring up an order made by justices at a special sessions for licensing purposes, whereby, upon the application for the transfer of the licence of the Queen's Hotel, Blaenau-Festiniog, from one Wild, to the applicant, it was ordered under s. 11 of the Licensing Act, 1902, that the door of a certain bar connected and communicating with the hotel, and known as "The Vaults," should be closed. The ground for the application was that the justices acted ultra vires in attempting under s. 11 (4) of the Licensing Act, 1902, to impose a term by making an order, or purporting to make an order under that section, the section providing that such order should be made by the general annual licensing meeting on renewal, and not by justices on transfer at special sessions. The justices had held that upon the construction of s. 11 (2) and (4) of the Licensing Act, 1902, and the cases of *Bushell v. Hammond* (1), and *Smith v. Portsmouth Justices* (2) it was within the province of the court in the exercise of their discretion to make such an order at transfer sessions. By s. 11 (4) of the Licensing Act, 1902:

"On any application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may require a plan of the premises to be produced before them, and to be deposited with their clerk, and, on renewing any such licence, they may, by order, direct that within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed, but any such order shall be subject to an appeal to a Court of Quarter Session, as provided by the Alehouse Act, 1828, and if any such order for structural alterations is made and complied with, no further requisition for

A the structural alteration of the premises shall be made within the next five years."

George Elliott, Fitch, and R. A. Griffiths for the appellant.

The justices did not appear.

B **LORD ALVERSTONE, C.J.**—As to what are the powers of justices at renewal sessions I express no opinion. I know the decisions in *Bushell v. Hammond* (1) and in *Smith v. Portsmouth Justices* (2), where *Bushell v. Hammond* (1) was thought to be distinguished. This was an application for a transfer of the licence, and is not within the words of s. 11 (4) of the Licensing Act, 1902—namely, "On any application for the renewal of a licence." The justices, therefore, had no jurisdiction to order structural alterations.

C **DARLING and SUTTON, JJ.**, concurred.

Rule absolute.

Solicitors: *Robbins, Billing & Co.*, for *R. O. Jones & Davies*, Blaenau-Festiniog.

D [Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.]

E

NEW MOSS COLLIERY, LTD. v. MANCHESTER CORPORATION

F [HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Robertson, Lord Atkinson and Lord Collins), January 30, 31, February 6, 7, 28, 1908]

[Reported [1908] A.C. 117; 77 L.J.Ch. 392; 98 L.T. 467;
72 J.P. 169; 24 T.L.R. 386; 6 L.G.R. 809; 52 Sol. Jo. 334]

G *Land—Right to support—Common law right—Effect of Waterworks Clauses Act, 1847* (10 & 11 Vict., c. 17).

H The respondents, under a power given by a special Act, purchased by agreement two adjacent parcels of land from two different owners in order to construct waterworks. The surface of the first parcel was conveyed together with all mines and minerals beneath it. Only the surface of the second parcel was conveyed, the vendor reserving the right to work the minerals without making compensation. The appellants, who were the owners of the minerals, gave notice to the respondents under the Water Clauses Act, 1847 [repealed] of their intention to work their mines within 40 yards of the waterworks. The respondents gave no counter-notice and did not claim any right to compensation under the Act. The appellants, while working the mine in the proper and usual manner, caused subsidences on the first parcel of land, and the respondents claimed damages and an injunction on the ground that there had been an interference with their easement of lateral support from the adjacent land of the appellants. The appellants contended that the provisions of the Water Clauses Act, 1847, had superseded the pre-existing common law rights including the right to support of the surface, and, as the respondents had not observed the procedure set out in the Act, they could not succeed.

I **Held:** the respondents were entitled to the common law right of lateral support from the appellants' adjacent land, that right not having been destroyed by the Act.

Notes. The Waterworks Clauses Act, 1847, has been repealed and replaced by the Water Act, 1945. Section 22 of the 1847 Act now corresponds to ss. 13 and 14 of the Third Schedule to the 1945 Act. A

Distinguished: *Howley Park Coal and Cannel Co. v. London and North Western Rail. Co.*, [1911-13] All E.R.Rep. 432. Considered: *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, [1931] 1 Ch. 145; Applied: *Wath-upon-Deerne U.D.C. v. Brown and Co.*, [1935] All E.R.Rep. 127; *Hargreaves Ltd.'s Executors v. Burnley Corpn.*, [1936] 3 All E.R. 959; Referred to: *Joicey v. North Eastern Rail. Co.* (1906), 76 L.J.K.B. 253; *Jary v. Barnsley Corpn.*, [1907] 2 Ch. 600; *Newcastle-under-Lyme Corpn. v. Wolstanton, Ltd.*, [1947] 1 All E.R. 218. B

As to the right of support in respect of mines in general, see 26 HALSBURY'S LAWS (3rd Edn.) 339 et seq.; and for cases see 34 DIGEST 700 et seq. For the Waterworks Clauses Act, 1847, see 26 HALSBURY'S STATUTES (2nd Edn.) 729. For the Water Act, 1945, see *ibid.* 786. C

Case referred to:

- (1) *Great Western Rail. Co. v. Bennett* (1867), L.R. 2, H.L. 27; 36 L.J.Q.B. 133; 16 L.T. 186; 15 W.R. 647, H.L.; 11 Digest (Repl.) 164, 375. D

Also referred to in argument:

Eden v. North Eastern Rail. Co., [1907] A.C. 400; 76 L.J.K.B. 940; 97 L.T. 254; 71 J.P. 450; 23 T.L.R. 685; 51 Sol. Jo. 623, H.L.; 11 Digest (Repl.) 170, 403.

Pountney v. Clayton (1883), 11 Q.B.D. 820; 52 L.J.Q.B. 566; 49 L.T. 233; 47 J.P. 788; 31 W.R. 664, C.A.; 11 Digest (Repl.) 302, 2088. E

Elliot v. North Eastern Rail. Co. (1863), 10 H.L.Cas. 333; 2 New Rep. 87; 32 L.J.Ch. 402; 8 L.T. 337; 27 J.P. 564; 9 Jur.N.S. 555; 11 W.R. 604; 11 E.R. 1055, H.L.; 11 Digest (Repl.) 172, 420.

Glasgow Corpn. v. Farie (1888), 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274; 37 W.R. 627; 4 T.L.R. 781, H.L.; 11 Digest (Repl.) 163, 363. F

Holliday v. Wakefield Corpn., [1891] A.C. 81; 60 L.J.Q.B. 361; 64 L.T. 1; 40 W.R. 129; 7 T.L.R. 153, H.L.; 11 Digest (Repl.) 170, 407.

Dixon v. Caledonian and Glasgow and South Western Rail. Cos. (1880), 5 App. Cas. 820; 43 L.T. 513, 45 J.P. 108; 29 W.R. 249, H.L.; 11 Digest (Repl.) 168, 395.

Caledonian Rail. Co. v. Sprot (1856), 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 11 Digest (Repl.) 175, 434. G

Re Lord Gerard and London and North Western Rail. Co., [1895] 1 Q.B. 459; 64 L.J.Q.B. 260; 72 L.T. 142; 43 W.R. 374; 11 T.L.R. 170; 14 R. 201, C.A.; 11 Digest (Repl.) 163, 365.

Ruabon Brick and Terra Cotta Co. v. Great Western Rail. Co., [1893] 1 Ch. 427; 62 L.J.Ch. 483; 68 L.T. 110; 41 W.R. 418; 9 T.L.R. 121; 2 R. 237, C.A.; 11 Digest (Repl.) 168, 393. H

Great Western Rail. Co. v. Fletcher (1860), 5 H. & N. 689; 2 L.T. 803; 6 Jur. N.S. 961; 8 W.R. 501; 157 E.R. 1355; sub nom. *Fletcher v. Great Western Rail. Co.*, 29 L.J.Ex. 253; 24 J.P. 516, Ex. Ch.; 11 Digest (Repl.) 164, 373.

Consett Waterworks Co. v. Ritson (1889), 22 Q.B.D. 318; 60 L.T. 360; 53 J.P. 373; reversed, 22 Q.B.D. 702; 64 L.J.Ch. 293, n.; 124 L.T. 818, n.; 59 J.P. 199; 43 W.R. 122, n.; 5 T.L.R. 435; 13 R. 123, n.; [1922] 2 Ch. 187, n., C.A.; 11 Digest (Repl.) 165, 381. I

Midland Rail. Co. v. Miles (1885), 30 Ch.D. 634; 55 L.J.Ch. 251; 53 L.T. 381; 34 W.R. 136.

Appeal by the defendants in the action from a decision of the Court of Appeal (VAUGHAN WILLIAMS, ROMER and COZENS-HARDY, L.JJ.), reported [1906] 2 Ch. 566, reversing a judgment of FARWELL, J., reported [1906] 1 Ch. 278, in favour of the

A defendants, in an action brought by the plaintiffs for infringement of the plaintiffs' right to lateral support from adjacent land mined by the defendants.

Cripps, K.C., Upjohn, K.C., and MacSwinney for the appellants.

Sir R. Finlay, K.C., C. E. Jenkins, K.C., and H. F. Moulton for the respondents.

Their Lordships took time for consideration.

B Feb. 28, 1908. The following opinions were read.

LORD LOREBURN, L.C.—The facts upon which this appeal depends are simple. The corporation of Manchester desired to construct waterworks, and for that purpose purchased two pieces of land under their special Act, which gave them power to purchase by agreement, but not compulsorily. The first piece of land they bought from Lord Stamford. It is coloured yellow on the plan. In this conveyance only the surface was granted to the corporation, and the vendor reserved the right to work the minerals without making compensation. The second piece of land was bought from Mr. Taylor. It is coloured pink on the plan, and the conveyance included both the surface and all mines and minerals underneath. In time the waterworks were constructed, covering part of this pink land, and now the owner of minerals beneath the yellow land is excavating his minerals so as to damage the natural surface of the pink land. The excavations which do this damage are partly outside and partly inside a belt of forty yards in width round the works of the Manchester Corporation. Before excavating within the forty yards belt the mine owners under the yellow land gave to the corporation a notice under s. 22 of the Waterworks Clauses Act, 1847. No counter-notice was given. In these circumstances the question to be decided is: Whether the mine owners ought to be restrained from mining so as to damage the pink land, first, as to mines under the yellow land within the forty yards belt; secondly, as to mines under the yellow land outside the forty yards belt?

In my opinion the Court of Appeal was right in granting an injunction under both these heads. It was urged in argument that the mine owners were entitled to do what they had been doing by virtue of the Waterworks Clauses Act, 1847. That Act provides that in the case of a purchase under the compulsory powers of a special Act all mines should be deemed to be excepted in the conveyance of such land unless they shall have been expressly referred to therein and conveyed thereby. The House of Lords have decided in *Great Western Rail. Co. v. Bennett* (1) upon similar railway clauses that the statutory purchaser in such case cannot claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters by which alone rights of the company and the mineowners are regulated. In that case the question was between undertakers who had purchased the surface compulsorily and the vendor who had retained the minerals. I cannot see what relevancy that decision has to the present case. Here the purchase of the pink land was voluntary, and the Manchester Corporation had no power to buy compulsorily. Further, in buying the pink land the corporation bought not only the surface, but also the minerals underneath, and bought therewith the right to lateral support from the yellow land which the pink land had always possessed. I do not understand how a decision as to the rights created between vendor and purchaser upon the separation of surface from underlying minerals can govern the rights between the owners of two plots of land between whom there is no privity of contract. The Waterworks Clauses Act, 1847, also contains cll. 22 and 23, which, in the absence of agreement, require the owner of any mines or minerals beneath or within a prescribed distance of the undertakers' works, or, if no distance is prescribed, then within forty yards, to give notice to the undertakers before he works the same, and the undertakers may buy the necessary support on paying suitable compensation. If they do not give such

notice, then certain consequences follow to which I will advert presently. No doubt the present appellants were bound to give notice under s. 22. But what is the consequence of their having done so and no counter-notice having been given? For that we must look to s. 23. It seems to me that the effect of s. 23 is as follows. The mine owner is authorised to work into the belt as if the Act of 1847 and the special Act had not been passed. That is to say, if he has, apart from the Acts, a right to let down the surface, he may do so. If he has no such right then the Acts do not enable him to do so. In any case he must not wilfully damage the works or work his mines in an unusual way. A B

If these Acts had not been passed the owner of the pink land would have had indisputably a right of lateral support to his surface in its natural state against the owner of minerals beneath the yellow land, and I am quite unable to see how this right has been destroyed. It was strenuously argued by counsel for the appellants that the Waterworks Clauses Act, 1847, operates to obliterate all pre-existing right to support of the surface from minerals either subjacent or adjacent to the works, whenever lands are purchased by virtue of the Act. I can see no ground for such a contention. It would involve a free gift to neighbouring mineral owners of a most valuable right, and a ruinous withdrawal from the undertakers of rights most essential to the safe maintenance of waterworks, without compensation, and, so far as I can see, without reason. The legislature might do such a thing no doubt, but I find nothing in the Act that says this, even indirectly. Nor do I find any judicial authority for it antecedent to the decision of FARWELL, J. The argument of counsel for the appellants when analysed really amounted to this, that because a conveyance under the Act of surface leaving minerals in the hands of the vendor does not confer upon the surface a right to support, therefore, whenever any land is bought by undertakers by virtue of the Act, every easement for support heretofore attaching to it, whether vertical or lateral, is destroyed. I shall not so hold unless directed by an Act of Parliament, or by authority which I am compelled to follow. Accordingly I am of opinion that the pink land still enjoys the right of support for the natural surface against the yellow land which it always possessed, and that the decision of the Court of Appeal was right. C D E F

LORD MACNAGHTEN, LORD JAMES OF HEREFORD, and LORD ROBERTSON concurred.

LORD ATKINSON.—I concur in thinking that this appeal should be dismissed. The facts have been already fully stated, and it is unnecessary to repeat them. The decision of the case turns mainly on the construction of sections of the Waterworks Clauses Act, 1847, and the determination of the subject-matter to which those sections apply. Section 18 obviously deals with the owner of those mines which lie under land sold by him to the undertakers. Sections 22 and 23 are wider in their scope, and deal with three classes of mine owners: (i) Those who own mines which lie under the works and buildings of the undertakers. (ii) Those who own mines lying under the works and pipes described in certain plans, kept and deposited by the undertakers in manner provided by the three preceding sections. (iii) Those who own mines lying within the prescribed distance, or, if not prescribed, forty yards "therefrom"—i.e., I presume, from the reservoirs, buildings, or underground pipes and works of the undertakers so described. G H I

In the first class of cases the undertakers would be the owners of the surface. And several authorities have been cited in argument, from *Great Western Rail. Co. v. Bennett* (1) downwards, to establish that in purchases of land by undertakers under their compulsory powers, mines being reserved to the grantor, there is no grant by implication of the right to have the surface supported by the subjacent minerals, such as would be implied in the case of a grant to an ordinary purchaser, but that the mutual rights and obligations of the grantor

A and grantee, the mineowners and the surface-owners are regulated entirely by the code contained in the Waterworks Clauses Act, 1847. In class No. (ii) the undertakers would most probably, but not necessarily, be the owners of the surface, since it is conceivable that they might only acquire wayleave for their underground pipes. And in class No. (iii) the surface of the land between the limit and their reservoirs, buildings, underground pipes or works

B might or might not belong to them, the plain object of the statute being to give to the undertakers the opportunity of securing, by the purchase of mines, if they so desire, not only subjacent but also adjacent support for their reservoirs, buildings, underground pipes and works. No reference, however, is made in the statute to lands belonging to the undertakers upon which reservoirs or buildings have not been constructed or erected, or in which pipes and works have not been laid or sunk. Their rights and obligations in reference to lands of this

C latter description are left untouched by the code, to be regulated and determined by the common law. Again, these three sections deal with mines which belong to persons other than the undertakers, and I am quite unable to discover anything in the statute, or in the authorities to which we have been referred, to deprive the undertakers, where they own both the surface and the subjacent

D minerals, of such a natural right of lateral support as any owner of lands and the minerals beneath them would be entitled to at common law. It is conceded that the north part of the reservoir is upon Taylor's land. It is further conceded that the workings in Lord Stamford's land, partly within and partly without the limit of forty yards, have caused a subsidence of that part of the reservoir situate on Taylor's land, and would by reason of the deprivation of

E the lateral support have caused a subsidence of those lands even if the reservoir had never been built upon them.

The appellants, as owners of the mines under the land sold by Lord Stamford, gave the notice required by s. 22, and no counter-notice was given by the respondents. Under these circumstances it appears to me that the mine owner under Lord Stamford's land, provided he did no wilful damage and did not

F work his mines in an unusual manner, could work them so as to let down the surface of Lord Stamford's land if he so desired, because, though s. 23 provides that the mines may be worked "as if this Act and the special Act had not been passed," yet, according to the several authorities cited, the respondents never acquired the right to have the surface supported, such as an ordinary grantee of the surface would, by implication, have acquired. They

G got the statutory right in lieu of that implied right, and the fact that they have not availed themselves of this statutory right to the full cannot operate to vest in them the right for which the statutory right was a substitute. But with regard to Taylor's lands none of that reasoning applies. There the respondents had the right of lateral support vested in them by the purchase from Taylor, and as the words "as if this Act and the special Act had not been

H passed" cannot operate to vest in the respondents a right in reference to Lord Stamford's land which they never had, so neither can it operate to deprive them of the right they had acquired, and would if the parties were remitted to their original positions have been entitled to enjoy and enforce. I concur with COZENS-HARDY, L.J., in thinking that the result as to Taylor's land would be the same whether the workings which caused the subsidence were within

I or without the forty yards limit, and I approve of the results at which he arrived and of the reasoning by which he arrived at them. I, therefore, am of opinion that this appeal should be dismissed with costs.

LORD COLLINS.—I concur.

Solicitors: *Bower, Cotton & Bower*, for *H. G. Hall*, Ashton-under-Lyne; *Austin & Austin*, for *Sir William H. Talbot*, Town Clerk of Manchester.

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

R. v. WHITE

[COURT OF CRIMINAL APPEAL (Lord Alverstone, C.J., Bray and Pickford, JJ.), May 2, 1910]

[Reported [1910] 2 K.B. 124; 79 L.J.K.B. 854; 102 L.T. 784; 74 J.P. 318; 26 T.L.R. 466; 54 Sol. Jo. 523; 22 Cox, C.C. 325; 4 Cr. App. Rep. 257]

Criminal Law—Murder—Attempted murder—Completion or attempted completion of act with intent to kill—Act not capable of resulting in killing unless accompanied by other acts.

The completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even though this completed act would not, unless followed by other acts, result in killing.

Criminal Law—Murder—Attempted murder—Penalty—Criminal Procedure Act, 1851 (14 & 15 Vict., c. 100), s. 9—Offences against the Person Act, 1861 (24 & 25 Vict., c. 100), ss. 11-15.

An accused person found guilty of an attempt to murder under s. 9 of the Criminal Procedure Act, 1851, which provides that a person indicted for felony or misdemeanour may be found guilty of an attempt, comes within ss. 11 to 15 of the Offences against the Person Act, 1861 (relating to such attempts in various specific circumstances), and is liable to the punishment provided by that Act.

Notes. Considered: *R. v. Thomas*, [1949] 2 All E.R. 662. Referred to: *R. v. Robinson* (1915), 79 J.P. 303.

As to attempts to commit a crime in general, see 10 HALSBURY'S LAWS (3rd Edn.) 306 et seq.; and for cases see 14 DIGEST (Repl.) 112 et seq. For the Criminal Procedure Act, 1851, see 5 HALSBURY'S STATUTES (2nd Edn.) 715. For the Offences against the Person Act, 1861, *ibid.*, 786.

Cases referred to:

- (1) *R. v. Connell* (1853), 6 Cox, C.C. 178; 14 Digest (Repl.) 383, 3741.
- (2) *R. v. Linneker*, [1906] 2 K.B. 99; 75 L.J.K.B. 385; 94 L.T. 856; 70 J.P. 293; 54 W.R. 494; 22 T.L.R. 495; 50 Sol. Jo. 440; 21 Cox, C.C. 196, C.C.R.; 14 Digest (Repl.) 114, 794.

Appeal against conviction.

Maddocks for the appellant.

Ryland Adkins (*McCurdy* with him), for the Crown.

Cur. adv. vult.

BRAY, J., read the following judgment of the court.—In this case the appellant was indicted for the murder of his mother, and was convicted of an attempt to murder her and sentenced to penal servitude for life. He appeals from this conviction on several grounds, which we will deal with one by one. The evidence, put shortly, was this: That on Jan. 9 last the mother was found dead in a sitting posture on a sofa in a sitting-room in her house. There was a round table standing 2 ft. from the sofa, on the further side of which was a wine glass three-parts filled with a liquid made up of a drink called nectar, which was afterwards shown to contain two grains of cyanide of potassium. There were also on the table a nectar bottle, two lumps of sugar, and a spoon. There was no evidence to show that she had taken any of this liquid, and the result of the post-mortem and of the analysis of the contents of the stomach and of the contents of the wine glass was to show she had not died from poisoning by cyanide of potassium, but that death was most probably caused by syncope or heart failure, due to fright or some external cause; and, further, that the quantity of cyanide of potassium in the wine glass was, even if she had taken the whole, insufficient to cause her death. The appellant was

A proved to have bought cyanide of potassium on Dec. 22 previous. He stated in his evidence that he bought it for case-hardening a chisel, and that he had placed it in a cupboard in the room where the mother was found dead, and that he thought it possible she might have taken it from there. The prisoner did not live in the house. No traces of any of the poison were found after her death either in the cupboard or in the house, nor of the newspaper in which the appellant said he had wrapped it. There was a good deal of evidence showing that the appellant had a motive for killing his mother—viz., to obtain her money, she having made a will in his favour—and also showing that the appellant had made several statements previous to Jan. 9, to the effect that he expected his mother's death, although in fact her state of health was not such as to show that she was in any danger. In our opinion the evidence was sufficient to warrant the jury in drawing the inference that the appellant had put the cyanide of potassium in the wine glass. It was strongly urged that, even if this was so, the smallness of the dose showed that he could not have had the intention to murder her; but there was evidence that on some day between Christmas Day and the new year the prisoner had produced to a witness (Carden) from his pocket a small substance about the size of a marble, which appeared to him to resemble sugar candy, and stated that "this stuff is a deadly poison; a small quantity about the size of a pin's knob put into a little water would sober you" [i.e., the witness] "if you were drunk, instantly." There is no doubt he was referring to the cyanide of potassium which he had bought a few days previously. He, therefore, perfectly well knew the deadly character of this poison, and supposed that a very small quantity would produce an instant effect. Upon consideration of all the evidence, including the denial of the prisoner that he had put anything into the wine glass at all, we are of opinion that there was sufficient evidence to warrant the jury also in coming to the conclusion that the appellant put the cyanide in the glass with intent to murder his mother.

The next point made was that, if he put it there with that intent, there was no attempt at murder; that the jury must have acted upon a suggestion of the learned judge in his summing up that this was one, the first or some later, of a series of doses which he intended to administer and so cause her death by slow poisoning, and that if they did act on that suggestion there was no attempt at murder, because the act of which he was guilty—viz., the putting of poison in the wine glass—was a completed act and could not be and was not intended by the appellant to have the effect of killing her at once. It could not kill unless it were followed by other acts which he might never have done. There seems no doubt that the learned judge in effect did tell the jury that, if this was a case of slow poisoning, the appellant would be guilty of the attempt to murder. We are of opinion that this direction was right, and that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt, but would none the less be an attempt. While saying this, we must say also that we do not think it likely the jury acted on this suggestion, because there was nothing to show that the administration of small doses of cyanide of potassium would have a cumulative effect; we think it much more likely, having regard to the statement made by the prisoner to the witness Carden, that the appellant supposed he had put sufficient poison in the glass to kill her. This, of course, would be an attempt to murder.

I We now come to the most difficult point, which was this: that under s. 9 of the Criminal Procedure Act, 1851, if the appellant were found guilty of attempting to murder it would be a conviction of the common law offence of attempting to murder, and not of any of the special statutory offences under ss. 11 to 15 of the Offences against the Person Act, 1861. If this point were a good one, the punishment would be only two years' imprisonment instead of penal servitude for life, which could be given in case of a conviction under any of ss. 11 to 15 of the Offences against the Person Act, 1861. The argument on the part of the appellant was this: That ss. 11 to 15 of the Offences against the Person Act, 1861, dealt with

special offences—viz., ss. 11 to 13 with doing certain acts with intent to murder, and s. 15 with doing other acts not mentioned in the previous section with the like intent; that these were made special statutory offences distinct from the common law offence of attempting to murder and that the attempt referred to in s. 9 of the Criminal Procedure Act, 1851, was the common law offence, and not one of these special statutory offences. In support of this it was said that at the time of the passing of the Criminal Procedure Act, 1851, though the statutory offences comprised in ss. 11 to 14 of the Offences against the Person Act, 1861, existed under earlier Acts, now repealed, they were not known as attempts to murder; they did not comprise all attempts to murder, there being no enactment having the effect of s. 15, and the only offence known to the law as attempt to murder was the common law offence, and that must have been the offence contemplated by that Act. Further, it was argued, in proceeding under ss. 11 to 15 of the Offences against the Person Act, 1861, the indictment must state the particular offence under the particular section; there could not be one indictment charging the different offences under each of the sections alternatively, and that the result of holding that under an indictment for murder a man could be convicted of one of these special statutory offences would enable the prosecution to include in one indictment a number of special statutory offences, and that, if that had been intended, it would have been enacted by the Offences against the Person Act, 1861: "Whosoever shall by any means attempt to murder shall be guilty of felony," etc. Finally, it was argued that there was a difference between doing an act with intent to murder and attempting to murder.

In support of all these points great reliance was placed on *R. v. Connell* (1). The argument on the part of the prosecution was that the Offences against the Person Act, 1861, for the first time dealt comprehensively with all attempts to murder, and made them all felonies and all punishable with the same maximum punishment—viz., penal servitude for life—so that after the passing of that Act, on a conviction for attempt to murder under the Criminal Procedure Act, 1851, the conviction was a conviction under the Offences against the Person Act, 1861, and punishable with penal servitude for life; that, although this might have the effect of including in one indictment several special statutory offences, that was the necessary consequence and effect of the Offences against the Person Act, 1861, and, if it were not so, there must in every case where there was a failure to prove the charge of murder be a fresh indictment and a fresh trial on exactly the same evidence, which would lead to the same result, and that this was the very mischief which the Criminal Procedure Act, 1851, was intended to remedy, and that no hardship on the prisoner would result; no new evidence would be introduced, and he would be convicted of the attempt on the same evidence which was relied on to prove the complete offence. As to the last point, it was said that there could not be an attempt to murder unless there was an intent to murder, so that if a prisoner were convicted by the jury of an attempt to murder, he must necessarily have been convicted of an offence within one of the ss. 11 to 15 of the Offences against the Person Act, 1861.

After full consideration, and having had the advantage of hearing a most able argument from counsel for the Crown, we have come to the conclusion that the reasoning of the prosecution is sound and must prevail. We will first deal with *R. v. Connell* (1). The ground of that decision seems to be that the record would merely show a conviction for an attempt to murder, and it would be consistent with the record that the attempt had been by some means other than those mentioned in the special statutory offences, which at that time (1853) did not include an offence under s. 15. It might be, therefore, that the prisoner was convicted of an offence which was only punishable as a common law misdemeanour, and there need be no authority for the statutory punishment; it would be consistent with the record that the man should have been sentenced to penal servitude for life when he had only been guilty of a common law misdemeanour. We think *R. v. Connell* (1) may be distinguishable on these grounds; but the passing of the

- A** Offences against the Person Act, 1861, removed this difficulty. That Act was intended as a code for all attempts to murder. This group of ss. 11 to 15 is headed with the words "Attempts to murder," and these words fortify the conclusion at which we have arrived. After the passing of that Act all attempts at murder necessarily fall within one of these five sections. If that Act had provided in so many words that all attempts to murder should be punishable with penal
- B** servitude for life, the effect of such an enactment on s. 9 of the Criminal Procedure Act, 1851, must have been that if the prisoner were convicted of the attempt to murder, penal servitude for life could be awarded, and ss. 11 to 15 of the Offences against the Person Act, 1861, substantially were such an enactment. It is not a sound argument that if that had been intended there would have been this one section, and that alone, because we know that in Acts which are intended to
- C** consolidate as well as to amend the law it is the practice to re-enact sections in the repealed Acts, and then to fill up any gap, rather than frame new sections in new language. By the time the consolidation Act comes the language of the old section has often been judicially interpreted, and it is desirable to use the same language. We think that no such inference as was suggested by counsel for the Crown can be drawn from the absence of the simple provision that all attempts to murder
- D** should be punishable with penal servitude for life. As to the difference between acts which are attempts to murder and acts which are done with intent to murder, we feel some difficulty in accepting what KENNEDY, J., says in *R. v. Linneker* (2); but however that may be, it is sufficient to say, as we have already said, that all the offences in ss. 11 to 15 are treated as attempts to murder, and there cannot be an act done with intent to murder without its being an attempt to murder, and a
- E** prisoner cannot be convicted under s. 9 of the Criminal Procedure Act, 1851, unless, as here, the jury have found him guilty of an attempt to murder. For these reasons we think the appeal fails and must be dismissed.

Solicitors: *Maddocks, Ogden & Co.*, Coventry; *Director of Public Prosecutions.*

[Reported by *GERALD DODSON, Esq., Barrister-at-Law.*]

A

CONWAY v. WADE

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Atkinson, Lord Collins, Lord Gorell and Lord Shaw), April 26, 27, July 27, 1909]

[Reported [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248;
25 T.L.R. 779; 53 Sol. Jo. 754]

B

Trade Union—Trade dispute—Dispute between union official and workman—Non-payment of fine—Dismissal of workman procured—Threat of strike—Scope of Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 3.

A "trade dispute," to come within s. 3 of the Trade Disputes Act, 1906, [25 HALSBURY'S STATUTES (2nd Edn.) 1269] must be fairly definite and of real substance, a real thing imminent or existing. The phrase does not necessarily include every case of personal difference between any one workman and one or more of his fellows, e.g., a dispute between an official of a trade union and a workman who has been fined but has not paid the fine. The section does not protect from liability a mere outsider or busybody who interferes in other people's work or business for motives of his own, even though he may contemplate bringing a trade dispute into existence if he does not get his own way.

C

D

The respondent, an officer of a trade union, but acting without the authority of the executive, induced the appellant's employers to discharge him by threatening that, if they did not do so, the members of the union employed by the firm would strike in order to compel the appellant, who was a member of the union, to pay a fine which had been imposed upon him some years before. In an action by the appellant against the respondent for damages for procuring his dismissal,

E

Held: the respondent was not protected from liability by the Trade Disputes Act, 1906, his acts not having been done "in contemplation or furtherance of a trade dispute" within the meaning of s. 3 of that Act.

F

Per LORD LOREBURN, L.C.: Section 3 cannot fairly be confined to an act done by a party to a dispute. A dispute may have arisen, for example, in a single colliery of which the subject is so important to the whole industry that either employers or workmen may think a general lock-out or a general strike necessary to gain their point. Few are parties to, but all are interested in, the dispute.

G

Notes. Considered: *Dallimore v. Williams and Jesson* (1912), 29 T.L.R. 67; *Vacher v. London Society of Compositors*, [1911-13] All E.R.Rep. 241. Applied: *Scrutton v. Lewis* (1913), Times, Jan. 16. Distinguished: *Dallimore v. Williams and Jesson* (1914), 30 T.L.R. 432. Considered: *Valentine v. Hyde*, [1919] 2 Ch. 129; *Hodges v. Webb*, [1920] All E.R.Rep. 447. Distinguished: *White v. Riley*, [1920] All E.R.Rep. 371. Considered: *Ware and De Freville, Ltd. v. Motor Trade Association*, [1920] All E.R. 387. Distinguished: *Sorrell v. Smith*, [1925] All E.R.Rep. 1. Followed: *R. v. Tearse*, [1944] 2 All E.R. 403. Applied: *Bents Brewery Co. v. Hogan*, [1945] 2 All E.R. 570. Considered: *Huntley v. Thornton*, [1957] 1 All E.R. 234. Referred to: *Sanken v. Busnach* (1912), 28 T.L.R. 515; *Larkin v. Long*, [1914-15] All E.R.Rep. 469; *Pratt v. British Medical Association*, [1918-19] All E.R.Rep. 104; *Davies v. Thomas*, [1920] All E.R.Rep. 438; *The Croxteth Hall, The Celtic*, [1930] P. 197; *R. and W. Paul, Ltd. v. Wheat Commission* (1935), 152 L.T. 352; *Crofter Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142; *D. C. Thomson & Co. v. Deakin*, [1952] 2 All E.R. 361; *R. v. National Arbitration Tribunal, Ex parte South Shields Corpn.*, [1951] 2 All E.R. 828.

H

I

As to trade disputes, see 32 HALSBURY'S LAWS (2nd Edn.) 521, 524; and for cases see 43 DIGEST 120.

A Case referred to:

(1) *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, 169.

Appeal by the plaintiff from a decision of the Court of Appeal (COZENS-HARDY, M.R., FARWELL and KENNEDY, L.JJ.) [1908] 2 K.B. 844, reversing a decision of the Divisional Court (CHANNELL and SUTTON, JJ.).

B The action was brought by the plaintiff in the county court to recover £50 damages from the defendant for threats and coercive acts on the part of the defendant, in consequence whereof the plaintiff was dismissed from his employment and prevented from getting work. The judge left the following questions to the jury:

C “(1) Was there a trade dispute existing or contemplated by the men?—No. (2) Did they communicate this fact to Wade?—No. (3) Did Wade act in consequence of such communication?—No. (4) Did Wade utter any threat to any employer of Conway?—Yes. (5) Did what Wade did prevent, or was it intended to prevent, the plaintiff from getting or retaining employment?—Yes. (6) Was it done in order to compel the plaintiff to pay arrears of fine?—Yes. (7) Was it done in order to punish the plaintiff for not paying such arrears?—Yes. (8) Was what the defendant did done only to warn the employers that the union men would leave in consequence of their being unwilling to work with Conway?—No. (9) Was it done in consequence of the men objecting to work with the plaintiff?—No. (10) Did he do anything more than act on behalf of the men employed at Readhead’s?—Yes.”

E The jury found for the plaintiff with damages £50, and judgment was entered accordingly, a new trial being refused by the judge. The Divisional Court affirmed the decision of the county court judge. Their decision, however, was reversed by the Court of Appeal on the ground that the action was not maintainable by reason of the Trade Disputes Act, 1906, s. 3.

F *Avory, K.C., J. E. Joel and H. D. Woodcock* for the plaintiff.

C. A. Russell, K.C., and E. Shortt for the defendant.

Their Lordships took time for consideration.

July 27, 1909. The following opinions were read.

LORD LOREBURN, L.C.—In my opinion, the order appealed from should be reversed. This action was tried before the county court judge at South Shields.

G Your Lordships have not that learned judge’s summing-up before you, but no kind of objection was raised to it. A series of questions was put to the jury by desire of counsel on both sides, and duly answered, so that we have all the material facts either admitted or found.

If the jury were right, what happened was as follows. The plaintiff was in employment under the firm of Readhead & Co. The defendant Wade, in order to compel the plaintiff to pay a fine due to the trade union, and to punish him for not paying it, procured Messrs. Readhead & Co.’s foreman to dismiss him, by threats that, unless they dismissed him, the union men in their service would leave off work, which was not true. The plaintiff had to quit his employment in consequence, and so suffered damage. So far, I own that from the evidence, as it appears on paper, I am not sure that I should myself find all these things, but I am quite sure that the jury who heard the witnesses are better judges on such a subject than I can be. The defendant must be taken to have acted as a mischief-maker in order to injure the plaintiff from unworthy motives, accompanied by threats that he would cause Messrs. Readhead’s men to come out, in a matter with which he had no concern; for it is admitted that, though district delegate of the union, he was acting without authority. The only defence really made to this action, beyond a denial of these facts, was s. 3 of the Trade Disputes Act, 1906, and it was upon this ground alone that the Court of Appeal decided the case. Manifestly it is essential to any defence under this section that the defendant should

show that the act complained of was done in contemplation or furtherance of a trade dispute. Otherwise the section cannot possibly apply. Now, the jury, in addition to their other findings, have found explicitly that there was no trade dispute either existing or contemplated by the men, which has been properly taken to mean that the act complained of was not done in contemplation or furtherance of a trade dispute. A

The judge was satisfied with this verdict, as was the Divisional Court. In the Court of Appeal, however, the learned judges have found this fact the other way, and thereupon entered judgment for the defendant. Knowing as I do how averse the Court of Appeal is from usurping the functions of a jury, I conclude that the learned judges were enabled to bring this case within s. 3 by taking a different view of the section from that which I take, for the verdict of the jury seems, I believe to all your Lordships, a reasonable enough conclusion from the evidence, and one which it is our duty to support. "Trade dispute" is a familiar phrase in earlier Acts of Parliament, and is defined in this Act. I do not know that the definition is of much assistance. If this section is to apply there must be a dispute, however the subject-matter of it be defined. A mere personal quarrel, or a grumbling, or an agitation will not suffice. It must be something fairly definite and of real substance. If this be so, I am then so far from thinking it impossible to doubt that there was a trade dispute, that I actually think that there was none, if, indeed, my opinion, founded on printed evidence, is worth much. The law, however, prefers the opinion of a jury, and the jury have in this case come to the same conclusion. B C D

I prefer to say nothing as to some opinions expressed in the Court of Appeal with regard to this Act and the motives supposed to have actuated those who passed it. If the Act is to be interpreted or applied in the view that stirring up strife is the aim and object of any part of it, then indeed it will be a fountain of bitter waters. But some opinions were also expressed as to a matter on which the Court of Appeal has both authority and jurisdiction—namely, the true meaning of the words "in contemplation or furtherance." I regret that I cannot altogether agree with what was said. It is necessary to consider how the law stood before 1906. As to the liability of trade union funds and the law of conspiracy we are not here concerned, but it is material to see in what circumstances an individual could be sued for inducing someone not to employ or not to serve another, for that is the point arising in this appeal, and to that I will confine myself. I think that on that point the law stood as follows. If the inducement was accompanied by violence or threats (always remembering that a warning is one thing and a threat is another) there was a good ground of action. I next suppose that there was no violence and no threat, and yet the inducement involved a breach of contract; then also it was established after a long controversy commencing with *Lumley v. Gye* (1), in 1853, that an action could be maintained, unless at all events some sufficient justification could be made good. But suppose that one person simply induced someone not to employ another or not to serve another, without violence or threat or breach of contract, would an action lie, and in what circumstances, in such a case? I believe that there has not been either a conclusive or an exhaustive answer to that question. The further difficulty arises: What is a sufficient justification? Is it supplied by self-interest or by trade competition, or by what other condition or motive? No answer in general terms has ever been given, and perhaps no answer can be given. A parallel difficulty arises where the inducement is by two or more persons acting together. It is always a source of danger when the law is uncertain, and inasmuch as industrial warfare unhappily takes too often the form of strikes and lock-outs, and inducing other persons to co-operate in them, uncertainty as to the weapons allowed by the law is likely to cause more alarm than perhaps may be justified. Certainly some dicta in recent cases gave rise to an apprehension that it might be held unlawful for men to induce others to join them in a strike, especially in what is called a secondary strike, for the essence of a strike consists E F G H I

A in inducing others not to serve particular employers, or, as the case may be, any employers in a particular trade.

I believe that, stated generally, to have been the state of the law preceding the Trade Disputes Act, 1906, so far as it was settled, and that the uncertainties were as I have described. Section 3 of that Act, which purports to deal with this point, is as follows :

B "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

C Let me see how this alters the pre-existing law. It is clear that, if there be threats or violence, this section gives no protection in any case, for then there is some other ground of action besides the ground that "it induces some other person to break a contract," and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done "in contemplation or furtherance of a trade dispute." What is the meaning of these words I will consider presently. In this

D respect there is a change. If there be no threat or violence and no breach of contract, and yet there is "an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills," there again there is perhaps a change. It is not to be actionable, provided that it was done "in contemplation or furtherance of a trade dispute." So there is no longer any question in such cases whether there

E was "sufficient justification" or not. The condition contained in these words as to a trade dispute is made sufficient. I come now to the meaning of the words "an act done in contemplation or furtherance of a trade dispute." These words are not new in an Act of Parliament; they appear in the Conspiracy and Protection of Property Act, 1875. I think that they mean that either a dispute is imminent and the act is done in expectation and with a view to it, or that the dispute is

F already existing and the act is done in support of one side to it. In either case the act must be genuinely done as described and the dispute must be a real thing imminent or existing.

I agree with the Master of the Rolls that the section cannot fairly be confined to an act done by a party to the dispute. I do not believe that that was intended.

G A dispute may have arisen, for example, in a single colliery, of which the subject is so important to the whole industry that either employers or workmen may think a general lock-out or a general strike necessary to gain their point. Few are parties to, but all are interested in, the dispute. If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity in other people's work or business, a jury would be entirely justified in saying that what he did was done in contemplation or in furtherance, not of the trade dispute, but

H of his own designs, sectarian, political, or purely mischievous, as the case might be. These words do, in my opinion, in some sense import motive, and in the case which I have put, a quite different motive would be present. If the jury so found, the meddler would not be protected by s. 3 of the Act of 1906. But I have no doubt that an act done with a single eye to the dispute "in contemplation or in furtherance" of it, would not be actionable on any of the grounds specified in the

I section. In regard to a peacemaker, who in the opinion of the Court of Appeal is not protected under this section, he requires no protection. A peacemaker is not under the laws of this country, and never has been, held liable in an action. As for the present appeal, I move your Lordships to allow it with costs here and below.

LORD MACNAGHTEN.—I concur.

LORD JAMES OF HEREFORD.—In order to arrive at a conclusion upon this appeal your Lordships must determine two questions of fact. The first is, "Were

the Acts complained of the outcome of a trade dispute within the meaning of s. 3 of the Act of 1906? In my opinion, the jury found correctly (i) that a trade dispute did not exist and was not contemplated by the men; (ii) that the men did not communicate any such existence or contemplation of a trade dispute to the defendant; (iii) that the defendant did not act in consequence of any such communication. I see no ground for setting aside those findings; on the contrary, if I had been a member of the jury, so far as I can judge, I should have been of the same opinion. The circumstances given in evidence seem to show that the complaint in respect of the non-payment of the fine was not a genuine complaint, but was put forward as a pretence under which the plaintiff might be deprived of the position to which he had been promoted. It seems that the fine referred to had been imposed eight years before the events in question, and that it had never been enforced although the plaintiff had intermittently been a member of the union, and had been received as such, and apparently no dispute existed as to his liability to pay the fine. On Sept. 23, 1908, the plaintiff entered upon employment at Readhead's works as an ordinary workman. On the 25th the defendant saw the plaintiff's receipt for the union payment and said: "It is all right, go to work." Up to this time it seems clear that no trade dispute existed. But within a few days the plaintiff was appointed a chargeman with an advance of wages from 28s. to 33s. per week. I come to the conclusion that it was the preference of the plaintiff that caused certain of his fellow-workmen to desire to get rid of him, and with that object to put in motion the defendant, who could speak with apparent authority to the plaintiff's employers. Accepting this duty the defendant took the old forgotten incident of non-payment out of stock and represented it as a ground of complaint against the plaintiff. At any rate, I think that this inference might well be drawn by the jury, and, if such result is correct, I submit that no sufficient ground exists under which your Lordships can come to the conclusion that this finding should be overruled.

The second question that has to be determined is: Did the defendant use threatening language to the plaintiff's employer with the intention of preventing the plaintiff from retaining his employment? The jury have found affirmatively that the defendant made use of such language with the intention alleged. The question involved is, of course, one of fact. The words used may be without controversy, but the sense in which they are used may have to be determined not only by the mere words, but by many surrounding circumstances—even those of voice and gesture. In this case the defendant's threat to the plaintiff that he would not be allowed to work shows, as it seems to me, that the defendant's position was one of hostility to the plaintiff. His interference was caused by a desire that the plaintiff should not continue in Readhead's employment. There was no apparent reason why the defendant should act as a gratuitous adviser in the interests of the plaintiff's employers, and if he did not interfere as an adviser, it seems apparent he must have done so in a spirit of hostility to the plaintiff, and with the object of depriving him of his employment—in which effort he succeeded. I think that a good cause of action was established, and that the defendant is not protected by s. 3 of the Act of 1906. The appeal, therefore, succeeds.

LORD ATKINSON.—It was, in my opinion, perfectly competent for the jury as reasonable men to have come to the conclusion, on the evidence, that the whole story put forward by the defendant as to the existence among the fellow-workmen of the plaintiff of an objection to his presence and a resolve to leave the employment if he was to continue in it was a fabrication. There are two circumstances in the case which, to my mind, point in that direction—first, the fact that none of the plaintiff's fellow-workmen ever suggested to him that any such objection or resolve existed; and, second, the fact that, neither in the letter of the defendant of Oct. 17, 1907, nor in that of his solicitor of Oct. 21, is any reference whatever made to either of these matters. Messrs. Hannay and Stewart, the

A plaintiff's solicitors, had, in their letter of Oct. 17, the receipt of which the defendant acknowledged, distinctly charged him with unlawfully and maliciously procuring the plaintiff's dismissal from his work at Readhead's yard, and also with having informed the plaintiff that he (the defendant) would stop the former's getting work elsewhere. There is not in the correspondence any denial of the truth of either of these charges, nor, stranger still, any statement to the effect that the defendant, as he now contends, only communicated to Baines, the manager of the works, the resolve which the workmen of the firm had already formed, or that he had merely remonstrated in a friendly way with or advised their manager. That story was reserved for the trial, and the fact that it was so reserved might, in my view, be most reasonably regarded as throwing grave suspicion upon it. It appears to me to be clear, and, indeed, I hardly think that it is seriously disputed, that the words used by Wade to Baines are capable of conveying a threat, and that the jury were justified as reasonable men in finding, as they did, that the words did convey a threat. I do not gather from the judgments of the learned justices that they did not think there was evidence sufficient to support this finding, as well as the two findings (i) that what Wade did prevented, and was intended to prevent, the plaintiff from getting or retaining employment; and (ii) that this was done in order to compel the plaintiff to pay the arrears of the fine which he owed and also (iii) to punish him for not having theretofore paid it.

I gather that the Court of Appeal were of opinion that, apart from the Trade Disputes Act, 1906, the plaintiff would on these findings have been entitled to a verdict, notwithstanding that the defendant did not conspire with another, or with others, but merely acted alone. If so, I concur with them. If, however, the jury were of opinion, as apparently they were, that the above-mentioned story put forward by the defendant was a fabrication, I fail to see how their first finding, that no trade dispute existed among the men, or was contemplated by them, is perverse, provided it means, as I think that it must be taken to mean, a dispute between the men employed at Readhead's works at the time when Wade spoke to Baines. It is quite true that Baines, having, in his evidence in chief, said that before he saw Wade there was, as far as he knew, no reason to stop Conway, and also that "he knew of no dispute in Readhead's works in October in the nature of a trade dispute, and none between employer and workman," on his cross-examination stated that Linny "said something to him about Conway" that there was a money dispute, that "Linny said that if Conway was kept on the men would stop work." He did not mention when this last-mentioned conversation took place, but, even assuming that it took place before his interview with Wade, Baines was obviously a witness friendly to the defendant. He had acted in obedience to the tyrannical requirements of the latter. He had gone to the Adam and Eve Lodge and signed a paper "because he was in a hurry to get back." It was quite competent for the jury to accept the other portions of Baines' evidence, fortified as they are by the evidence of the plaintiff, and to reject this statement extracted in an obviously friendly cross-examination. It would appear to me, therefore, that the finding of the jury on the first question, if taken in the sense which I have indicated, can well be supported by the evidence. It is not suggested that any trade dispute existed among, or was contemplated by, any workmen other than the workmen employed at Readhead's works, nor is it suggested that any trade dispute was contemplated by any employers of workmen other than those interested in this firm.

I A trade dispute may no doubt have been contemplated by Wade at the time when he interfered, as the intended and probable result of his own action. That no doubt appears on the evidence of the plaintiff himself. But Wade was an outsider, he was neither an employer nor a workman—he was a mere intermeddler—with no authority from any trade union body to act as he did.

One of the questions to be decided, therefore, is whether s. 3 of the Trade Disputes Act, 1906, applies to a non-existing dispute, not arranged for, intended to be brought about, regarded as imminent or likely to occur, or even thought of by any employer or any workmen, or by anyone save an intruder of this kind at the

time when he intervenes. In order that a dispute may be a trade dispute at all, A
a workman must be a party to it on each side, or a workman on one side and an
employer on the other, and an act done in furtherance of a dispute is not protected
unless the dispute be one of that character. It is help, assistance, or encourage-
ment to such a dispute that the legislature apparently had in view when it used
the words "in furtherance." Must it not, when it uses in juxtaposition with these
words the words "in contemplation," be held to have had in view a dispute which B
must at the time when the act which it designed to protect was done have been,
at all events, "thought of" by some person who should be a party to it when it
arose, if it was to be a trade dispute within the meaning of the Act? Otherwise
an intruder, such as Wade, would be shielded from liability simply because of his
own mental outlook, however peculiar that outlook might be, and however unknown
to or unshared in by others. From the illustration taken by the Master of the C
Rolls and the observations made by the other lords justices, I gather that this latter
is their view. If I am right in thinking so, then with all respect I must say that
I am unable to concur with them. Just as the legislature intended to protect acts
in the nature of aid, assistance, help, and encouragement rendered to the disputants
of the kind described on one side or the other of a dispute which had actually arisen
when they used the words "in furtherance of," so I think they must be held where D
they use the words "in contemplation of" to have meant them to apply to aid,
assistance, help, or encouragement given to the same persons when these persons
were arranging for, designing, or meditating a dispute which by their participation
in it when it did arise would become a "trade dispute." It is impossible to sup-
pose, I think, that the legislature ever intended that where perfect peace pre-
vailed in any factory or establishment, and an intruder, a mere mischief-maker, E
actuated by greed, or some feeling of revenge, interfered, and by threats and
molestation stirred up strife and disputes which neither employer nor workmen
theretofore thought of, he should be made irresponsible because of the very mischief
which he intended and hoped to stir up. On this, the true construction, as I think,
of the words, "done in furtherance and contemplation of a trade dispute," occur-
ring in s. 3 of the Act of 1906, borrowed as they are from the Conspiracy and Pro- F
tection of Property Act, 1875, it would appear to me that there is no inconsistency
whatever between the finding of the jury on the first question left to them and
their findings on questions 6 and 7. The fact that Wade, being what he was, inter-
fered in order to compel the plaintiff to pay the old arrears he owed, and also in
order to punish him for not paying them, does not, in my view, at all establish that
his interference was an act done "in contemplation of a trade dispute" within the G
meaning of the statute. The finding of the jury, therefore, on question No. 1
cannot, I think, be properly disturbed, and its alleged perversity was, in effect, in
my view, the only question raised by the notice of appeal. It follows, therefore,
that in my opinion the decision of the Court of Appeal should be reversed, and the
judgment of the Divisional Court be restored, and this appeal allowed with costs.

LORD COLLINS and **LORD GORELL** concurred. H

LORD SHAW.—By the Trade Disputes Act, 1906, s. 3, it is provided that

"an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other I
person to dispose of his capital or his labour as he wills."

In the present case an act was done by the defendant which induced the plaintiff's employer forthwith to dispend with his services. The circumstances are set forth in the opinion of **LORD JAMES OF HEREFORD**, to which I shall afterwards refer. The jury have substantially affirmed that the act was of a threatening or coercive character, and caused the loss of employment in circumstances which, at common law, would have afforded a good ground of action. But the defendant pleads that the

A act was done "in contemplation or furtherance of a trade dispute," and that his common law liability is thus removed. These terms have been construed by the learned judges of the Court of Appeal. In view not only of the general importance of the question, but of the terms in which the judgments of the learned lords justices are couched, I need not say that I have considered with much anxiety the point raised. It is no doubt true that by s. 5 (3) the expression "trade dispute" receives a very wide interpretation. It

"means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment . . . of any person," etc.

C But I cannot see my way to hold that "trade dispute" necessarily includes accordingly every case of personal difference between any one workman and one or more of his fellows. It is true that after a certain stage even such a dispute, although originally grounded, it may be, upon personal animosity, may come to be a subject in which sides are taken, and may develop into a situation of a general aspect containing the characteristics of a trade dispute, but, until it reaches that stage, I cannot hold that a trade dispute necessarily exists. I cannot better illustrate my meaning than by simply taking the facts of the present case in the light of the rules of the trade union to which the plaintiff belonged. It is said that eight years ago he had been fined by his union and had not paid. In the interval he had rejoined the membership and was apparently a full paying member. Wade, the defendant, was an official delegate of the union. By the rules of the union, district committees were appointed to decide all complaints and disputes between members or branches in their district, and with regard to the official delegates it is provided that

"under no circumstances shall they take part in a movement initiated by members or a strike which has not first been sanctioned by the executive council in accordance with these rules."

F This was not a strike. At the most it was a "movement initiated by the members." I do not think that it was even the latter, but assume that it was, and it will be at once seen that the whole scheme of the union rules is to settle such movements so as to prevent them from reaching the stage of a strike, and to hear, not only disputes between members but even complaints, before they have reached the stage of dispute. The conduct of Wade was contrary not only to the terms but to the spirit of the rules, and I am not surprised to observe that the trade union accepts no responsibility whatever for such conduct. Suppose, however, these rules, instead of being violated, had been followed in the present case. When a complaint was made, if it ever was made, to Wade as to the non-payment by Conway of a fine, two courses were open—either to suggest to Conway the payment, which might have been made, and all dispute avoided; or, second, to act according to the rules, and submit the case to the district committee and see that Conway was brought into line with the union. In that case also Conway might have been either excused or the fine adhered to. Up to that stage there were not, in my opinion, the general elements of a trade dispute which the statute requires. In this view, what is meant by the words "in contemplation or furtherance of a trade dispute"? I think that the argument was well founded that the contemplation of such a dispute must be the contemplation of something impending or likely to occur, and that they do not cover the case of coercive interference in which the intervener may have, in his own mind, that if he does not get his own way he will thereupon take ways and means to bring a trade dispute into existence. To "contemplate" a "trade dispute" is to have before the mind some objective event or situation—with those elements of fact or probability to which I have adverted—but does not mean a contemplation, meditation, or resolve in regard to something as yet wholly within the mind, and of a subjective character. I think that any other construction would be ill-founded, and would lead to strange and mischievous results. With

regard to the term "furtherance" of a trade dispute, I think that must apply to a trade dispute in existence, and that the act done must be in the course of it, and for the purpose of promoting the interests of either party or both parties to it. It will be seen accordingly that I dissent respectfully but totally from the view of the Master of the Rolls that "the words 'in contemplation' are difficult, but they must embrace an act done by a person with a view to bringing about a trade dispute," and from the opinion of FARWELL, L.J., that "the Act was intended to encourage trade disputes, whether trade unions were concerned in them or not." When the learned lord justice adds that

"all that is requisite is that he (the interloper) should be in a position to induce some workmen to make some complaint, it matters not what, which could be called a dispute between employers and workmen or between workmen and workmen, and to lead the foreman to discharge his enemy for fear of trouble, and this stirring up of strife is the aim and object of this section,"

it will be seen how far a wider construction of the terms "in contemplation or furtherance of a trade dispute" may be carried; but, in my opinion, to carry them beyond the region of a trade dispute, either actual, impending, or probable, and into the region of private animosity, which may, if thwarted, take the shape of bringing a trade dispute into being, is not a sound construction, but, on the contrary, is a misconstruction of the section. Whether the trade dispute was actual, impending, or probable, is a question of fact in each case. Having reached that stage, I find myself in such entire agreement with the narrative and bearing of the circumstances, both in fact and in law, given by LORD JAMES OF HEREFORD, that I adopt and do not presume to add to his Lordship's opinion.

Appeal allowed.

Solicitors: *Gibson & Weldon*, for *Hannay*, *Hannay & Stewart*, South Shields; *Robinson & Bradley*, for *Edward Clark*, Newcastle-on-Tyne.

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

A

SOUTH EASTERN RAIL. CO. v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LTD.

[CHANCERY DIVISION (Swinfen Eady, J.), July 9, 10, 12, 27, 31]

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.J.J.), November 5, 1909]

B

[Reported [1910] 1 Ch. 12; 79 L.J.Ch. 150; 101 L.T. 865;
74 J.P. 21; 26 T.L.R. 61; 54 Sol. Jo. 80]

Railway—Accommodation works—Agreement—Severed lands—Grant of right to make tunnel under line—Place and time uncertain—Personal contract—Interest in land—Perpetuity—Uncertainty—Right to grant—Assignability of grant—Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), s. 71.

C

By an accommodation works agreement dated May 31, 1847, a railway company, who were purchasing a strip of land for their line, agreed to make a level crossing and that the landowner, his heirs, appointees or assigns, should be at liberty at any time thereafter at his or their expense to construct a tunnel under the railway to join the lands severed by the railway. The point at which the tunnel was to be made was not defined. The landowner conveyed the land to the railway company, and the right to make the tunnel at his or their own expense was reserved to the landowner, his heirs, appointees and assigns. The defendants became entitled to a lease of part of the land on both sides of the railway under which, during the continuance of the lease, the "rights and privileges" of the agreement of May 31, 1847, became vested in them. The railway company disputed their right to make a tunnel under the railway line.

D

E

Held: (i) the provision in the agreement as to the tunnel was a personal contract by the railway company, the original covenantors, and did not offend against the rule against perpetuities: *London and South Western Rail. Co. v. Gomm* (1) (1882), 20 Ch.D. 562, distinguished; (ii) the benefit of the contract could be assigned to a lessee of part of the lands during the continuance of the lease.

F

Held, further, by SWINFEN EADY, J.: (i) the right to make the tunnel under the agreement was a reservation of an easement to the landowner by the railway company and not an exception out of the land granted by him to the railway company, and, therefore, the right to select the site of the tunnel was not void for uncertainty: *Sanderson v. Cockermouth and Worthington Rail. Co.* (2) (1849), 1 Beav. 497; 2 H. & Tw. 327, applied; *Pearce v. Watts* (3) (1875), L.R. 20 Eq. 492, and *Saville Brothers, Ltd. v. Bethell* (4), [1902] 2 Ch. 523, distinguished; (ii) the grant of the easement was not inconsistent with the purposes for which the land was taken by the railway company, who had a legal right to grant it: *Re Gonty and Manchester, Sheffield and Lincolnshire Rail. Co.* (5), [1896] 2 Q.B. 439, applied; (iii) the agreement was also valid as an agreement for further accommodation works under s. 71 of the Railways Clauses Consolidation Act, 1845.

G

H

Notes. Considered: *County Hotel and Wine Co. v. London and North Western Railway*, [1918] 2 K.B. 251. Followed: *Hutton v. Watling*, [1947] 2 All E.R. 641. Considered: *British Transport Commission v. Westmorland County Council*, *British Transport Commission v. Worcestershire County Council*, [1957] 2 All E.R. 353; *Dunn v. Blackdown Properties, Ltd.*, [1961] 2 All E.R. 62. Referred to: *Sharpe v. Durrant* (1911), 55 Sol. Jo. 423; *South Eastern Railway v. Cooper*, [1923] All E.R.Rep. 111.

I

As to accommodation works, see 31 HALSBURY'S LAWS (3rd Edn.) 601 et seq.; and for cases see 38 DIGEST (Repl.) 322 et seq. As to when an instrument is void for uncertainty, see 11 HALSBURY'S LAWS (3rd Edn.) 416-418; and for cases see 17 DIGEST (Repl.) 367 et seq. As to interests to which the rule against perpetuities

does not apply, see 29 HALSBURY'S LAWS (3rd Edn.) 299 et seq.; and for cases see **A** 37 DIGEST 71 et seq. For the Railways Clauses Consolidation Act, 1845, s. 71, see 19 HALSBURY'S STATUTES (2nd Edn.) 631.

Cases referred to :

- (1) *London and South Western Rail. Co. v. Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620, C.A.; 37 Digest 79, 195.
- (2) *Sanderson v. Cockermouth and Workington Rail. Co.* (1849), 1 Beav. 497; **B** affirmed (1850), 7 Ry. & Can. Cas. 618; 2 H. & Tw. 827; 19 L.J.Ch. 503; 47 E.R. 1708, L.C.; 38 Digest (Repl.) 324, 225.
- (3) *Pearce v. Watts* (1875), L.R. 20 Eq. 492; 44 L.J.Ch. 492; 23 W.R. 771; 17 Digest (Repl.) 368, 1743.
- (4) *Savill Brothers, Ltd. v. Bethell*, [1902] 2 Ch. 523; 71 L.J.Ch. 652; 87 L.T. 191; 50 W.R. 580, C.A.; 17 Digest (Repl.) 301, 1077. **C**
- (5) *Re Gonty and Manchester, Sheffield and Lincolnshire Rail. Co.*, [1896] 2 Q.B. 439; 65 L.J.Q.B. 625; 75 L.T. 239; 45 W.R. 83; 12 T.L.R. 617, 620; 40 Sol. Jo. 715, C.A.; 19 Digest (Repl.) 24, 98.
- (6) *Cooper v. Stuart* (1889), 14 App. Cas. 286; 58 L.J.P.C. 93; 60 L.T. 875; 5 T.L.R. 387, P.C.; 17 Digest (Repl.) 389, 1934.
- (7) *Mulliner v. Midland Rail. Co.* (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 **D** L.T. 121; 43 J.P. 573; 27 W.R. 330; 19 Digest (Repl.) 23, 97.
- (8) *Witham v. Vane* (1883), Challis's Real Property, App.V., H.L.; 37 Digest 80, 201.

Action by the South Eastern Rail. Co. to restrain the defendants, the Associated Portland Cement Manufacturers (1900), Ltd., from constructing a tunnel beneath the plaintiffs' railway to connect certain chalk lands on one side of the railway with certain land on the other side. **E**

By an agreement dated May 31, 1847, and made between the plaintiffs' agent of the one part and the agent of J. H. Calcraft of the other part, it was recited that the plaintiffs required to purchase certain land belonging to J. H. Calcraft for the purpose of their proposed branch railway, and that, the parties being unable to agree the amount of compensation, that question had been referred to arbitration, but, as the arbitrator had no power to determine what accommodation works the landowner was entitled to for the more convenient use of the land severed by the proposed railway, the parties had consented to enter into this agreement with regard to accommodation works. The agreement then provided that the plaintiffs should at their own cost make and maintain a certain level crossing for the use of the vendor, J. H. Calcraft, his heirs, appointees, or assigns, and the occupiers for the time being of the land adjoining thereto or occupied therewith, and it continued : **F**

"It is hereby further agreed that if the said John Hales Calcraft, his heirs, appointees, or assigns, shall at any time hereafter be desirous that a tunnel or archway under the said proposed railway (where it passes or is intended to pass through the said land required to be purchased by the said company) shall be constructed for the purpose of carrying chalk or other materials to or from the south side of the line of the said proposed railway for shipment on the river Thames or for any other purpose, he or they shall be at liberty at his or their own costs and expenses to construct such a tunnel or archway, provided that in the construction thereof he or they does not or do not in any way interfere with the said branch railway or impede the traffic on the line thereof, and provided that the said tunnel or arch is constructed to the satisfaction and under the direction of the engineer of the said company. And it is hereby expressly understood and agreed that all costs, damages, and expenses (if any) which may be incurred or sustained by the said company in consequence of the formation and maintenance of the said tunnel or archway shall be paid to them, their successors or assigns, by the said John Hales Calcraft, his heirs, appointees, or assigns. And lastly it is hereby agreed that the said company, **G** **H** **I**

A their successors or assigns, shall not be required to make any further or other accommodation works for the use of the said John Hales Calcraft, his heirs, appointees, and assigns, other than the level crossing aforesaid."

By a conveyance by deed-poll dated Dec. 31, 1847, J. H. Calcraft conveyed the land to the plaintiffs, their successors and assigns, in consideration of £2,040, to hold the same unto the plaintiffs, their successors and assigns, for ever according B to the true intent and meaning of the plaintiffs' Acts of Parliament,

"Subject nevertheless to and reserving always to me the said John Hales Calcraft, my heirs, appointees, and assigns, and for my and their use and benefit and for the use and benefit of the occupiers for the time being of the lands and hereditaments adjoining to the said lands and hereditaments hereby C assured or intended so to be or occupied with such adjoining land and hereditaments one good and sufficient crossing for horses, carts, and carriages on a level with the rails of the said proposed railway. . . . And also the right and liberty to and for me the said John Hales Calcraft, my heirs, appointees, and assigns, to construct at my and their own costs and expenses a tunnel or archway under the said proposed railway,"

D and the clause continued following the language of the agreement. A covenant and declaration followed in these terms:

"And I the said John Hales Calcraft do hereby for myself, my heirs, executors, and administrators, covenant and declare with and to the said company, their successors and assigns," E amongst other things, that the sum of £2,040 was accepted by him in full satisfaction of all compensation to which he or any persons claiming under him might be entitled for any damage by severance or otherwise and in satisfaction of other accommodation works

"except the said level crossing . . . and other than and except the privilege of making the tunnel or archway aforesaid, and which said level crossing and F privilege of constructing a tunnel or archway as aforesaid are provided for by an agreement dated May 31 last."

The land extended for about 1,600 yards along each side of the line. J. H. Calcraft died on Mar. 13, 1880, and by his will devised and bequeathed all his real and personal estate to William Montague Calcraft. By a lease dated Sept. 30, 1884, W. M. Calcraft demised a portion of the chalk lands on each side of the line with G the right to work the chalk to the London Portland Cement Co., Ltd., through whom the defendants claimed, for fifty-seven years from June 24, 1884, at a certain rent. The lease contained this provision:

"It is hereby agreed and declared that during the continuance of this demise the rights and privileges and liabilities of the lessor under and by virtue of [the agreement dated May 31, 1847, a copy whereof was endorsed on the lease] H shall be vested in the lessees, who hereby covenant to indemnify the lessor against all costs, damages, and liabilities in respect of the said agreement and in respect of any works or other things thereby authorised."

The defendants, having worked out all the chalk on one side of the line, proposed to make a tunnel to get to the other side to work the chalk there. The plaintiffs I contended that they had no right to do so, and demanded a rent of about £75 a year for permission to make it. The defendants refused to pay this, and, as they proposed to make the tunnel without the plaintiffs' consent, this action was brought.

Micklem, K.C., and Percy Wheeler for the plaintiffs, the railway company.
E. C. Macnaghten, K.C., and MacSwinney for the defendants.

Cur. adv. vult.

July 31, 1909. SWINFEN EADY, J., stated the facts, and continued: The question is whether the defendants have the legal right to make the tunnel. The

plaintiffs have not raised any case on the merits, but rely on their legal objections. A
Of course, if their legal objections are good, they must prevail. The plaintiffs do
not dispute, and on the documents it is indisputable, that the terms on which
they acquired the land were that they were to make the level crossing for the
accommodation of the adjoining owner, and that he was to have the right to make
a tunnel, these being in lieu of all other accommodation works. Having obtained
a conveyance of the land on these terms, they now hold the land, but seek to B
repudiate one of the terms and say it is not binding. They raise certain legal
questions which it becomes necessary to consider. If they were to prevail, one
cannot help feeling that there really would be an injustice to the landowner, seeing
that the right to make a tunnel was one of the terms on which his land was
conveyed to the plaintiffs.

The principal objections raised were that the provision was too uncertain and C
indefinite, and that it was void in law as tending to perpetuity. It was said that
the provision was too indefinite because the precise point at which the tunnel was
to be made was not defined, and the vendor had a considerable stretch of land on
both sides of the railway. The answer to that objection is that the right to make
the tunnel was vested in J. H. Calcraft, his heirs, appointees, and assigns, and,
therefore, he or they had the right of determining the spot. The provision is not D
nearly so indefinite as the provision for accommodation works in *Sanderson v.*
Cockermouth and Workington Rail. Co. (2), which was enforced in an action for
specific performance. In that case, the plaintiff had agreed to sell to the railway
company certain lands, and the provision for accommodation works was in these
terms: "subject to the making such roads, ways, and slips for cattle as may be
necessary." That was all. No power was given to either of the parties to deter- E
mine what was necessary. The vendor brought a bill for specific performance.
The defendants objected, amongst other things, that the provision was vague and
indefinite, but LORD LANGDALE, M.R., made a decree for specific performance,
merely referring it to the master to inquire what works were necessary. There
was an appeal to LORD COTTENHAM, L.C., who said (2 H. & Tw. at p. 331):

"What is the contract? It is a contract for the purchase of lands, subject F
to the duty of making communications between the lands severed by the rail-
way. The defendants having got from the plaintiff a performance of his part
of the contract, must not the court interfere for the purpose of securing to the
plaintiff that advantage which he has contracted for?"

Those observations are applicable here. The vendor has performed his part of the G
contract and conveyed the land. In *Sanderson v. Cockermouth and Workington*
Rail. Co. (2), the grantor of the land was not merely left to pursue his legal
remedies, but the court actively interfered by giving him specific performance for
the purpose of securing to him the advantage which he had contracted for, and
referred it to the master to settle what works were necessary.

On the point of uncertainty—that is, that the point at which the tunnel was to H
be made was not defined—it was said that the case comes within cases such as
Pearce v. Watts (3) and *Savill Brothers, Ltd. v. Bethell* (4). *Pearce v. Watts* (3)
was the case of an exception. The plaintiff was the purchaser of land from the
defendant, and a reservation was inserted in the contract of "the necessary land
for making a railway through the estate to Prince Town." The purchaser sought I
specific performance. SIR GEORGE JESSEL, M.R., held that the reservation was
void for uncertainty, and refused specific performance. He said (L.R. 20 Eq. at
pp. 492, 493):

"By the contract the vendor agrees to sell certain land, but 'reserves the
necessary land for making a railway through the estate to Prince Town.' If
the conveyance were executed in this form, it is obvious, according to the
present law, the whole land would pass to the purchaser, the reservation being
void for uncertainty. But this is not the intention of the parties, for the

A vendor intended to reserve a substantial part of the estate. The contract does not show what that is. I neither know what is the amount of land necessary for a railway, nor what line the railway is to take, nor anything about it, and, therefore, I cannot enforce specific performance of the contract."

B But that was really an exception from the grant of the land. The vendor agreed to sell an estate except a certain part, and the part excepted was left indefinite. The contract was wholly unperformed, and SIR GEORGE JESSEL, M.R., refused to order specific performance of it. The other case relied on, *Savill Brothers, Ltd. v. Bethell* (4), was also a case of an exception, and, looked at carefully, is material on this point. A freehold estate was conveyed by vendors to a purchaser in fee simple

C "save and except and reserving unto the vendors a piece of land not less than forty feet in width commencing at the level crossing over the railway at the point marked A on the said plan and terminating at the nearest road to be made by the purchaser or his assignee on the estate so as to give access to such road from"

D other lands of the vendors. The exact position of the piece of land so excepted was not in any way defined. For the plaintiff it was argued that an exception of an indefinite piece of land was invalid altogether, and it was said it was not a reservation, but an exception, and it was void for uncertainty. BUCKLEY, J., said ([1902] 2 Ch. at p. 529):

E "The question wholly turns on this in my view. The deed of Mar. 23, 1896, recites the covenant not to carry on this trade upon any part of the 'hereditaments intended to be hereby conveyed'; and the covenant is that the trade shall not be carried on upon any part of the said 'hereditaments hereby conveyed.' The question, therefore, is whether there is excepted from the deed, so that it is not thereby conveyed, the piece of land upon which Bethell is now erecting a public-house. [That was the piece of land in dispute.] It is said that in this case the exception is void upon two grounds. First, that it is uncertain because one cannot tell what is excepted; and, secondly, that it infringes the rule as to perpetuities."

F BUCKLEY, J., then referred to the older authorities, there being some conflict between them, and then he referred to a more modern authority, namely, a passage from LORD WATSON's judgment in *Cooper v. Stuart* (6), where delivering the judgment of the Privy Council, his Lordship said this (14 App. Cas. at pp. 289, 290):

G "An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee."

H Then BUCKLEY, J., said ([1902] 2 Ch. at p. 530):

I "I cannot read that sentence as consistent with the view that there can be an exception which does not operate immediately, because until a subsequent event you cannot ascertain either the dimensions or the situation of the thing excepted. In other words, I read that as not being consistent with the view of the law that it may by subsequent election be determined what is properly the subject of an exception."

It will be observed that he is there dealing with an exception strictly so called. Then, further on, he said (*ibid.* at pp. 531, 532):

"It has been said that I may treat it, as in the case of *Cooper v. Stuart* (6), as being not a true exception, but a reservation in the sense that it may be treated as a defeasance or shifting use, as a grant to Times, the grantee, until the road is selected, and then to the vendors. It appears to me I cannot treat it in that way. In *Cooper v. Stuart* (6) the word was 'reserving,' and in this

case the words are 'save and except and reserving.' The difference is well known between the two. An exception is a taking out, a subtraction from, that which has been previously expressed to be granted of some part of the thing granted. A reservation must be of some new thing out of that which is granted. Here both words are used—'save and except and reserving.' I must, therefore, treat this as being an exception from the thing which is granted. I ought to add that I have been asked to determine another question that might arise between the parties, namely, whether any effect could be given to this clause by way of reserving an easement to the vendors of a right of way over the land which has been granted to the purchaser. On that I say nothing at all. Even if it did take that form, the soil would equally pass to the purchaser and would be bound by the covenant."

From his judgment there was an appeal, and STIRLING, L.J., delivered the reserved judgment of the court, which determined that the conveyance in that case operated at common law and not under the Statute of Uses. STIRLING, L.J., said ([1902] 2 Ch. at p. 540):

"It has long been settled that, according to the common law, a limitation of an estate of freehold to commence in futuro is void. . . . If, then (as we think), the conveyance of Mar. 23, 1896, operates at common law, the exception is bad."

That is to say, if there were an immediate estate, not an estate to begin in futuro, but immediately, as would be the case if it operated at common law, the exception, being thus indefinite, would be bad. Then it was suggested that the deed might operate under the Statute of Uses, and that there might be a shifting use, and that, at the time the use sprang up, the land would be defined, and, therefore, the objection that the exception was too indefinite would be got rid of. The lord justice proceeded to point out that then there would be another fatal objection to it, because the shifting use would not arise necessarily within the period allowed by the law against perpetuities. He said (*ibid.* at pp. 540, 541):

"If, however, it can be held that the conveyance operates under the Statute of Uses, then it appears to us that the exception is equally bad as infringing the rule against perpetuities; for the election, without which the exception is of no effect, need not be made, according to the terms of the conveyance, until after the 'nearest road' had been made by the purchaser or his assignee—an event which would not necessarily occur within the period prescribed by the rule. It was contended that, according to the law as stated in SHEPPARD'S TOUCHSTONE, the election must be made in the lifetime of both grantor and grantee; but the answer is that, although this might be so if the deed had been silent on the subject, the parties have chosen to determine otherwise. On this part of the case the reasoning of SIR GEORGE JESSEL, M.R., in *London and South Western Rail. Co. v. Gomm* (1) appears to be in point."

Now, down to that point the lord justice had been treating it as an exception, and not a reservation, and pointing out that it was invalid either for one reason or another. If the deed operated at common law, it was void for uncertainty; if it operated under the Statute of Uses, it was void for perpetuity. Then there was obviously a suggestion of the reservation of the easement, the same point that BUCKLEY, J., had been asked to deal with. The lord justice with regard to that said this ([1902] 2 Ch. at p. 541):

"We do not thereby decide that effect cannot in some other way be given to the intention, which is plain on the face of the deed, that the vendors should be entitled to access from their lands on the east side of the railway to the roads which the purchaser proposed to make on the west side."

That point of any easement being reserved was not decided at all. Both those cases so strongly relied on by the plaintiffs were cases of exception from a grant. This is the reservation of an easement.

- A The second point was that it was void as being contrary to the rule against perpetuities, and that it was covered by *London and South Western Rail. Co. v. Gomm* (1). But the conveyance reserves an immediate right or easement of tunnelling. It is not a right to arise at some future time; it is an immediate right. The conveyance was made subject to a legal reservation of the easement. That is not like *London and South Western Rail. Co. v. Gomm* (1), where the covenant
- B was to re-convey on the happening of a future event which might not arise within the period of time allowed by the rule against perpetuities. Moreover, in that case, as the covenant had not been entered into by Gomm himself, it was essential for the railway company to maintain that the covenant conferred an interest in the land. SIR GEORGE JESSEL, M.R., pointed this out, and said that, if it was a mere personal contract, it would not be obnoxious to the rule against perpetuities, but,
- C as Gomm had not himself entered into the covenant, he was not one of the contracting parties, and it was essential for the plaintiff to prove that it ran with the land. In the present case, the plaintiffs themselves entered into the contract to grant and granted an easement of the tunnel, and they are the parties to the contract who now wish to restrain the vendor from carrying out that easement. In my opinion, there is no question here as to the validity of the grant of an ease-
- D ment in futuro; there was an immediate present right to make the tunnel immediately the conveyance was executed, and the plaintiffs accepted the grant subject to it.

- Thirdly, it was said that the plaintiffs had no legal right to grant the easement, having regard to cases like *Mulliner v. Midland Rail. Co.* (7)—that is to say, having purchased the land for the purpose of their railway, they could not grant
- E to somebody else the easement of tunnelling under it. In my opinion, there is nothing in that point. In *Re Gonty and Manchester, Sheffield and Lincolnshire Rail. Co.* (5) it was decided by the Court of Appeal that the company could grant a right of way, if it was not inconsistent with the purposes for which the lands were taken by the railway company. Here, the existence of the tunnel will not prejudice the plaintiffs the least in the world. It is merely part of the accommo-
- F dation works agreed on.

A fourth point to be dealt with is this. It appears to me that the present matter is directly within s. 71 of the Railway Clauses Consolidation Act, 1845. That section provides :

- "If any of the owners or occupiers of lands affected by such railway shall
- G consider the accommodation works made by the company, or directed by such justices to be made by the company, insufficient for the commodious use of their respective lands, it shall be lawful for any such owner or occupier, at any time, at his own expense, to make such further works for that purpose as he shall think necessary, and as shall be agreed to by the company, or, in case of difference, as shall be authorised by two justices."
- H Here the landowners are proposing at their own expense to make the tunnel they consider necessary. The plaintiffs have agreed that they shall make it, and the agreement is in evidence before me. The plaintiffs say that they do not agree to it now, but, having agreed that it shall be done for value, and having received the value, they cannot turn round and say they do not now agree and retract their agreement.
- I Then it was said that the defendants are not the heirs, appointees, or assigns of the original vendor. In my opinion, they certainly are. William Montague Calcraft, the son, succeeded to the land with all the rights, powers, and privileges of his father John Hales Calcroft, and, by the lease of Sept. 30, 1884, he made the lessees his assigns for the purpose of the construction of the tunnel. He expressly conferred on them the power he had of constructing the tunnel. That lease was, on Nov. 1, 1900, assigned to the defendants. It was said, as I gather, that no one could be the assign of that right who was not the assign of the whole of the land held by the vendor. I do not accept that at all. The vendor could have made the

tunnel at any point he pleased, and could assign the benefit of that power to the purchaser or lessee of any part of that land. Of course there can only be one tunnel, and, having once assigned the right to make it to one purchaser, he could not confer it on any other unless the first purchaser released the right to him so as to enable him to grant it to some other person. Under the deed of Sept. 30, 1884, the defendants have, in my opinion, the right to construct the tunnel. Any subsequent grant to anyone else was only so far as it could be lawfully granted, and it could not be granted to anyone else, having been already granted to the defendants. In my opinion, the defendants have a legal right to make the tunnel, and, therefore, the action brought by the plaintiffs to restrain them from making it fails.

The plaintiffs appealed.

Micklem, K.C., and *Percy Wheeler* for the plaintiffs, the railway company.

Hon. E. C. Macnaghten, K.C., *MacSwinney* and *H. O'Hagan* for the defendants.

SIR HERBERT COZENS-HARDY, M.R.—I fail to appreciate the relevancy of the greater part of the arguments we have heard in this case. The only point that has been argued before us seems to me to be reasonably clear. In 1847, the railway company wanted to acquire, pursuant to their Parliamentary powers, some land in Kent which divided the estate of Mr. Calcraft. It is a neighbourhood in which there is chalk, and I will assume in favour of the railway company, but, of course, without deciding it, that, under the conveyance which they obtained from Mr. Calcraft, chalk was not an excepted mineral, but that the underlying chalk passed to and is now vested in the railway company. It was obvious that, in a transaction of that kind, various arrangements were absolutely necessary for the accommodation of the severed land, and that, in the absence of such arrangements, the compensation payable by the railway company to Mr. Calcraft would have been assessed at a figure far beyond that at which it was assessed. The compensation was left to a gentleman to ascertain, but, by this agreement made between the railway company and Mr. Calcraft by his agent, certain obligations were entered into by the railway company with Mr. Calcraft. [His LORDSHIP referred to the agreement, and continued:] That was an agreement entered into by the railway company—if I may use such a phrase of a corporation, a living covenantor, a covenantor now alive. Let me suppose that Mr. Calcraft was alive. What possible objection would there have been to an action by Mr. Calcraft against the actual covenantor? What would the doctrine of the rule against perpetuities have to say to the matter? I have listened with some amazement to the contention that the rule against perpetuities applies where the action is brought, not against an assign of the covenantor, but against the covenantor himself, and I listened with still more amazement when I heard of *London and South Western Rail. Co. v. Gomm* (1) cited as an authority for that purpose. It is well to make quite clear what that case was. The London and South Western Railway Company sold some land which they believed to be surplus land to one Powell, and the conveyance to Powell contained this covenant by Powell:

“And Powell for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiffs, their successors and assigns, that he, the said G. Powell, his heirs and assigns, owner and owners for the time being of the hereditaments intended to be thereby conveyed, and all other persons who should or might be interested therein, should and would at any time thereafter, whenever the said land might be required for the railway or works of the company, whenever thereunto requested by the company, their successors or assigns, by a six calendar months' previous notice in writing re-convey”

the property for £100. Powell assigned to Gomm, and the London and South Western Railway Company in the action, which was brought against Gomm and not against Powell, sought to enforce that covenant against Gomm, who was not the covenantor, and who could not be made liable on the covenant unless it was a

A covenant which ran with the land so that the burthen of it passed with the land, and it was held by the Court of Appeal that the action failed. But, so far from that being any authority in favour of the proposition which has been urged, it is, as I read it, as clear and distinct an authority as could be desired to the contrary. KAY, J., from whom the appeal was brought, said (20 Ch.D. at p. 576):

B "A contract to buy or sell land and covenants restricting the use of land, though unlimited, are not void for perpetuity."

That means as between the contracting parties, and SIR GEORGE JESSEL expressly drew the distinction in these words (*ibid.* at p. 580):

C "If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell, who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land."

And LINDLEY, L.J., says (*ibid.* at p. 588):

D "How is Gomm to be held to be bound by this covenant? He did not enter into it, he is not bound at law."

E So far from that being an authority that Powell would not have been bound by the covenant, and that the London and South Western Railway Company could not have enforced the covenant against Powell, I think the observations of all the members of the court plainly indicate that, in that case, there would have been a perfectly enforceable covenant by Powell at the instance of the London and South Western Railway Company, and the whole doctrine of the rule against perpetuities would have had absolutely nothing whatever to do with it. So that, if Mr. Calcraft were now alive, I think there could be no answer to an action by him against his living covenantor claiming to enforce the rights under the covenant in the agreement of 1847.

F Then the next point is this. It may be said, supposing Mr. Calcraft might have sued on this covenant, Mr. Calcraft died long ago, and it must be for the present defendants to make out that they are entitled to the benefit of the covenant as assignees of the covenant. That, I think, they do make out with ease and perfect satisfaction. Mr. Calcraft died in 1880. His son was his universal successor. G Both his real and his personal estates were vested in him. He being in that position granted a lease in 1884 to the predecessors of the defendants for a long term of years of a portion of the chalk on each side of the railway not extending the whole length of the land subject to the agreement of 1847, and at the end of the habendum there is this proviso:

H "And it is hereby agreed and declared that during the continuance of this demise the rights and privileges and liabilities of the lessor under and by virtue of [not the conveyance of 1847 be it observed, but the agreement of May, 1847, which I have referred to], a copy whereof is endorsed upon these presents, shall be vested in the lessees."

I How, after that, it can be said that the defendants as successors of the lessee are not entitled to say, with regard to the benefit of this agreement which was endorsed on the lease and which is expressly said to be vested in them, that they are assignees of the covenant and entitled in the character of such assignees of the covenant to sue the living covenantor, really is altogether beyond me. It seems to me, when one gets really to the bottom of this case, that it is a very plain one. A living covenantor has covenanted with A.B. and his assigns, and the defendants are the assignees of that covenant, and they simply ask that they may be entitled to claim the benefit and to enforce the benefit of that covenant for the purpose of connecting the two portions of the demised chalk which are separated by the railway and which they desire to join by means of a tunnel. I should add that no

tunnel has yet been made pursuant to this agreement. No greater burden is imposed on the railway company by this. Only one tunnel could be made, and it seems to me that the view taken by the learned judge is perfectly right, and that the rule of perpetuities has nothing whatever to do with it, and that the present defendants are the assignees of the covenant quoad the demised property. In that demised property they desire to make the tunnel, and I can see no reason why as against the covenantors, with whom alone we are concerned, they should not enforce their rights. The appeal will be dismissed with costs. A B

FLETCHER MOULTON, L.J.—I am of the same opinion. I do not think that in my whole experience I have ever had to decide a more utterly unmeritorious claim than that which is put before us by the plaintiffs. In 1847, the plaintiffs, the South Eastern Rail. Co., were anxious to buy a strip of land for the purpose of their railway. It is quite clear from the documents before us that that severed the land of the person from whom they were purchasing, and that the claims for severance would have run into a very large sum of money. They were claims that could have been largely diminished by accommodation works, and the damage was damage which would arise in the future. They, therefore, made an agreement whereby some slight accommodation works were made on the surface, and the railway company agreed to allow one tunnel to be made underneath the surface when the time should arise which rendered it necessary; but it was provided that it should be so made as not to affect the railway and to the satisfaction of the railway company's engineer. I have not the slightest doubt that such an agreement most gravely affected the price that the railway company paid for the land. Severance claims in the case of land which, as in the present case, was going to be used for the purpose of excavating chalk (which I will assume is a material that passes to the railway company under the ordinary conveyance) are difficult to assess. Generally in compensation cases they are assessed at very high values because the person from whom the land is taken has no option but to sell it, and can only claim compensation at that moment, future damage must be considered, and, therefore, arbitrators generally take a very liberal view of the amount of his claim. Having thus obtained the land for a considerably less sum than they otherwise would have had to pay by reason of their having entered into this eminently sensible agreement, the railway company, now that the time has arisen and the person who is entitled to the benefit of this agreement wishes to make the tunnel, repudiate their agreement. And, to do them justice, there is no hypocrisy in it. They do not pretend that they do it on public grounds, but they do it because they think themselves justified in repudiating an agreement of which they have had the benefit because, in this way, they will be paid either £70 or £75 a year more. If they were right in law, the fact that I was thoroughly disgusted with the railway company for putting forward such a claim would not affect me in the slightest. The importance of making English law clear and certain is so immeasurably greater than any other consideration, and it is the one thing that we are here to do, that I should have decided in their favour if they were, in my opinion, right in law; but in this case the law on which they found their claim seems to be quite as bad as the morals. The railway company made a personal agreement that they would allow something to be done. They are bound by that agreement because, as the Master of the Rolls said, personal covenants do not fall within any rule of perpetuities, and, besides, they are the actual covenantors. Therefore, I confess that I cannot see a shadow of justification for the claim they set up. If the other person to the agreement were alive, they would be bound by the covenant which they entered into with him. It is true that he is dead, but, to my mind, on the most elementary principles of law the benefit of this covenant passed as part of his estate to the residuary legatee, and it has been assigned by him to the defendants, and they are, for the purposes of to-day, in exactly the same position as the original Mr. Calcraft himself. On those grounds, I am of opinion that the railway company are bound by their agreement. C D E F G H I

A **FARWELL, L.J.**—I am of the same opinion. It is settled beyond argument that an agreement merely personal, not creating any interest in land, is not within the rule against perpetuities. It is sufficient to refer to *Witham v. Vane* (8). There was there

B “a covenant by a purchaser of lands in fee simple contained in the conveyance made to him by the vendor, that the purchaser, his heirs, appointees, and assigns, will from time to time and at all times pay, or cause to be paid, to the vendor, his heirs, executors, administrators, or assigns, the sum of sixpence for every chaldron of coals wrought and gotten out of the lands conveyed, and which shall be shipped for sale.”

C That was entered into by Earl Darlington (afterwards Duke of Cleveland) in 1824. He died in 1842. The benefit of the covenant was assigned to certain other persons and they sued the executors of the duke in 1883, and this question of perpetuity was swept aside as having no relevancy whatever to a mere personal covenant, although it was connected in some way with the land. But the fact that there is some connection with, or reference to, land does not make the personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the court can by construction turn it from personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor, it may be both; he may have attempted both to limit the estate, which may be a limitation bad for perpetuity, and he may have entered into a personal covenant which will be binding on him because the rule against perpetuities has no application to such a covenant.

E The real answer, I think, to any question of difficulty arising from tying up land is that the covenantee recovers on the covenant against the original covenantor, and he recovers in damages only unless the covenantor is still the owner of the land to which the covenant relates. If the covenantor is still the owner of that land, the covenantee recovers in the same manner on the covenant, but, instead of damages, he may claim specific performance, and then it is for the court to consider whether, under the circumstances, it is equitable to grant specific performance or give damages in lieu of it. So far as I see, I should have no hesitation whatever in decreeing specific performance in a case like this. There certainly is no dishonesty in the railway company's case; there is a clear covenant by them to do a certain thing when called on by a particular person. They are so called on by that person. They have had the benefit of the covenant in the reduction of the amount of the money which they have had to pay, and now they refuse to perform their own personal covenant on the ground of perpetuity.

Appeal dismissed.

Solicitors : *John W. Watkin; Leonard & Pilditch.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

A

Re BROCKMAN

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Buckley and Kennedy, L.J.J.), May 4, 5, 21, 1909]

[Reported [1909] 2 Ch. 170; 78 L.J.Ch. 460; 100 L.T. 821;
25 T.L.R. 595; 53 Sol. Jo. 577]

B

Costs—Taxation—Right of client to order—Requirement of submission to pay—Amount certified payable—Exclusion of statute-barred debts—Delivery of papers—Lien—Solicitors Act, 1843 (6 & 7 Vict., c. 73), s. 37 and s. 43.

C

D

E

Where a client applies in any Division of the High Court for an order to tax a bill of costs (i.e., an order to tax only, and not an order both to tax and to deliver up papers) within one month after delivery of the bill he has an absolute right to the order and should not be required to submit to pay the amount found on taxation to be due. Where, however, he applies outside that period he thereby appeals to the discretion of the court which should require from him a submission to pay. This submission, which is inserted in the order, should be a submission to pay, not what is due, but only what is certified as payable having regard to, *inter alia*, the statutes of limitations. A similar submission should be required when the client applies for the delivery up of papers. In this case the order should direct taxation of the statute-barred items so as to ascertain the amount for which the solicitor has a lien. The submission enables an order for payment to be made without the necessity for a separate application by the solicitor under the Solicitors Act, 1843, s. 43.

Decision of WARRINGTON, J., [1909] 1 Ch. 354, reversed.

Notes. The Solicitors Act, 1843, has been repealed. For s. 37 and s. 43 of that Act see now ss. 67-69 and s. 71 of the Solicitors Act, 1957, respectively.

Referred to: *Re Plummer*, [1917] 2 Ch. 432.

F

As to taxation of costs, see 36 HALSBURY'S LAWS (3rd Edn.) 139 et seq.; as to submission to pay, see *ibid.*, p. 156; as to order for payment, see *ibid.*, p. 172. For cases see 42 DIGEST 177-179, 198-200, and 317-318. For the Solicitors Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 1053.

Cases referred to:

- (1) *Re Margetts*, [1896] 2 Ch. 263; 65 L.J.Ch. 479; 74 L.T. 309; 44 W.R. 462; 40 Sol. Jo. 404; 42 Digest 244, 2756.
- (2) *Budgett v. Budgett*, [1895] 1 Ch. 202; 64 L.J.Ch. 209; 71 L.T. 632; 43 W.R. 167; 39 Sol. Jo. 61; 13 R. 1; 42 Digest 254, 2851.

Also referred to in argument:

H

Re Pender (1846), 2 Ph. 69; 16 L.J.Ch. 25; 8 L.T.O.S. 113; 10 Jur. 891; 41 E.R. 868, L.C.; 42 Digest 166, 1711.

Curwen v. Milburn (1889), 42 Ch.D. 424; 62 L.T. 278; 38 W.R. 49; on appeal, 42 Ch.D., p. 432, C.A.; 42 Digest 254, 2849.

Ex parte Jarman (1877), 4 Ch.D. 835; 46 L.J.Ch. 485; 42 Digest 201, 2225.

Re Murray, [1867] W.N. 190; 42 Digest 270, 3037.

I

Re Norman (1886), 16 Q.B.D. 673; 54 L.T. 143; 34 W.R. 313; 2 T.L.R. 272; sub nom. *Re Norman, Ex parte Bradwell*, 55 L.J.Q.B. 202, C.A.; 42 Digest 187, 2015.

Re Bromley (1844), 7 Beav. 487; 49 E.R. 1154; sub nom. *Re Bromley, Ex parte London and Brighton Rail. Co.*, 13 L.J.Ch. 320; 42 Digest 177, 1856.

Re Thurgood (1854), 19 Beav. 541; 2 Eq. Rep. 1152; 23 L.J.Ch. 952; 24 L.T.O.S. 10; 18 Jur. 821; 2 W.R. 682; 52 E.R. 461; 42 Digest 175, 1831.

Re Bateman, unreported, cited in 19 Beav. at p. 544.

Re Pyne (1848), 5 C.B. 407; 136 E.R. 936; 42 Digest 309, 3440.

- A *Re Woods, Ex parte Ditton* (1880), 13 Ch.D. 318; 42 L.T. 161; 28 W.R. 402, C.A.; 42 Digest 168, 1736.
- Re Park, Cole v. Park* (1888), 41 Ch.D. 326; 58 L.J.Ch. 128; 59 L.T. 925; affirmed (1889), 41 Ch.D., p. 336, C.A.; 42 Digest 159, 1596.
- Re Hirst and Capes*, [1908] 1 K.B. 982; 77 L.J.K.B. 930; 52 Sol. Jo. 684; affirmed sub nom. *Hirst and Capes v. Fox*, [1908] A.C. 416; 99 L.T. 624; sub nom. *Re Hirst and Capes*, 77 L.J.K.B. 938; 52 Sol. Jo. 684, H.L.; 42 Digest 198, 2181.
- Re Elmslie & Co.* (1869), L.R. 9 Eq. 72; 42 Digest 166, 1705.
- Re Battams and Hutchinson*, [1897] 1 Ch. 699; 66 L.J.Ch. 394; 76 L.T. 385; 45 W.R. 458; 41 Sol. Jo. 387; 42 Digest 199, 2192.
- Re Hughes*, [1899] W.N. 125; 42 Digest 199, 2193.
- C *Re Debenham and Walker*, [1895] 2 Ch. 430; 64 L.J.Ch. 859; 73 L.T. 115; 43 W.R. 699; 13 R. 631; 42 Digest 199, 2187.
- Lumsden v. Shipcote Land Co.*, [1906] 2 K.B. 433; 75 L.J.K.B. 665; 95 L.T. 17; 54 W.R. 461; 22 T.L.R. 559; 50 Sol. Jo. 499, C.A.; 42 Digest 157, 1572.

Appeal by the Sandgate Urban District Council from a decision of WARRINGTON, J., on a summons for taxation of a bill of costs.

- D On May 14, 1908, Lewis James Drake Brockman, who had acted as solicitor to the Sandgate Urban District Council and their predecessors, the Local Board of Health of the district of Sandgate, delivered to the council certain bills of fees, charges, and disbursements amounting in the aggregate to about £435. The bills covered a period extending from the year 1881 to the year 1905, when he ceased to be their solicitor. On June 12, 1908, within one month after the delivery of the bills, the council took out a summons, under the Solicitors Act, 1843, asking that it might be referred to the taxing master to tax and settle the bills, such taxation and settling to be with the usual directions, but on the footing (inter alia) that all fees, charges, and disbursements (if any) which, or the remedies for the recovery of which, were barred by the Statute of Limitations at the date on which the bills wherein they were respectively comprised were delivered should be disallowed.
- F The summons did not ask for delivery up of any documents, and therefore, no question as to the solicitor's lien arose. The summons was adjourned into court and came on to be heard before WARRINGTON, J., in January, 1909. WARRINGTON, J., held that where the client applies for taxation, whether within a month after the delivery of the bill or more than a month after the delivery of the bill, he submits to pay what is found due on taxation, and due in a proper sense—namely, not that for which an action could be brought, but that which is due whether barred by the Statute of Limitations or not; that if he wishes to raise the statute he must not himself institute proceedings for taxation, but must leave the solicitor to institute proceedings against him, which will result in taxation; and that, if he takes the proceedings, then there is no room for the application of the statute. His Lordship was of opinion, therefore, that the order for taxation ought not to contain the special direction asked for by the council. The council not desiring to take an order without that special direction, no order was made on the summons, except that the council should pay the costs. From that decision the council appealed.
- G
- H

Henry Terrell, K.C., and *G. Solomon* for the council.

Cave, K.C., and *F. E. Ward* for the solicitor.

Cur. adv. vult.

I

May 21, 1909. **SIR HERBERT COZENS-HARDY, M.R.**, read the following judgment of the court.—This appeal raises an important question as to the right of a client who within one month after the delivery of bills by a solicitor containing items which are alleged to be statute-barred seeks to obtain an order for taxation in such a form as will not compel him to pay statute-barred items, the client not desiring to claim the return of papers or to interfere with any lien which the solicitor may have. It incidentally has brought to our notice a striking difference in the practice of the Chancery Division as compared with the practice in the King's

Bench Division. We have had the advantage of communicating with the senior taxing master, who, after consultation with his colleagues, has furnished us with a memorandum. A

The statute of 1843 is the governing statute. By s. 37, on the application within one month of delivery of a bill, the client has, in our opinion, an absolute right to have the bill taxed and settled without any money being brought into court and without any submission to pay. The words are that the court is "required" to refer the bill for taxation. If taxation is applied for after the expiration of one month there is no such absolute right, but the court may refer the bill to taxation with such directions and subject to such conditions as the court thinks proper. The words are "it shall be lawful." The earlier statute of 2 Geo. 2, c. 23, which was made perpetual by the statute 30 Geo. 3, c. 19, and was repealed by the Act of 1843, required as a condition for taxation a submission by the client to pay. No such conditions is to be found in the Act of 1843, and we can see no justification for requiring such a submission where the application is within one month of delivery. On the construction of the Act of 1843 this seems to be reasonably clear. Form 41 of Appendix K of the Rules of the Supreme Court, 1883, set out in the ANNUAL PRACTICE, 1909, vol. 2, p. 152, is important, for it gives the proper form of order without any such submission even where delivery of papers is sought for. The practice in the King's Bench Division has been and is to make the order without requiring a submission to pay (see CHITTY'S ARCHBOLD'S QUEEN'S BENCH PRACTICE (14th Edn.), vol. 1, p. 147). But in the Chancery Division, where the great majority of non-litigious taxations have been dealt with, the order of course has ever since 1843 contained the submission to pay. This is probably a relic of the earlier practice under the statute of 2 Geo. 2, c. 23. The scheme of the Act of 1843 is peculiar. If the solicitor delivers a bill of costs, and the client within one month applies for taxation, the court restrains the solicitor from commencing or prosecuting any action pending the reference for taxation. And, assuming that the reference results in a certificate in favour of the solicitor, he can without issuing a writ apply under s. 43 for an order for payment. We think that the Act does not deprive the client of the right to rely upon the Statute of Limitations. The proceedings, it is true, are initiated by the client and not by the solicitor. But, nevertheless, they are of such a nature that the solicitor gets the benefit of them. The analogy of claims by creditors in an administration suit is very close. B

We, therefore, think that the order to tax ought to be so framed as not to impose upon the client a burden greater than he would have to bear if he were sued by the solicitor. The effect of requiring submission to pay as interpreted by KEKEWICH, J., in *Re Margetts* (1) is to prevent the client from relying upon the Statute of Limitations. In the earlier case of *Budgett v. Budgett* (2) ([1895] 1 Ch. at p. 214) the same learned judge had expressed emphatically a different view, and we understand from the taxing masters that until *Re Margetts* (1) the taxing masters had been in the habit of striking out statute-barred items. Since, however, *Re Margetts* (1) the practice has changed. C

In our opinion the submission to pay is not really necessary in any case, for s. 43 of the Act enables an order to be made in any division for payment of the certified balance. Nevertheless where the client is appealing to the discretion of the court a submission to pay in a modified form may be not only free from objection, but a reasonable saving of expense. The submission avoids the necessity of a separate application under s. 43. In our opinion the submission should be in every such case only a submission to pay, not what is due, but what is payable, by which we mean what is payable having regard (inter alia) to the defence of the Statute of Limitations. In any case in which the client seeks an order for delivery of papers that order should direct taxation also of the statute-barred items, so as to ascertain also the amount for which the solicitor has a lien upon the papers. WARRINGTON, J., felt himself bound to follow the practice which has existed so long. In our opinion, we ought not to attach too great weight to a practice which has been confined to the Chancery Division, and which, so far as our information goes, has not been D

- A often applied in the Chancery Division to taxation within one month where delivery of papers is not asked. It seems highly desirable that the practice should be made uniform in both divisions. The form suggested by the taxing master* seems to meet the difficulty by directing where any submission is required that the submission is only to pay what is certified as "payable," by which is meant recoverable having regard to (inter alia) the Statute of Limitations, and by directing the taxing master where necessary to certify what is "due" as distinct from "payable" with a view to ascertaining the amount for which there is a lien. Where, however, the client applies within one month after delivery of a bill and does not claim delivery up of papers, no submission to pay ought to be inserted.
- B

- The result is that in our opinion this appeal must be allowed and a simple reference ordered to tax the costs, and to certify the amount payable by the petitioner to the solicitor, or by the solicitor to the petitioner. If the client does not object to a submission to pay in the qualified form above suggested, the submission may, of course, be inserted. It will be for the taxing master to deal with any question under the Statute of Limitations, subject, of course, to review by the judge. The form suggested by the taxing master should be used in all divisions, so as to secure uniformity of practice. In any case in which (i) no submission to pay can be exacted, or (ii) no delivery of papers is desired, such parts of the printed form as are not appropriate should be struck out. The solicitor must pay the costs of the appeal. The costs in the court below should be costs in the taxation, and will be paid by one or other party according as one-sixth is or is not taxed off.
- D

Appeal allowed.

- E Solicitors: *John Hands*, for *J. Shera Atkinson*, Sandgate; *White, Borrett & Co.*, for *Brockmans*, Folkestone.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

* The form of revised order was as follows:—Order to tax after the month.—Upon the petition of this day preferred unto this court. It was alleged that the petitioner employed the above-named.

- F That the said solicitor on or about the day of delivered unto the petitioner bill of fees and disbursements which, as the petitioner advised ought to be taxed. That the petitioner submit to pay what shall be certified as payable to the said solicitor on the taxation of said bill. It was, therefore, prayed and it is accordingly ordered that it be referred to the taxing master to tax and settle the said bill and that the petitioner and also the said solicitor do produce before the said master upon oath as he shall direct all books, papers, and writings in their custody or power respectively relating to the matters hereby referred or any of them. And that they be examined touching the same matters or any of them as the said master shall direct. And it is ordered that the said solicitor do give credit for all sums of money by received of or on account of the petitioner. And that be at liberty to charge all sums of money paid by to or on account of the petitioner. And it is ordered that if such bill when taxed be less by a sixth part than the said bill as delivered, the said master do tax the petitioner, costs of this reference, and if such bill when taxed shall not be less by a sixth part than the said bill as delivered, the said master do tax the said solicitor, costs of this reference. And the said master is to certify the amount payable by or due from the petitioner to the said solicitor, or payable by to the petitioner as the case may be, having regard to the costs of this reference so to be taxed as aforesaid, and any sum or sums of money which may have been so received or paid as aforesaid, and it is ordered that the amount so to be certified as payable be paid within twenty-one days after service of this order and of the taxing master's certificate to be made in pursuance thereof by the party from whom I to the party to whom the same shall be certified to be payable, unless the court shall upon special circumstances be certified by the said master otherwise order upon application to be made within one week after the date of the said master's certificate by the party liable to pay such amount. And it is ordered that upon payment by the petitioner to the said solicitor of what may be certified to be payable or due to as aforesaid, or in case it shall appear that there is nothing due to, he the said solicitor do deliver to the petitioner upon oath all deeds, books, papers, and writings in custody or power belonging to the petitioner. And it is ordered that no proceedings be commenced against the petitioner in respect of the said bill pending this reference, but the said master is to make his certificate in a month (unless the said master shall extend the time to enable him to make his certificate), or this order is to be of no effect.

Re JUDGMENT DEBTOR (No. 530 of 1908)

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Buckley and Kennedy, L.J.J.), May 29, 1908]

[Reported [1908] 2 K.B. 474; 77 L.J.K.B. 968; 99 L.T. 126;
24 T.L.R. 689; 52 Sol. Jo. 567; 15 Mans. 209]

Bankruptcy—Notice—Notice based on judgment debt—"In accordance with the terms of the judgment"—*Judgment in favour of P. and S. trading as H. Co. —Notice to pay P. and S. as private individuals—Bankruptcy Act, 1883* (46 & 47 Vict., c. 52), s. 4 (1) (g).

By a writ "P. and S., trading as the H. Co." claimed a certain sum of money. Later a final judgment was signed which provided "that the plaintiffs recover against the defendants" a certain sum. The plaintiffs served a bankruptcy notice on one of the defendants requiring him to "pay to P. of (his private address) and S. of (his private address) the sum of £x . . . as being the balance due on a final judgment obtained by them against you and G. in the High Court etc. dated Sept. 2, 1907, . . . or you must satisfy the court that you have a counterclaim, set-off or cross-demand against the said P. and S., trading as the H. Co." The debtor contended that this notice was not "in accordance with the terms of the judgment," and so did not comply with the requirements of s. 4 (1) (g) of the Bankruptcy Act, 1883 [now s. 2 of the Bankruptcy Act, 1914]. There was no evidence that the debtor had been actually misled by the terms of the notice.

Held (BUCKLEY, L.J., dissenting): the notice was not "in accordance with the terms of the judgment," was embarrassing to the debtor, and so must be set aside.

Re Howes, Ex parte Hughes (1), [1892] 2 Q.B. 628, applied.

Notes. The Bankruptcy Act, 1883, has been repealed and replaced by the Bankruptcy Act, 1914; the provisions formerly made by s. 4 (1) (g) of the 1883 Act are now made by s. 2 of the 1914 Act and r. 137 (b) of the Bankruptcy Rules, 1952.

Distinguished: *Re A Debtor* (No. 2 of 1912), *Ex parte The Debtor* (1912), 106 L.T. 895. Applied: *Re Debtor* (No. 21 of 1950), *Ex parte The Debtor v. Bowmaker, Ltd.*, [1950] 2 All E.R. 1129. Referred to: *Re A Debtor* (No. 41 of 1951), *Ex parte The Debtor v. Hunter*, [1952] 1 All E.R. 107.

As to form of bankruptcy notice, see 2 HALSBURY'S LAWS (3rd Edn.) 279, para. 522; and for cases see 4 DIGEST (Repl.) 100-103, 894-927. For the Bankruptcy Act, 1914, s. 2, see 2 HALSBURY'S STATUTES (2nd Edn.) 329; and for r. 137 (b) of the Bankruptcy Rules, 1952, see 3 HALSBURY'S STATUTORY INSTRUMENTS.

Case referred to:

(1) *Re Howes, Ex parte Hughes*, [1892] 2 Q.B. 628; 62 L.J.Q.B. 88; 67 L.T. 213; 40 W.R. 647; 36 Sol. Jo. 629; 4 R. 4, C.A.; 4 Digest (Repl.) 102, 915.

Also referred to in argument:

Re De Murrieta, Ex parte South American and Mexican Co. (1896), 12 T.L.R. 238; 3 Mans. 35; sub nom. *Re Murrieta, Ex parte South American and Mexican Co.*, 40 Sol. Jo. 317, C.A.; 4 Digest (Repl.) 101, 911.

Re Winterbottom, Ex parte Winterbottom (1886), 18 Q.B.D. 446; 56 L.J.Q.B. 238; 56 L.T. 168; 4 Morr. 5, D.C.; 4 Digest (Repl.) 100, 898.

Interlocutory Appeal.

On July 29, 1907, the plaintiffs, William Paye and William Skipp, trading as the Hertingfordbury Brick Co., commenced an action in the King's Bench Division by specially endorsed writ against James Gilbert & Co. as principals and the debtor as surety for the sum of £111 6s. 6d., the price of goods sold and delivered by the plaintiffs to James Gilbert & Co. on the guarantee of the debtor, dated April 25,

A 1907. The writ contained a statement that it was issued by Ridsdale & Son (giving their address for service), agents for Chalmers-Hunt and Davies, of Ware, in the county of Herts, solicitors for the plaintiffs, and it concluded as follows :

“The plaintiff William Paye resides at Oak Villa, Enfield Highway, Middlesex, and the plaintiff William Skipp resides at Hope House, Ware, Herts.”

B On Sept. 2 the plaintiffs obtained leave to sign final judgment for the amount endorsed on the writ with interest, if any, and it was adjudged “that the plaintiffs recover against the defendants for £111 6s. 6d. and £8 16s. costs.” The defendants having paid certain sums on account of this judgment the plaintiffs served on the debtor, in pursuance of s. 4 (1) (g) of the Bankruptcy Act, 1883, a bankruptcy notice, intitled “In Re” the debtor, giving his name, “Ex parte William Paye and William Skipp, trading as the Hertingfordbury Brick Co.” in the following terms :

“Take notice that within seven days after service of this notice on you, excluding the day of such service, you must pay to William Paye, of Oak Villa, Enfield Highway, in the county of Middlesex, and William Skipp, of Hope House, Ware, in the county of Herts, the sum of £50 12s. 6d. claimed by them as being the balance of the amount due on a final judgment obtained by them against you and James Gilbert & Co. in the High Court of Justice, King’s Bench Division, dated Sept. 2, 1907, whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction, or the satisfaction of the court, or you must satisfy the court that you have a counterclaim, set-off, or cross-demand against the said William Paye and William Skipp, trading as the Hertingfordbury Brick Co., which equal or exceeds the sum claimed by them and which you could not set up in the action in which the judgment was obtained.”

E It was decided by Mr. Registrar Giffard, on the authority of *Re Howes, Ex parte Hughes* (1) that the notice must be set aside as embarrassing to the debtor, inasmuch as it was not “in accordance with the terms of the judgment.” From that decision the judgment creditors appealed.

Frank Phillips for the judgment creditors.

Edward Clayton for the debtor.

G **SIR HERBERT COZENS-HARDY, M.R.**—In my opinion, the decision of the learned registrar in this case was right. I approach this question impressed with the idea that a bankruptcy notice which is the foundation of a bankruptcy—attended as a bankruptcy is with penal consequences—is a matter in which great strictness is required, and so far as I am aware always has been required since the Bankruptcy Act, 1883. I need not quote authorities on that point, because it is admitted by both sides. The notice is given in pursuance of a statutory provision

H —namely, s. 4 (1) (g) of the Bankruptcy Act, 1883, which says that a debtor commits an act of bankruptcy :

“if a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set off in the action in which the judgment was obtained :”

In the present case a writ was issued by William Paye and William Skipp, trading as the Hertingfordbury Brick Co. The writ was endorsed with a claim against James Gilbert & Co. as principals, and the debtor as surety for the price of goods sold and delivered to the company on the guarantee of the debtor. Judgment was signed in the action at a considerably later period, because certain payments were admitted to be made on account, and the judgment was for £111 6s. 6d. and costs. That was reduced subsequently, and the notice which was given is in these terms, which is said by the plaintiffs to be a good notice. [HIS LORDSHIP read the notice, and continued:] What is the effect of that? The judgment was a judgment that the plaintiffs recover. They sued as trading as the Hertingfordbury Brick Co., and they sued as partners. It is quite true that in the writ in the action their private addresses were given as they were given in this notice, but they sued and recovered judgment as partners alone. The notice requires that payment should be made to them not as partners, not as trading as the Hertingfordbury Brick Co., but as two individuals living in different counties, although I attach no importance to that. In short, it required and exacted under penal consequences payment to two individuals, when according to the judgment payment to one of them is all that the law required. Is that "in accordance with the terms of the judgment"? In my opinion it is not.

This case, although not identical with *Re Howes, Ex parte Hughes* (1), is, in some respects, almost a stronger case than that decision, which is binding on us. In that case the writ was endorsed with a claim by the plaintiffs "as trustees of St. John's Hospital, in the town and county of Northampton," for damages for breach of covenant. The judgment was headed "Between the Rev. Nathaniel Thomas Hughes and others plaintiffs, and Elizabeth Howes and Mark Howes defendants," not describing the plaintiffs as they were described in the writ, viz., as trustees of St. John's Hospital, and it was adjudged that the plaintiffs recover against the defendants a certain sum. Then the notice required payment within seven days "to the Rev. Nathaniel Thomas Hughes and others," and then in a bracket "trustees of the charity known as St. John's Hospital, Northampton." That was the very description of those persons given in the writ, because they were there described as trustees of the hospital. And because there was this addition to the writ which was strictly in accordance with facts known to the defendants, it was held by the Court of Appeal that the bankruptcy notice was not "in accordance with the terms of the judgment"; that it was calculated to perplex the debtor; and that it ought to be set aside. Here the notice was very much more calculated to puzzle and perplex the debtor. The debtor was told that he must pay two people when he was under no obligation to pay more than one. That does seem to me to be a substantial matter—substantial, I mean, in the sense in which it is right to use that word when dealing with such a technical matter as a bankruptcy notice. This is, in substance, the view that was taken by the learned registrar. I think it is right, and that this appeal fails.

BUCKLEY, L.J.—In all that I am about to say it is scarcely necessary to state that I do not intend to throw the slightest doubt on the proposition that bankruptcy notices are to be strictly construed, or on the proposition that the notice shall be one requiring the debtor to pay the judgment debt in accordance with the terms of the judgment. But, bearing all that in mind, I cannot myself see here that there is any defect in this bankruptcy notice. [HIS LORDSHIP summarised the facts leading up to the issue of the notice, and continued:] The bankruptcy notice is dated Feb. 24, 1908. It is intitled in the matter of the debtor "Ex parte William Paye and William Skipp, trading as the Hertingfordbury Brick Co." That means that in the matter of the debtor, Paye and Skipp, trading as the Hertingfordbury Brick Co., are making a certain application to the court in bankruptcy. The notice is

"that you pay to William Paye [giving his address] and William Skipp [giving his address] the sum of £50 12s. 6d., claimed by them as being the balance of

A the amount due on a final judgment obtained by them against you and James Gilbert & Co. in the High Court of Justice, King's Bench Division, dated Sept. 2, 1907."

Then it goes on thus:

B "You must satisfy the court that you have a counterclaim, set-off, or cross-demand against the said William Paye and William Skipp, trading as the Hertingfordbury Brick Co., which equals or exceeds the sum claimed by them, and which you could not set up in the action in which the judgment was obtained."

C I understand that notice, if I may put it in my own words, to say this: Take notice that we, A and B, trading as the X firm, require you to pay to A and B so much money unless you can establish a counterclaim against A and B, trading as such firm, which equals or exceeds the sum claimed. How could the debtor be in any way embarrassed by that notice? It seems to me almost absurd to say that he was embarrassed. He knew perfectly well who were asking him for payment and of what. Of course he knew that the two applicants trading as the firm were the plaintiffs in the action. The alleged defect is that the notice did not say D "we require you to pay in a particular character." Is that a valid objection? The application was made by them in that character, but payment was required to be made to them without more. I should have thought that there was not much difficulty in saying that the payment was a payment to be made to them in that character. To my mind, the sentence as to the counterclaim at the end assists that, because the applicants are there described as partners, but the point of the matter is in the title. They apply as partners in a firm, and they require payment E of a judgment debt recovered by them as partners in a firm, as the debtor knew.

But then it is said that *Re Howes, Ex parte Hughes* (1) governs this case, and, being a decision of this court, it is of course binding on me, and I should be bound to follow it. I do not, however, see that it covers the present case. In *Re Howes, Ex parte Hughes* (1), as I understand it, the position was this: A writ was issued F in which the Rev. N. T. Hughes and a number of other persons sued the defendants and endorsed their writ with a claim by the plaintiffs as trustees of St. John's Hospital. They took a judgment in the form that the Rev. N. T. Hughes and others should recover so much money. The first observation I desire to make on a judgment in that form is that, of course, it is quite wrong. The debtor cannot G tell from that form of judgment whom he has to pay. There is no certainty whom he has to pay. Who are Hughes and others? The judgment was a most embarrassing one. In that sense I should have thought it could not have been the foundation of a bankruptcy notice; but the bankruptcy notice requires the defendants to pay the plaintiffs in a certain character. That is not this case. This is a converse case. As I understand the decision of the Court of Appeal in *Re Howes, Ex parte Hughes* (1), it comes to this: judgment in favour of Hughes and others H could not be the foundation of a bankruptcy notice because it wanted certainty, and the bankruptcy notice to pay Hughes and others as trustees did not follow the terms of the judgment. I may point out that the bankruptcy notice put the debtor in this embarrassment, and it was a very considerable embarrassment, that if he was going to satisfy the judgment it lay on him to find out who were the trustees. The judgment ought to have told him. Those were the objections which the court I found in the bankruptcy notice there. The decision of the court was really summarised in a passage in the judgment of BOWEN, L.J., which I will read with some observations. The learned judge said ([1892] 2 Q.B. at p. 632):

"A bankruptcy notice ought to inform the debtor clearly who is the creditor whom he is required to pay. In the present case the judgment gives the debtor no such information [that means that a judgment to pay Hughes and others does not give the information] and the bankruptcy notice does not supply the defect."

That means that the bankruptcy notice stated that the debtor was to pay Hughes and others, trustees, leaving the debtor to find out who were the trustees. That case, in my opinion, is no authority for the proposition that a notice which shows that the application was made by A and B as members of a firm, but in the words which require payment does not say you are to pay A and B in the character in which A and B are making the application, is embarrassing. I think that in the present case it is perfectly plain on the face of the notice that the plaintiffs were applying as members of the firm, and the notice required payment to them. I think that there is no difficulty whatever in saying that the debtor was to pay them as members of the firm. For these reasons I think that the bankruptcy notice was good.

KENNEDY, L.J.—In this case I agree with the Master of the Rolls in thinking that the decision of the learned registrar was right. One has to consider two things when dealing with this necessarily technical point. In the first place, one has not to decide as to the validity or invalidity of the notice by considering whether the debtor to whom the notice was given has in fact been misled. It is sufficient that there is a good ground for saying that the debtor might have been misled. That is, I think, settled by authority. Secondly, in judging the probability of the debtor being misled, one has not to deal too liberally with the notice because of the quasi-penal consequences which a bankruptcy involves. Bearing that in mind one has to look at this particular notice. My own view is that in considering this notice one may take into account the position of a debtor who is not necessarily learned in the law, and it is not one of those cases in which a knowledge of the law whether payment is to be made properly to one or must be made to both together is to be imputed to the person required to make the payment. One must remember that these bankruptcy notices may have to be served on people who are possibly illiterate; certainly on persons who are not to be treated as versed in the law. In approaching this case one has to see whether, treating him as an ordinary person, the debtor might be misled. Here the judgment was properly obtained in the action by the plaintiffs, trading as the Hertingfordbury Brick Co.

I need not review the facts, because they have been already stated. When it came to sending out the notice of payment of the £50 which the plaintiffs conceived to be due to them the notice was headed rightly, but it directed the debtor to take notice that he was to pay not to them as partners, nor to one of them as partners. I am not sure whether there has ever been any form settled for a notice of this kind, but I should have thought the proper form was: "Pay to A and B, trading as, &c., or one or either of them." That would have been a proper natural notice which would then tell the debtor what he has to pay, viz., a partnership debt, and that payment to either is in accordance with the judgment. That is what is required by the terms of s. 4 (1) (g) of the Bankruptcy Act, 1883. Instead of that, the notice tells him he must pay the same sum of money to both of them. In a sense it was due to both, but it was an obligation which might be discharged, having regard to the nature of the liability, by payment to either of them—and in that respect this notice is, in my opinion, possibly misleading. I do not know whether any form is settled, but I believe that notice in regard to partnership debts is framed in the form I have mentioned. Then, having told the debtor that payment is to be made to both, the notice concludes as follows. [His LORDSHIP read it, and continued:] Now, it is quite true that a person who is a lawyer, or who has a lawyer to advise him, may know, or in the second case would speedily learn, that if he has got a counterclaim against the two creditors although not in connection with the firm, but a general claim against the two, yet he would be entitled to set-off this debt against the debt which was the subject of the notice. But I think that, having spoken of the claim as a debt of the two apart altogether from the partnership, to limit the right to counterclaim as a claim against them trading as the Hertingfordbury Brick Co. is to add a further possible cause of error

- A** to that which I think is a possible cause of error in the body of the notice where it states the obligation. As regards the authorities, as the facts will hardly ever be the same, there is not much use in comparing them. All one has to seek in cases of this kind is the principle. I cannot help thinking that *Re Howes, Ex parte Hughes* (1) was in a sense a weaker case, that the judgment was in a form which was objectionable.
- B** But what the court has to do and what the court had to do there on the question of the validity of the notice is simply to say whether the notice requiring the debtor to pay is in accordance with the terms of the judgment. While that judgment stood, I should have thought that the debtor was in great difficulty; but if the debtor allows it to stand, then, although it might possibly be a ground for the registrar declining to act on a bankruptcy notice which has not been properly complied with by reason of the fact that the judgment was obscure and the debtor was misled, yet, so far as this section is concerned, I do not see how any objection could have been made. I have some doubt how far an objection to a notice based on a wrong form of judgment comes within s. 4 (1) (g). But what happened in that case was that some enlightenment was afforded by the notice. The notice bettered the judgment in the sense of correcting or doing something to correct it
- D** by telling the debtor that the judgment creditors were trustees of a certain charity. If one looks at the comparative chances of the debtor being misled, those chances were diminished by the notice, although the judgment, I agree, was itself obscure so far as regards the persons to whom the debt was to be paid. But what I decide on is the principle. Here is a possibly misleading notice which is not in accordance with the terms of the judgment. I think we ought to do what the court
- E** has always done in cases of the recipient insisting on the invalidity of the notice, and hold it bad although the objection to the validity may be in a sense a technical one and although there is no evidence that the debtor was in fact actually misled.

Appeal dismissed.

F Solicitors: *Ridsdale & Son*, for *Chalmers-Hunt & Davies*, Ware, Herts; *Corbould-Ellis & Mitchell*.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

Re POYSER. LONDON v. POYSER

[CHANCERY DIVISION (Parker, J.), July 15, 1910]

[Reported [1910] 2 Ch. 444; 79 L.J.Ch. 748; 103 L.T. 134]

Annuity—Arrears—Property settled by will—Estate liable for annuity—Annuity not paid by will trustees—Adjustment of arrears between capital and income.

By a settlement made on the marriage of J.C.P., one of the testator's sons, in 1900, the testator covenanted with the trustees that he, his executors or administrators, would pay to them during the joint lives of himself and his wife and the survivor of them and so long as J.C.P. or his wife or any of their issue should be living the yearly sum of £250, and that he would pay to the trustees £10,000, it being declared that they should pay the income thereof and the £250 a year to J.C.P. for life. The testator died in 1901. By his will he devised and bequeathed the residue of his real and personal estate to the trustees of the will on trust for sale and conversion, and directed that, subject to certain annuities, his residuary estate should be divided among his five sons and three daughters in such proportions that one son, H.C.P., should have one fifteenth and that the other children should each have two fifteenths with remainders over. In error the trustees of the will supposed that J.C.P. was not entitled to receive both his annuity and also the income from his share in the testator's estate, and so they did not pay the annuity to the settlement trustees. J.C.P. became entitled to a considerable sum for arrears, and the trustees of the will had in hand sufficient funds representing capital to pay them off. On a question whether, as between the tenants for life and the remaindermen of the settled shares, some part of the burden ought not to be thrown directly on the tenants for life,

Held: the arrears of the annuity since the testator's death and any payments made since such death in respect of the annuity ought to be paid or adjusted on the footing that as between the tenants for life and the persons entitled in remainder to each settled share or settled part of a share in the testator's estate a proportionate part (regard being had to the number of shares in which the testator's estate was divisible) of each instalment of the annual sum of £250 covenanted to be paid by the testator in the indenture of 1900 so long as such sum continued to be payable must be borne by and out of the income and capital respectively of each such settled share or settled part of a share on the footing of ascertaining what sum, if set aside at the testator's death and added to simple interest on that sum calculated at the rate of £3 10s. per cent. per annum as from the same date to the date when such instalment became payable would equal the amount of that instalment and paying in account a proportionate part of that sum out of or against capital and a proportionate part of the residue of the instalment in question out of or against income (regard being had in either case in fixing the proportionate part to the number of shares into which the testator's estate was divisible).

Notes. Considered: *Re Forster-Brown, Barry v. Forster-Brown*, [1914] 2 Ch. 584. Applied: *Re Tod, Bradshaw v. Turner*, [1916-17] All E.R.Rep. 1054. Considered: *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562. Applied: *Re Shee, Taylor v. Stoger*, [1934] All E.R.Rep. 623. Considered: *Re Fenwick, Fenwick v. Stewart*, [1936] 2 All E.R. 1096; *Re Leicester's Settled Estates, Coke v. Leicester*, [1938] 3 All E.R. 553; *Re Darby, Russell v. Macgregor*, [1939] 3 All E.R. 6. Referred to: *Re Hart, Hart v. Arnold* (1912), 107 L.T. 757; *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358; *Re Cooke, Randall v. Cooke*, [1916] 1 Ch. 480; *Re Foster, Hunt v. Foster*, [1920] 1 Ch. 391; *Re Wills, Dulverton v. Macleod*, [1939] 3 All E.R. 6.

A Cases referred to:

- (1) *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest (Repl.) 475, 5450.
- (2) *Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211; 75 L.J.Ch. 604; 94 L.T. 817; 54 W.R. 556; 40 Digest (Repl.) 756, 2432.
- (3) *Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596; 77 L.J.Ch. 16; 97 L.T. 706; 40 Digest (Repl.) 757, 2433.
- (4) *Re Henry, Gordon v. Gordon*, [1907] 1 Ch. 30; 76 L.J.Ch. 74; 95 L.T. 776; 40 Digest (Repl.) 756, 2431.
- (5) *Re Bacon, Grissel v. Leathes* (1893), 62 L.J.Ch. 445; 68 L.T. 522; 41 W.R. 478; 37 Sol. Jo. 340; 3 R. 459; 40 Digest (Repl.) 756, 2430.
- (6) *Re Thompson, Thompson v. Watkins*, [1908] W.N. 195; 40 Digest (Repl.) 757, 2434.

C

Also referred to in argument:

- Re Muffett, Jones v. Mason* (1888), 39 Ch.D. 534; 57 L.J.Ch. 1017; 59 L.T. 499; 37 W.R. 9; 4 T.L.R. 738; 40 Digest (Repl.) 756, 2428.
- Re Harrison, Townson v. Harrison* (1889), 43 Ch.D. 55; 59 L.J.Ch. 169; 61 L.T. 762; 38 W.R. 265; 40 Digest (Repl.) 754, 2401.
- Yates v. Yates* (1860), 28 Beav. 637; 29 L.J.Ch. 872; 3 L.T. 9; 6 Jur.N.S. 1023; 54 E.R. 511; 23 Digest (Repl.) 478, 5464.
- Fletcher v. Stevenson* (1844), 3 Hare, 360; 13 L.J.Ch. 202; 8 Jur. 307; 67 E.R. 420; 23 Digest (Repl.) 372, 4424.

D

Adjourned Summons to determine the apportionment of an annuity between corpus and income of an estate.

E

By an indenture of marriage settlement, dated in 1900, Josiah Poyser covenanted to pay to the trustees of the settlement the annual sum of £250, such payments to be made during the lives of himself and his wife Eliza Poyser and the life of the survivor of them, and to continue so long as his son John Poyser or F. Evans (the parties to the marriage) or any issue of the marriage should be living. A further covenant provided that:

F

"The said Josiah Poyser hereby covenants with the trustees that . . . the executors or administrators of the said Josiah Poyser shall within twelve calendar months after his death or the death of the said Eliza Poyser, whichever shall last happen, pay to the trustees the sum of £10,000 with interest thereon at the rate of 3 per cent. per annum from such death until payment thereof, provided that the said Josiah Poyser or his executors shall be at full liberty respectively to pay the said sum of £10,000 or any part thereof to the trustees or trustee at any time during the joint lives of the said Josiah Poyser and his wife the said Eliza Poyser or during the life of the survivor of them."

G

Josiah Poyser died in 1901, his wife Eliza Poyser surviving him. By his will, dated in the same year, he bequeathed certain legacies and annuities, and directed that the £10,000 should be paid to the trustees of the marriage settlement as soon as might be after his death, and that the amount so paid should be accounted for and debited against the share of John Poyser in his residuary estate. Testator divided his residue amongst his eight children in the proportion of one-fifteenth to his son H. Poyser and two-fifteenths to each of his other children, but directed that the executors and trustees of his will were to retain the share of his son H. Poyser, the shares of his daughters, and a moiety of the shares of his other sons, and to invest each share upon trust for that particular child for life, with power of appointment, with remainders over. The estate being of a somewhat complicated character, the executors were delayed in carrying out the administration, and, believing that John Poyser was not entitled both to the annual payment of £250 and the full income from his share in the testator's estate, they allowed payment of the former to fall into arrear. By an order dated in May, 1908, and made on an originating summons, it was declared that, by the wording of the indenture of settlement, after

H**I**

payment of the £10,000 directed to be paid by the testator, the trustees of the settlement would nevertheless still be entitled to payment of the annual sum of £250 during the lifetime of the testator's widow; that the trustees were not entitled to demand payment of the £10,000 until the death of testator's widow; and that the payments of the annual £250, during her lifetime, ought, for the purposes of division, to be treated as simply a debt payable out of the capital of the estate. The present summons was taken out to determine how these payments, together with the accumulated arrears, were to be apportioned as between the corpus and income of the estate.

J. K. Young for the executors of the will.

E. A. Jennings for one of the tenants for life.

L. W. Byrne for another tenant for life.

T. B. Napier for the remaindermen.

PARKER, J.—In this case the general principles laid down in *Allusen v. Whittell* (1) are applicable, and, that being so, the decisions of SWINFEN EADY, J., in *Re Dawson* (2) and *Re Perkins* (3) are to be preferred to those of KEKEWICH, J., in *Re Henry* (4) and *Re Bacon* (5). I also agree with SWINFEN EADY, J., that the method of apportionment is in the discretion of the court, and JOYCE, J., found the same thing in *Re Thompson* (6). [HIS LORDSHIP then declared that the principle laid down in *Re Perkins* (3) should be followed, and that each instalment should be treated separately, it being ascertained, on the occasion of its payment, what sum if set aside at the testator's death and accumulated at $3\frac{1}{2}$ per cent. simple interest would equal the amount of that instalment; the equivalent of such sum being debited to the corpus of the estate, and the balance to interest. Instalments in arrear to be treated on the same footing.]

Solicitors: *E. F. & H. Landon*; *Rawle, Johnstone & Co.*, for *Reeve & Mayhew*, Lowestoft; *Gibson & Weldon*, for *Watson & Everitt*, Norwich.

[Reported by W. HAYES, Esq., Barrister-at-Law.]

A

Re RUDDINGTON LAND

[CHANCERY DIVISION (Parker, J.), February 20, March 6, 1909]

[Reported [1909] 1 Ch. 701; 78 L.J.Ch. 378; 100 L.T. 648]

B

Industrial and Provident Society—Dissolution—Unrealised assets—Jurisdiction to appoint trustee—No claim by Crown to property as bona vacantia—Industrial and Provident Societies Act, 1893 (56 & 57 Vict., c. 39), s. 61 (c) (e).

The property of an incorporated industrial or provident society, dissolved under ss. 58 and 61 of the Industrial and Provident Societies Act, 1893, by an instrument of dissolution, is subject to a trust for appropriation and division, after providing for the claims of creditors, in accordance either with the provisions of the instrument or with the award of the chief registrar.

C

A society was dissolved before any of its property had been transferred to the trustees under the dissolution scheme to realise the assets. On a petition to the court by the persons named in the scheme as trustees,

D

Held: after the execution of the instrument of dissolution the society became a trustee of its property within the Trustee Acts; therefore, a new trustee could be appointed and, the Crown not claiming the property as bona vacantia, an order could be made vesting the property in the new trustee on the trusts applicable thereto under the instrument.

E

Notes. The Trustee Act, 1893, ss. 25, 26, have been repealed; see now The Trustee Act, 1925, ss. 41 (3) (4), 44, 26 HALSBURY'S STATUTES (2nd Edn.) 119, 123.

As to dissolution and winding-up of industrial and provident societies, see 21 HALSBURY'S LAWS (3rd Edn.) 61–65; and for cases see 28 DIGEST (Repl.) 471–474. For Industrial and Provident Societies Act, 1893, s. 61 (c) (e), see 12 HALSBURY'S STATUTES (2nd Edn.) 905.

F

Cases referred to in argument:

Re Printers and Transferrers Amalgamated Trades Protection Society, [1899] 2 Ch. 184; 47 W.R. 619; 15 T.L.R. 394; 43 Sol. Jo. 550; sub nom. *Re Printers and Transferrers Society*, *Challinor v. Maskery*, 68 L.J.Ch. 537; 43 Digest 109, 1142.

Re No. 9, Bomore Road, [1906] 1 Ch. 359; 75 L.J.Ch. 157; 94 L.T. 403; 54 W.R. 312; 13 Mans. 69; 43 Digest 686, 1180.

G

Re Taylor's Agreement Trusts, [1904] 2 Ch. 737; 73 L.J.Ch. 557; 52 W.R. 602; 48 Sol. Jo. 560; 43 Digest 686, 1184.

Re General Accident Assurance Corpn., Ltd., [1904] 1 Ch. 147; 73 L.J.Ch. 84; 89 L.T. 699; 52 W.R. 332; 43 Digest 744, 1824.

Re Richard Mills & Co. (Brierly Hill), Ltd., Smith v. The Company, [1905] W.N. 36; 43 Digest 744, 1825.

H

Re Higginson and Dean, Ex parte A.-G., [1899] 1 Q.B. 325; 68 L.J.Q.B. 198; 79 L.T. 673; 47 W.R. 285; 15 T.L.R. 135; 43 Sol. Jo. 153; 5 Mans. 289, D.C.; 4 Digest (Repl.) 370, 3375.

Petition praying for a declaration as to the disposition of the funds and property of an industrial society after dissolution.

I

The Ruddington Carrying Society, Ltd. (hereinafter called the society), was registered on Nov. 22, 1878, under the Industrial and Provident Societies Act, 1876. By an instrument of dissolution, dated Oct. 10, 1908, pursuant to the provisions of the Industrial and Provident Societies Act, 1893, and signed by three-fourths of the members of the society, it was agreed and declared that the funds and property of the society should be appropriated and divided, and that the real and personal estate and assets should be realised by Alfred Wilson, assisted by a committee; and meanwhile the business of the society should be carried on as a going concern to effectuate an advantageous winding-up. Pursuant to s. 61 (c) of the Act a statutory

declaration was made by three of the members and the secretary of the society that the provisions of the Act had been complied with and sent to the Registrar of Friendly Societies, together with the instrument of dissolution. The registrar duly caused a notice of the dissolution of the society to be advertised on Nov. 6, 1908. No proceedings had been commenced by a member or other person interested in the funds of the society to set aside the dissolution, and the society was legally dissolved as from Nov. 6, 1908. The Industrial and Provident Societies Act, 1893, provides :

"Section 58. A registered society may be dissolved (a) by an order to wind-up the society, or a resolution for the winding-up thereof, made as is directed in regard to companies by the Companies Acts, 1862 to 1890, the provisions whereof shall apply to any such order or resolution except that the term "registrar" shall for the purpose of such winding-up have the meaning given to it by this Act; or (b) by the consent of three-fourths of the members, testified by their signatures to an instrument of dissolution.

Section 61. Where a society is terminated by an instrument of dissolution : . . . (c) A statutory declaration shall be made by three members and the secretary of the society that the provisions of this Act have been complied with, and shall be sent to the registrar with the instrument of dissolution; and any person knowingly making a false or fraudulent declaration in the matter shall be guilty of a misdemeanour. . . . (e) The registrar shall cause a notice of the dissolution to be advertised at the expense of the society in the "Gazette" and in some newspaper circulating in or about the locality in which the registered office of the society is situated; and unless, within three months from the date of the "Gazette" in which such advertisement appears, a member or other person interested in or having any claim on the funds of the society commences proceedings to set aside the dissolution of the society in the county court of the district where the registered office of the society is situated, and such dissolution is set aside accordingly, the society shall be legally dissolved from the date of such advertisement, and the requisite consents to the instrument of dissolution shall be considered to have been duly obtained without proof of the signatures thereto."

By this petition Alfred Wilson and the members of the committee prayed (i) that it might be declared that the society was at and immediately before the date of its dissolution possessed of certain hereditaments and of certain choses in action then belonging to the society as trustee for the petitioner, Alfred Wilson, or any purchaser from him of the hereditaments; (ii) that, pursuant to s. 25 of the Trustee Act, 1893, Alfred Wilson might be appointed to be a trustee of the hereditaments and choses in action in the place of the society, and that, pursuant to s. 26 of that Act, the hereditaments might be ordered to vest in Alfred Wilson for all the estate or interest vested in the society immediately before the dissolution thereof upon the trusts upon which the same were held by the society; (iii) that the right to sue for and recover the choses in action might, pursuant to s. 35 of that Act, be vested in Alfred Wilson.

Percy Wheeler for petitioners.

H. C. Sargent for the Attorney-General.

PARKER, J.—This is a petition under the Trustee Act, 1893, to obtain an order appointing a trustee, and a consequent vesting order in respect of property, both real and personal, of a society incorporated under the Industrial and Provident Societies Act, 1893, that society having been dissolved. Societies registered under the Act can be dissolved either (a) under the Companies Act or (b) by an instrument of dissolution with the consent of three-fourths of the members. If the former mode of dissolution is adopted, no difficulty in most cases need arise, for the official liquidator will see that the society is properly kept alive till all its assets have been distributed. But if the second course be taken s. 61 of the Act of 1893 applies, and

- A** the instrument may provide for the appropriation and division of the funds belonging to the society, though it is not necessary that it should do so, since the section also says that the same may be stated in the instrument of dissolution to be left to the award of the chief registrar. Therefore, under s. 61, on the dissolution of the society, which occurred as soon as the chief registrar advertised the instrument of dissolution, the funds had to be distributed under the provisions of the Act, either
- B** as specified in the instrument of dissolution or according to the award of the chief registrar. In the present case the instrument of dissolution was executed and advertised, and the society became dissolved as from the date of the advertisement, before any of the property had been transferred to the agents or trustees under the scheme of dissolution who were to see to its realisation and distribution. They, therefore, cannot now easily sue in respect of the choses in action or get in the out-
- C** standing legal estate in the realty; and hence this application to the court for relief. I think that on the true construction of s. 61 the property of a society dissolved under an instrument of dissolution is subject to a trust for appropriation and division (after providing for the claims of creditors), in accordance either with the provisions of the instrument or the award of the chief registrar; and that on the execution of the instrument the society becomes bound to hand over its property to
- D** the agents appointed or allow it to be disposed of as the chief registrar directs. After the execution of the instrument of dissolution the society becomes a trustee within the definition clause of the Trustee Act, 1893, which includes constructive trusts and trustees. The society is a trustee within that meaning of the word, and, therefore, a new trustee can be appointed. If so, there is no difficulty in regard to a vesting order, as to which difficulties have arisen because where no trustee could
- E** be appointed the jurisdiction arises only under sub-s. 2 (c) of s. 26 of the Trustee Act, 1893, and it is difficult to say of a trustee that he cannot be found when the trustee is known not to exist, and is therefore of course impossible to find. But if the court can appoint a new trustee under s. 25 a vesting order can be made; and in the present case the Crown not claiming the property as bona vacantia, I can appoint Mr. Alfred Wilson a trustee in place of the society, and make an order
- F** vesting the real estate and choses in action in him on the trusts applicable thereto under the instrument of dissolution.

Solicitors: *Kinch & Richardson*, for *Eking, Wyles & Morris*, Nottingham;
Treasury Solicitor.

[*Reported by W. HUNTER BOND, Esq., Barrister-at-Law.*]

STEEDEN *v.* WALDEN

[CHANCERY DIVISION (Eve, J.), June 16, 17, July 4, 1910]

[Reported [1910] 2 Ch. 393; 79 L.J.Ch. 613; 103 L.T. 135;
26 T.L.R. 590; 54 Sol. Jo. 681]*Infant—Next friend—Infant's liability to indemnify for costs and damages—
Action properly brought on infant's behalf—Dismissal of action.*

An action on behalf of an infant having been properly brought under the advice of counsel, which a court administering the infant's estate would have sanctioned, proved unsuccessful and the infant derived no benefit from it. The infant's next friend in the action claimed a charge on the infant's property for costs and damages incurred in the action on his behalf, an account, sale or mortgage of the infant's property, and an indemnity.

Held: an infant was *prima facie* liable to indemnify his next friend, and an order ought to be made against the infant defendant declaring his liability to indemnify the next friend against costs and damages in or in relation to the unsuccessful action, but, as the court was not administering the infant's property, no declaration of charge could be made.

Notes. As to civil proceedings on behalf of infants, see 21 HALSBURY'S LAWS (3rd Edn.) 314-322; and for cases see 28 DIGEST (Repl.) 664 et seq.

Cases referred to:

- (1) *Nalder v. Hawkins* (1833), 2 My. & K. 243; Coop. temp. Brough. 175; 39 E.R. 937, L.C.; 28 Digest (Repl.) 669, 1685.
- (2) *Whittaker v. Marlar* (1786), 1 Cox, Eq. Cas. 285; 29 E.R. 1169, L.C.; 28 Digest (Repl.) 683, 1888.
- (3) *Smallwood v. Rutter* (1851), 9 Hare, 24; 20 L.J.Ch. 332; 17 L.T.O.S. 118; 15 Jur. 370; 68 E.R. 399; 28 Digest (Repl.) 669, 1686.
- (4) *Taner v. Ivie* (1752), 2 Ves. Sen. 466; 28 E.R. 298; sub nom. *Tanner v. Ivie*, 1 Dick. 168, L.C.; 28 Digest (Repl.) 684, 1898.
- (5) *Campbell v. Campbell, Campbell v. Mackay* (1837), 2 My. & Cr. 25; 40 E.R. 550, L.C.; 28 Digest (Repl.) 675, 1773.
- (6) *Cross v. Cross* (1845), 8 Beav. 455; 5 L.T.O.S. 234; 50 E.R. 179; 28 Digest (Repl.) 676, 1777.
- (7) *Clayton v. Clarke* (1861), 3 De G.F. & J. 682; 30 L.J.Ch. 657; 4 L.T. 489; 7 Jur.N.S. 562; 9 W.R. 718; 45 E.R. 1042, L.J.J.; 28 Digest (Repl.) 684, 1895.
- (8) *Pritchard v. Roberts* (1873), L.R. 17 Eq. 222; 43 L.J.Ch. 129; 29 L.T. 883; 22 W.R. 259; 42 Digest 297, 3311.
- (9) *Helps v. Clayton* (1864), 17 C.B.N.S. 553; 5 New Rep. 191; 34 L.J.C.P. 1; 11 L.T. 476; 29 J.P. 263; 10 Jur.N.S. 1184; 13 W.R. 161; 144 E.R. 222; 28 Digest (Repl.) 514, 295.
- (10) *Anon* (1819), 4 Madd. 461; 56 E.R. 775; 28 Digest (Repl.) 676, 1780.

Also referred to in argument:

Flight v. Bollard (1828), 4 Russ. 298; 38 E.R. 817; 28 Digest (Repl.) 681, 1852.
Re Hicks, Lindon v. Hemery, [1893] W.N. 138; 28 Digest (Repl.) 682, 1869.
Anderton v. Yates (1852), 5 De G. & Sm. 202; 64 E.R. 1081; 28 Digest (Repl.) 682, 1878.

Wolmershausen v. Gullick, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 9 T.L.R. 437; 3 R. 610; 26 Digest (Repl.) 150, 1115.

Pearce v. Pearce (1804), 9 Ves. 548; 32 E.R. 715, L.C.; 28 Digest (Repl.) 682, 1867.

Caley v. Caley (1877), 25 W.R. 528; 28 Digest (Repl.) 683, 1884.

Action for recovery of costs by next friend where the action was proper but unsuccessful.

- A** The plaintiff, Edwin George Steeden, had, in a previous action, *Walden v. Edmonton Freehold Land and Building Society, Ltd., and Mercer* (1908 W. 1752), acted as next friend of the defendant William Spring Walden, an infant, born on June 20, 1890, under the following circumstances. Freehold property, known as "The Elms" had been purchased out of money provided by the defendant's grandmother and conveyed in the year 1894 to her sons Charles Meen Walden, the defendant's uncle, and William Walden, the defendant's father; Charles M. Walden having died in 1897, William Walden purchased his moiety of "The Elms," mortgaged "The Elms" to Mr. Sidney Smith, solicitor, to secure £342 10s., in November, 1906, and subsequently, on March 22, 1907, to secure £600 to the building society, the first named defendants in the previous action. The conveyances and mortgages were in the name of "William Spring Walden," and William
- C** Walden, while dealing with the property as his own, constantly asserted that it was his son's. William Walden having been adjudicated a bankrupt in January, 1908, the second defendant to the previous action was Cecil Mercer, the trustee of his property in bankruptcy, and the relief claimed was a declaration that the present defendant was entitled to an undivided moiety of "The Elms" redemption, and an injunction to restrain the building society from acting on their power of sale.
- D** Counsel had previously advised that William Spring Walden, the son, was the only person entitled. On June 15, 1908, an interim injunction was granted restraining the building society from selling or offering "The Elms" for sale. On Feb. 18, 1909, the learned judge dismissed the action against the building society with costs, and the damages and costs payable to the defendants under that judgment and an order of July 29, 1909, dealing with the costs subsequent to judgment amounted to
- E** £468 13s. 10d. The plaintiff's costs of that action amounted to £248 16s. The defendant was alleged to be entitled to freehold hereditaments at West Hampstead, and to chattels and other property at Basildon, in Essex.

The statement of claim set out the above facts, and the plaintiff claimed a declaration of charge or lien upon the interest of the defendant in the lands at West Hampstead and the personalty at Basildon and other property for the costs, damages, and other moneys payable by the plaintiff as next friend of the defendant in the action against the building society; an account of the costs, damages, and other moneys payable by the plaintiff; sale or mortgage of the lands, hereditaments, and chattels to enforce his charge; an indemnity and the costs of the present action. The statement of defence alleged that the action against the building society was not properly instituted for the benefit of the defendant, but for the purposes of a

G member of the firm of solicitors acting in the case, and on insufficient materials, and was not properly conducted.

Jessel, K.C., and Edward Ford for the plaintiff.

C. H. Carden Noad for the infant defendant.

Cur. adv. vult.

- H** July 4, 1910. **EVE, J.**, read the following judgment.—This action is of an unusual, if not of an unprecedented, character. The plaintiff recently acted as next friend of the defendant in an unsuccessful action, and he now sues the defendant, who is still an infant, claiming a declaration that the defendant is bound to indemnify him against the costs which he incurred and the costs and damages which
- I** he has been ordered to pay in the unsuccessful action. He further claims (i) a declaration that he is entitled to have the amount of such costs and damages charged upon an equity of redemption and certain chattels and other personal property belonging to the infant; (ii) to have the charge enforced by foreclosure or sale; and (iii) the costs of this action. The unsuccessful action was an action wherein the present defendant sought to establish his title to a freehold farm, messuage, and premises known as "The Elms," Basildon, in the county of Essex, as against a building society claiming to be legal mortgagees. In the action an interim order was made restraining the building society from exercising their power

of sale until judgment or further order upon the usual undertaking as to damages being given. The action was brought and the interim order applied for under the advice of counsel. The case laid before counsel and his opinion thereon have been put in evidence at this trial, and I am satisfied that all the facts known to the defendant's advisers were fully and accurately placed before counsel and, further, that the action was conducted throughout in a proper and reasonable manner. It was tried by me in February, 1909, and I gave judgment dismissing the action, directing an inquiry whether the defendants had suffered any and what damages by reason of the interim order which the defendant ought to pay, and ordering that the next friend should within one month from the date of the certificate pay to the defendants any damages thereby certified, and should also pay to the defendants their taxed costs of the action down to and including judgment. The damages and costs payable to the defendants under that judgment and an order of July 29, 1909, dealing with the costs subsequent to judgment amount to £468 13s. 10d. The plaintiff's own costs amount to £248 16s., and it is the total of these two sums—£717 9s. 10d. in all—for which the plaintiff claims indemnity in this action.

The general attitude of the court towards the next friends of infants is stated by LORD BROUGHAM, L.C., in *Nalder v. Hawkins* (1) (2 My. & K. at pp. 247, 248):

"It is undeniable that the habit of the court has been to encourage persons to come forward as next friends for the purpose of obtaining its aid in behalf of parties incapacitated to sue for themselves. The language of the books is frequently that next friends should not be discouraged; but there are cases which go much further both in their language and in their tendency; cases which, both by the words used and the things done, give great encouragement to undertake the office. In *Whittaker v. Marlar* (2) LORD THURLOW says that:

'Whoever will stand forward in that character, is to be encouraged to every possible extent, while he can be supposed to intend the infant's benefit.'

This seems to go as far as possible; it is as much as to say, that anyone may do what he pleases as next friend, until he does something which cannot by any possibility be supposed to be done bona fide for the infant's advantage. It must, however, be observed that this is rather the language of the case than the point decided; for there the court on a full review of the circumstances dismissed the bill and made the next friend pay the whole costs of that proceeding and of the application. But it had been referred to the master to inquire whether or not the suit was necessary, and he had reported against it, and the book does not state the facts upon which the report and the decision are grounded."

The Lord Chancellor further says (2 My. & K. at pp. 249, 250):

"The true and the just principle which should govern all such cases is this. No discouragement ought to be thrown in the way of persons bona fide suing as next friends; but no undue facility should be given to mere volunteers, who interfere rather for their own purposes than for the infant's advantage. While they appear to act bona fide they will be protected; the presumption will rather be in their favour; the proof will rather be thrown upon those who impeach their motives; the leaning will be more for than against them. But no strained presumptions will be made to protect them; no forced constructions will be put on their conduct; no benefit from bare possibilities will be conjured up in their behalf. They must be content to have their motives appreciated and their acts judged like other parties. If they have involved themselves in suspicion, their proceedings must be subjected to inquiry; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences; the suit at their instance must be stayed; or if the suit be useful to the infant, but the parties instituting it be unfit to conduct it, they must give place to others in whom the court can better repose confidence."

And language much to the same effect is to be found in the judgment of TURNER, V.-C., in *Smallwood v. Rutter* (3).

A The principles upon which the court acts in determining whether costs incurred by a next friend may properly be provided for out of property of the infant in course of administration by the court are illustrated by such cases as (i) *Taner v. Ivis* (4), where LORD HARDWICKE, L.C., as reported, says (2 Ves. Sen. at p. 468):

B "This is a very uncommon question to come before the court, how far a prochein amy in a suit for an infant, which is carried on by approbation of the court, shall be charged with costs in the event of that suit, or have an allowance for those costs against the infant. To be sure, the court ought to take care of infants, that they are not prejudiced by persons debtors to their estates, or who have the management of their estates; but were the court to go by such strict rules as are now laid down for the plaintiff who opposes this petition, it would be very dangerous to attempt the management of infants' estates. They must act under great degrees of uncertainty and under probabilities; and so must the masters, who cannot upon such references to them hear the other side, against whom the bill is brought, but only judge on circumstances *prima facie* whether it is reasonable to carry on such a suit for the infant. Application to refer to a master is very common. A prochein amy will venture to bring a bill to see on what foot the answer put it; but after answer comes in, and that it will probably be attended with expense, then is that application made."

D Later on, after dealing with the facts of the case and the liability as between the next friend and the other party to the litigation, his Lordship adds (*ibid.*):

E "It is a different question between the prochein amy and the infant, in whose behalf he has brought the suit, for then the question is whether he was sufficiently warranted to bring it; whether it was brought and carried on in a reasonable manner and without laches; for, if so, the infant ought to reimburse him in that suit, especially in a case of this kind, where everything as to the account and management of the infant's estate was under the direction of the court."

F (ii) In *Campbell v. Campbell* (5) LORD COTTENHAM, L.C., observes (2 My. & K. at p. 30):

"It is certainly not usual to make trustees for infants or their next friends pay personally the costs of proceedings; but it would not be a useful exercise of the discretion of the court to abstain from making an exception where a course of unnecessary litigation appears to have been adopted."

G (iii) *Cross v. Cross* (6), where in a doubtful case the Master of the Rolls, "fearful of discouraging interference on behalf of infants, very often absolutely necessary for their protection," gave the next friend the benefit of the doubt. (iv) *Clayton v. Clarke* (7); and (v) *Pritchard v. Roberts* (8). These and other decisions whereby the property of infants under the control of the court has been made available to recoup the next friend proceed upon the footing that the infant is *prima facie* liable to indemnify the next friend against costs properly incurred on his behalf, and they show that such liability ought to be and will be enforced in all cases where the court is satisfied that the litigation has been prompted by motives of benevolence towards the infant and has been conducted in his interest and with diligence and propriety. Moreover, in *Helps v. Clayton* (9), in a considered judgment to which WILLES, BYLES, and KEATING, JJ., were parties, it was held that a plea of infancy was no defence to an action brought to recover the costs of a marriage settlement, prepared on the instructions of an infant given by her father as her agent on the ground that the preparation of the settlement, beneficial as securing to the infant a proper provision, might justly be considered a necessary suitable to her estate and position. Nor must it be overlooked that an infant attaining full age *pendente lite*, and abandoning the suit, must pay the costs of the next friend unless he can establish that the action was improperly instituted: *Anon* (10).

In the present case, proceedings were commenced under the advice of counsel, properly instructed, and although they proved unsuccessful and the infant has

derived no benefit thereby, the ultimate event, depending mainly as it did on the extent to which the title of the defendant mortgagees was affected by the fraudulent conduct of the infant's father, remained a matter of uncertainty until all the evidence had been produced at the trial. Had I been administering the estate of the infant and had an application been made to me to sanction the institution of the action and its prosecution to a hearing, I should have acceded to the application and might even have gone so far as to authorise the raising of money to provide for the costs on the security of the infant's property outside the subject of the action. I think, therefore, this is eminently a case to which I ought to apply the principles underlying the decisions I have referred to, and I propose to make an order declaring that the defendant is bound to indemnify the plaintiff against the costs and damages which he was ordered to pay by the judgment of Feb. 18, 1909, and the order of July 29, 1909, made in the action of *Walden v. Edmonton Freehold Land and Building Society, Ltd.*, and the costs, charges, and expenses properly incurred by the plaintiff on the defendant's behalf in, and in relation to, such action. As I am not administering the infant's estate I do not see my way to make any such declaration of charge as the plaintiff asks for, but I give liberty to apply, and I order the defendant to pay the costs of this action.

Solicitors: *Stoneham & Sons; G. R. Cawley.*

[Reported by W. P. PAIN, ESQ., Barrister-at-Law.]

BROMLEY v. SMITH

[KING'S BENCH DIVISION (Channell, J.), January 12, 1909]

[Reported [1909] 2 K.B. 235; 78 L.J.K.B. 745; 100 L.T. 731]

Infant—Contract—Contract of service—Covenants in restraint of trade—Some clauses unenforceable against infant—Severance.

The defendant, while an infant, entered into an agreement with the plaintiff to act as an assistant in the plaintiff's retail bakery business, and his duty was to take the bread out and sell it to customers and others on a round. He agreed that he would not within three years after leaving the service and within a distance of ten miles be engaged in the business of miller, baker, and some other employments which the plaintiff did not then carry on. After several years' service and having ceased to be an infant he left the employment and set up a bakery business within the restricted area.

Held: in the circumstances the agreement was operative so far as concerned the restriction relating to the retail bakery business, but was inoperative with regard to the other restrictions; on construction of the agreement the operative part was severable from the non-operative parts; when the defendant entered into the agreement it was for his benefit as an infant despite the unenforceable clauses; and, therefore, the plaintiff was entitled to an injunction to restrain him from being engaged in the bakery business.

Notes. Applied: *Gadd v. Thompson*, ante p. 288. Referred to: *Attwood v. Lamont*, [1920] All E.R.Rep. 55; *Express Dairy Co., Ltd. v. Jackson*, [1929] All E.R.Rep. 327.

As to contracts by infants, see 21 HALSBURY'S LAWS (3rd Edn.) 138-148; and for cases see 34 DIGEST 41-44.

A Case referred to:

(1) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, 139.

Also referred to in argument:

- B** *Sir W. C. Leng & Co., Ltd., v. Andrews*, [1909] 1 Ch. 763; 78 L.J.Ch. 80; 100 L.T. 7; 25 T.L.R. 93, C.A.; 34 Digest 43, 196.
Mitchel v. Reynolds (1711), 1 P.Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, 59.
Meakin v. Morris (1884), 12 Q.B.D. 352; 53 L.J.M.C. 72; 48 J.P. 344; 32 W.R. 661; D.C.; 34 Digest 506, 4196.
- C** *Corn v. Matthews*, [1893] 1 Q.B. 310; 62 L.J.M.C. 61; 68 L.T. 480; 57 J.P. 407; 41 W.R. 262; 9 T.L.R. 183; 37 Sol. Jo. 190; 4 R. 240, C.A.; 34 Digest 506, 4197.
- Green v. Thompson*, [1899] 2 Q.B. 1; 68 L.J.Q.B. 719; 80 L.T. 691; 63 J.P. 486; 48 W.R. 31, D.C.; 34 Digest 506, 4198.
- Chesman v. Nainby* (1727), 2 Stra. 739; 2 Ld. Raym. 1456; 93 E.R. 819; affirmed, 1 Bro. Parl. Cas. 234, H.L.; 43 Digest 28, 206.
- D** *Mallan v. May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 Jur. 536; 152 E.R. 967; 43 Digest 32, 258.
- Haynes v. Doman*, [1899] 2 Ch. 13; 68 L.J.Ch. 419; 80 L.T. 569; 15 T.L.R. 354; 43 Sol. Jo. 553, C.A.; 43 Digest 24, 158.
- Baines v. Geary* (1887), 35 Ch.D. 154; 56 L.J.Ch. 935; 56 L.T. 567; 51 J.P. 628; 36 W.R. 98; 3 T.L.R. 523; 43 Digest 40, 394.
- E** *Evans v. Ware*, [1892] 3 Ch. 502; 62 L.J.Ch. 256; 67 L.T. 285; 36 Sol. Jo. 731; 3 R. 32; 43 Digest 28, 217.

Action tried by CHANNELL, J., without a jury.

The action was brought in the Clacton-on-Sea County Court, but was removed into the High Court by certiorari. The plaintiff's claim was for damages for breach by the defendant of an agreement made between him and the plaintiff, and for an injunction to restrain the defendant from continuing the breach of the agreement for three years from Oct. 9, 1908, and from being engaged either as principal, servant, or agent, or otherwise, in the business of a baker or manufacturer of flour, meal, bread, or confectionery, wholesale or retail, at Little Clacton or elsewhere within ten miles from Great Clacton.

G The plaintiff carried on a bakery business at Great Clacton, and, wanting a man to help him in the business, he entered into correspondence with the defendant. On Nov. 6, 1895, the plaintiff wrote to the defendant:

"In reply to your letter, I keep two men in bake office. You would be required as second help in the office work and serve the town round. You would be indoors. I want a very energetic young man who can serve a round well and keep customers and look up new ones. . . ."

H On Nov. 18, 1895, an agreement was made between the plaintiff and the defendant as follows:

"Agreement made this 18th day of November, 1895, between Henry Bromley, of Great Clacton, in the county of Essex, miller, baker, corn merchant, &c. (hereinafter called the master), of the one part, and George Smith, of Great Baddow (who is hereinafter referred to by the term "the servant") of the other part. Whereby the master in consideration of the engagement on the part of the servant hereinafter contained agrees to employ him as a baker and general assistant at his mills and bakeries in Great Clacton aforesaid at the remuneration of 15s. per week and a commission of 6d. in the pound for all ready money taken upon the following terms: . . . Clause 5. In consideration of the master taking the servant into the service of the master on the terms aforesaid the servant agrees that he will not at any time within the

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space of three years from the date of leaving the master's service either as principal, servant, agent or otherwise be directly or indirectly engaged in any of the businesses of miller, baker, hay, straw, and corn merchant, &c., or engaged in the manufacture of flour, meal, bread, or confectionery, restaurant keeper or assistant to such, either wholesale or retail within a radius of ten miles from Great Clacton."

By cl. 4 either the master or the servant could terminate the agreement by fourteen days' notice in writing.

At the time of entering into this agreement the defendant was an infant, being then of the age of nineteen years and three or four months. He had been employed in the bakery trade since he was twelve years of age, but he had no connection with the particular place (Great Clacton) in which the plaintiff was carrying on the business. All the places where he had been at work were in the same county, but not in that particular part. The plaintiff's mode of business was to send out a man with a bread cart; the man sold the bread to regular customers and also for ready money to other persons, and by the agreement he got a commission upon these ready-money sales. The plaintiff himself did not go about and see the customers. After the defendant had been in the plaintiff's service for nearly thirteen years, he left the plaintiff's employment and set up a bakery business in the same place, and several of the plaintiff's customers left the plaintiff and went to the defendant. The plaintiff had had the same agreement with the man whom the defendant succeeded, and he had had similar agreements with the men whom he had employed to take the bread round to customers. He said in his evidence that his men had been previously restricted; that he considered the restriction necessary for his trade, and that he would not have employed the defendant if he had refused to accept the agreement.

J. A. Hamilton, K.C. (Edward Morten with him), for the defendant.

Hohler, K.C. (C. E. Jones with him), for the plaintiff.

CHANNELL, J.—This case is by no means free from difficulty in point of law, and I am not at all sure that the judgment which I am about to give is right, but it is one which it is very desirable in the interests of the parties should be given. The way in which this business is carried on by the plaintiff is that he sends a man round with a cart and with bread, to sell that bread to people whom the servant calls on regularly, and who take their bread from him. The servant also sells it to other people who are willing to take it, because the agreement contains terms as to commission upon the ready-money sales, which were the sales of the bread which he hawked about. The plaintiff himself did not go about and see those customers; he obviously would not. That is a business that is not quite an ordinary baker's business: it certainly is not like the baker's business in a big town. It has no resemblance to it at all. It is much more like the business in which these contracts are very common, almost universal, namely, the business of carrying milk round by a carrier and selling the milk to the people who buy it, to the regular customers who take so much each day according to their requirements, and have the carrier calling on them. The plaintiff's bread business is far more like that than it is like the business of an ordinary baker in a big town who sends out his bread to his own regular customers. It is a business in which it is quite clear that the person who carries round that bread will get a connection with the customers which the master does not himself get. If the master wants to keep that business for himself, he must protect himself in this way. It may be that he may not foresee what may happen, but it seems a business in which this protection is very specially necessary.

The defendant came to the plaintiff and he had this agreement proposed to him, and the evidence clearly is that this particular agreement is the same agreement as had been signed and acted upon by the man whose place he was taking. There was ample consideration for the agreement in the taking the

A defendant into employment. I am dealing with the question now entirely as a matter of agreement. It was perfectly proper, so far as it related to the business which the defendant was to be taken in to do, namely, the retail baker's business of selling this bread upon the round. The defendant accepted it, as he said, because he saw that he would be likely to lose the job if he did not agree to it, and so he agreed to it, quite understanding the substantial effect of it. He continued in the service for some twelve or thirteen years, getting acquainted with all the customers, introducing a large number of new customers and getting paid for doing so. If he had not been paid for doing so some other moral considerations at any rate might arise, but he has taken the money for introducing those customers, and has made them the plaintiff's customers. Then he saw an advertisement of a baker's shop to be let in the neighbourhood, and he got into communication with Mr. Green, the owner of it, and he frankly enough told Mr. Green that there was a difficulty because he had entered into this contract. In the meantime the defendant when he went round to introduce his own successor takes the opportunity not only of telling the people that he is going to set up business on his own account, but of asking them for their custom, with the result that forty of the customers went to him and left the plaintiff. The plaintiff said that 100 of the customers did so, but forty is admitted. On those facts the necessity for protection is obvious. If it had not been obvious before the defendant's own conduct makes it clearly obvious.

Judges have made some remarks about contracts of this kind being usual or unusual, and it has been pointed out that if it is not usual in the trade that is very good evidence that it is not necessary, and if the people who know their own business do not consider it necessary, why should the court think it necessary. That is a very cogent argument, but I do not think it applies here. It can only happen where the businesses are the same. In this particular case the business is not the ordinary baker's business. It is much more analogous to the kind of business in which an agreement of this kind is almost universal. But it is said that because bakers generally do not require this, therefore it cannot really be necessary. The court, in talking about a thing being usual or unusual, did not contemplate a case in which it was only unusual, which was not usual because people usually were not shrewd enough to see the necessity for it. That is a totally different matter from a thing being unusual and unreasonable when it is suggested. The fact that it is not suggested, and is not thought of, does not make it unusual in the sense in which the court used the word.

G I am dealing first with the facts, and I have dealt with them as between the parties upon the evidence which has been given. The only outside evidence was that of other bakers, who said that this agreement was unusual. But the plaintiff's business was not at all analogous to the businesses which these witnesses were speaking about, and they themselves only said that they had never thought of it, and that they did not consider it necessary. Most of them said that from what had happened in this case they did see the value of such an agreement, and did think that it was reasonably necessary. The question arises upon those facts whether this agreement is or is not binding in law. We have to deal with the cases on the question. The law has been laid down in general terms, and it may well be that although upon all the merits this agreement ought to be enforceable, yet it may not be so in law. First of all, the law is clear that a man cannot restrict himself as regards his future labour and his future work in general terms so as to be restrained in regard to that work, unless there is a good reason for his doing so. The principal thing which is recognised as a sufficient reason for his doing so is that such a contract is necessary for the protection of the business in respect of which it is entered into. It is necessary, therefore, in order that this contract should be valid, that it should be reasonably necessary for the protection of the plaintiff's business. I have already intimated that, so far as regards the retail business of selling bread in the special way in which the plaintiff sold it, it was quite clearly necessary. The facts in this case show beyond a

doubt that when the servant breaks the contract and gives up the employment, A
he forthwith takes away a very large proportion of the plaintiff's customers.
That, therefore, clearly shows the necessity of it. But then the restriction must
not be made too wide. The contract must be made according to what is necessary
for the protection of the trade. In this case the contract is wide so far as regards
the subject-matter of what the servant is required not to engage in. It is not
absolutely necessary that these contracts should be limited so far as regards B
time, or even as regards space, in certain particular special businesses. I think
Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. (1) shows that.
But, speaking generally, it is necessary that these contracts should be limited,
both as regards space and as regards time. The contract in this case is so limited.
The restriction is for three years after leaving the service, and it is for a space
of ten miles from Great Clacton. Those limitations are very reasonable and, C
therefore, no difficulty arises.

The difficulty which arises is that the agreement prevents the servant from
entering into employments which upon the face of them do not appear as though
they would in any way compete with the plaintiff's business, or take away any
of his customers in his business. That seems to have arisen in this way. The
plaintiff was probably contemplating extending his business, and extending it, D
among other things, to that of a restaurant keeper, and possibly extending it in
the way of making it a wholesale business, so that he put in those words "whole-
sale or retail." That is probably how those words got into the agreement, because
it appears that the same words were in the last agreement which he had made
with the servant who came before the defendant, but had not been in the prior
agreement, which he had been in the habit of making for some years. If the E
agreement had been that the servant should serve the plaintiff not only in the
business which he was then carrying on, but also in the businesses which he was
contemplating adding to that, and, if the employment contemplated by the contract
had been an employment not only in the existing business but also in the future
businesses, the agreement would have been all right; but inasmuch as he was
only employing this man in one portion of the business which he was then carrying F
on, it is unreasonable that he should have restricted him from entering into
businesses in which he would really do no harm to the plaintiff's business, even
if he began to carry them on. One does not see how a man who got into
connection with people who wanted bread in Clacton-on-Sea could do any harm
in respect of a restaurant where people coming down for the day to Clacton-on-Sea
or Great Clacton go for their refreshments. Therefore, this agreement so far as G
it deals with restaurant keeping, and one or two other matters, went beyond that
which was necessary, because what was necessary was that the plaintiff's business
of selling bread on a round to customers who were seen by his men should be
protected.

That being so, the question is whether or not the agreement which might
have been made, and which was made, to protect that business, is made invalid H
by the fact that other things are included in it which cannot be enforced. The
law seems to be very clear in its principle, and somewhat difficult of application.
Where the agreement has provided for something which is legal, and has also
provided for something which is illegal, the fact that there is one illegal thing
of a severable kind in the agreement does not make the whole agreement illegal;
but the difficulty always arises on the construction of the agreement whether I
or not the thing is severable, and I have come to the conclusion that it is
severable, and that it may be separated in the way contended for by the plaintiff.
The words of the agreement are "directly or indirectly engaged in any of the
businesses," and I think that "any of the businesses" is, on the face of it,
alternative, and that probably, if necessary, we might read it "one or another
of those businesses." That difficulty does not arise with regard to the restaurant
keeping, which does not come into that part of the clause. As to the businesses of
miller, baker, and hay, straw, and corn merchant, we ought to leave out the

A hay, straw, and corn merchant, because no protection is wanted for that part of the plaintiff's business. That can be done by reason of the word "any"; "any of the businesses" treats them as separate matters. Then, "or engaged in the manufacture of flour, meal," etc. As to that, that is clearly an alternative, and I do not think that protection is really wanted for any one of those things, as the only suggestion of protection that the plaintiff really needs is the dealing with customers on the round. Therefore, the whole of that may be excluded. If this were the case of an adult I should hold that the injunction ought to be granted in the form asked for, that is, as an injunction against the defendant being directly or indirectly engaged for the period of three years in the business of a baker within a radius of ten miles from Great Clacton. That is the injunction I should grant apart from the question of infancy.

C I have now to deal with the question of infancy as an entirely separate question. The defendant was about the age of nineteen years and three months when he entered into this agreement. The plaintiff says that he did not know that, but he also says that he did not know it was material, and that his attention was not drawn to it. He certainly does not tell us that the defendant was represented to be over twenty-one years of age, and he did not think it mattered. It certainly does not matter whether he knew it or not, as the validity of infants' contracts does not depend on the knowledge of the other parties to the contracts. They depend upon the fact of the infancy. Does this agreement bind the infant? If it had been limited in the way which I have described, if it had been merely a contract that he would not directly or indirectly be engaged in the business of a baker within this district for this time and if it had been that only, there are abundant authorities absolutely in point to show that the infancy would not have mattered. The only doubt about it that could have arisen would be this point about its not being usual. The defendant was obtaining employment by it, and employment which it is clear that he could not have obtained except upon those terms, and, what is equally important, which he knew he could not obtain except upon those terms. Was it or was it not for his benefit to get employment upon those terms? Looking at the matter as a whole and excluding these extra things, I should certainly say it was. There were what are said to be perfectly proper wages. What he was giving up was the right to go into business in a place in which he had then no connection at all. It was not as if he had been previously in business in that place and was giving it up. He was an absolute stranger to the place. Why was it not for his benefit to get employment and wages, there upon the terms that when he left that business he was not to set up in opposition and take advantage of the service to get customers whom he never could have got but for the service? That is only ordinary honesty, and it is quite impossible to say that it was not for his benefit to serve upon those terms. The only difficulty to my mind about the infancy is the very ingenious argument which counsel for the defendant put forward. He said: Is an agreement which would be reasonable and which would be for the benefit of the infant, binding upon him when, in addition to that which is reasonable and is binding upon him, there is put into it clauses which are inoperative in law, and as to which, possibly, he would not know anything whether they were operative or not, and clauses which possibly might involve him in a law suit?

I Does that make this agreement as a whole one that is not for his benefit? That seems to depend upon what the court in one of the cases meant by the contract "as a whole." If it meant as a whole piece of paper with everything written on it, then this part is not for his benefit. It is certainly not for the infant's benefit to have clauses put into an agreement about which there is a doubt, and upon which the decision of a court is wanted, even though the point may be a very plain one, as to whether or not those clauses are valid. But does it make the real agreement one that cannot be enforced against him? On the whole I do not think it does. I think that when the court spoke of the agreement

as a whole, it meant the whole operative part of the agreement and not any A
 inoperative parts there might be in it, and that inoperative parts, as they might be
 disregarded in the case of an adult, might also be disregarded in the case of an
 infant. I am not sure that that is thoroughly sound, but on the whole I think
 it is. This agreement in its operation, excluding the part that in my judgment
 is inoperative, is a mere agreement that the infant shall get employment upon B
 the terms that when he gives up or is dismissed from that employment, he shall
 not take advantage of what he has learned and done in the course of that employ-
 ment in the way of getting a connection and setting up a business in that place
 where he never had any connection before. He can go back to the place from
 which he came and employ himself as a baker there, and if he still lives in
 Great Clacton he can do a great many other things, but he cannot take advantage
 of the connection he has got through the plaintiff to take away the plaintiff's C
 business and practically give it to Mr. Green, because that is what he is doing
 in this case. So far as the merits are concerned, my judgment is that there
 must be an injunction in the form in which counsel for the plaintiff has asked
 for it—that is, limited to the bakery business.

Judgment for the plaintiff. D

Solicitors: *Kingsford, Dorman & Co., for Elwes, Leaning & Chamberlayne,*
Clacton-on-Sea; Tarry, Sherlock & King, for Turner, Turner & Martin, Ipswich.

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

R. v. CRIPPEN F

[COURT OF CRIMINAL APPEAL (Darling, Channell and Pickford, JJ.), November 5,
 1910]

[Reported [1911] 1 K.B. 149; 80 L.J.K.B. 290; 103 L.T. 705;
 75 J.P. 141; 27 T.L.R. 69; 22 Cox, C.C. 289; 5 Cr. App. Rep. 255] G

*Criminal Law—Trial—Juror—Illness—Retirement from court—Attendance by
 doctors and unsworn bailiff.*

During the trial of a prisoner on a charge of murder, a jurymen became ill
 and was allowed to leave the court for about an hour and a half. He was
 attended by an unsworn bailiff and three doctors.

Held: while it was advisable that in such a case the bailiff should be sworn, H
 to give greater security to the privacy of the juror, in the absence of any
 suggestion that the juror was tampered with no irregularity had taken place
 invalidating the trial.

*Criminal Law—Evidence—Rebutting evidence—Admissibility—Matters to be
 considered—Possibility of evidence being given before close of case for
 prosecution—Relevance of evidence—Question for judge.* I

Before allowing rebutting evidence to be given by the prosecution after the
 closing of the case for the defence the judge must consider whether it could
 and ought to have been given before the prosecution closed their case. The
 evidence tendered in rebuttal must always be relevant to the issue, which is
 a preliminary matter on which the judge must satisfy himself.

Dictum of TINDAL, C.J., in *R. v. Frost* (2) (1840), 4 State Tr., N.S., 386,
 criticised.

- A Notes.** Applied: *R. v. Sullivan*, [1922] All E.R.Rep. 431. Referred to: *R. v. Foster* (1911), 6 Cr. App. Rep. 196; *R. v. Wilson, Lewis and Havard* (1911), 6 Cr. App. Rep. 125; *R. v. Owen*, [1952] 1 All E.R. 1040.

As to determination of criminal appeals, see 10 HALSBURY'S LAWS (3rd Edn.) 535-542; and for cases see 14 DIGEST (Repl.) 599 et seq. For the Criminal Appeal Act, 1907, s. 4, see 5 HALSBURY'S STATUTES (2nd Edn.) 929.

- B Cases referred to:**

- (1) *R. v. O'Neill* (1843), 2 L.T.O.S. 77; 3 Craw. & D. 146; 14 Digest (Repl.) 665, *4586.
- (2) *R. v. Frost* (1840), 9 C. & P. 129, 162; 2 Mood.C.C. 140; 4 State Tr.N.S. 85; 1 Town. St. Tr. 1; Gurney's Rep. 749, C.C.R.; 14 Digest (Repl.) 133, 963.
- (3) *Wright v. Willcox* (1850), 9 C.B. 650; 19 L.J.C.P. 333; 15 L.T.O.S. 228; 14 Jur. 746; 137 E.R. 1047; 22 Digest (Repl.) 23, 55.

- C** Also referred to in argument:

- R. v. Stimpson* (1826), 2 C. & P. 415; 14 Digest (Repl.) 322, 3122.
R. v. Hilditch (1832), 5 C. & P. 299; 14 Digest (Repl.) 322, 3123.
R. v. White (1847), 9 L.T.O.S. 24; 11 J.P. 246; 2 Cox, C.C. 192; 14 Digest (Repl.) 322, 3125.

- D Appeal against conviction.**

The appellant was indicted at the Central Criminal Court for the murder of his wife, found Guilty, and sentenced to death. It appeared that on the second day of the trial a jurymen became indisposed and was allowed to leave the court. He was conducted by an unsworn bailiff and three doctors, and was absent for an hour and a half. It further appeared that at the close of the case for the defence LORD ALVERSTONE, C.J., allowed the prosecution to call rebutting evidence. It was also submitted on behalf of the appellant that the learned judge at the trial wrongfully admitted the evidence of one James Childers, which was given after the close of the case for the defence. This evidence purported to be rebutting evidence, and was directed to show at what date the materials of an odd pair of pyjama trousers, which were found with the body of the murdered woman, were delivered to the appellant.

Tobin, K.C., *Huntly Jenkins* and *Roome* for the appellant.

Muir (Travers Humphreys and S. Ingleby Oddie with him) for the Crown.

- DARLING, J.**, delivered the following judgment of the court.—Upon the first point, we do not think that the rule that jurymen, in murder cases, must not separate, means that they must be physically kept together in a narrow or confined space. The bailiff in this case had been sworn at the beginning of the trial, and he accompanied the doctors whom LORD ALVERSTONE, C.J., permitted to attend the indisposed jurymen. It might happen in some cases of sudden and extreme illness that there would be no time in which to swear a bailiff, and we do not think it necessary that on such occasions, the bailiff should be sworn. It is probably advisable that he should be sworn when possible, in order to give greater security to the privacy of the jurymen. We think that what the LORD CHIEF JUSTICE did is justified by the decision in *R. v. O'Neill* (1). Moreover, there was no opportunity for tampering with the jurymen in question, and no tampering is suggested. Upon this point, therefore, the appeal must fail.

- I** With regard to the second point raised, the rule affecting rebutting evidence is that the judge, before allowing it to be given, must consider whether it could and ought to have been given before the prosecution closed their case. The evidence tendered must always be relevant to the issue, and that is a preliminary matter upon which the judge must satisfy himself. We do not think the words used by TINDAL, C.J., in *R. v. Frost* (2) adequately expresses the rule. He said (4 State Tr.N.S. at p. 386):

“There is no doubt that the general rule is that, where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case

by calling fresh witnesses, because they are met by certain evidence which contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins, but if any matter arises ex improviso which no human ingenuity can foresee, on the part of a defendant in a civil suit or a prisoner in a criminal case, there seems to me no reason why that matter which arose ex improviso may not be answered by contrary evidence on the part of the Crown."

We think that the rule should be put as we have indicated. The matter being considered by the judge upon these lines, it is then within his discretion as to what he does. He may exercise it in a manner different from that which possibly might be adopted by the Court of Criminal Appeal, but the judge at the trial is in the better position with regard to the facilities for arriving at a conclusion. It is true that in *Wright v. Willcox* (3) it was said that his discretion is subject to review by the Court of Appeal, but that statement found no place in the judgments of the majority of the judges in that case. On the contrary, MAULE, J., said:

"The objection to the reception of the evidence was that it was offered too late. It would be very inconvenient to hold this to be a sufficient ground for setting aside a verdict. Cases in which the discretion of the judge must be exercised frequently occur. When a party has closed his case he often asks and is allowed to supply a deficiency."

If we thought the prosecution had done something unfair, we should have power to deal with the matter, but there is nothing in the nature of a miscarriage of justice to bring the case within s. 4 of the Criminal Appeal Act, 1907. The Lord Chief Justice having rightly exercised his discretion, we see no ground for interfering, and the appeal must be dismissed.

Solicitors: *Arthur Newton; Director of Public Prosecutions.*

[Reported by GERALD DODSON, ESQ., Barrister-at-Law.]

ARNOLD v. MORGAN

[KING'S BENCH DIVISION (Ridley, Pickford and Hamilton, JJ.), December 16, 17, 1910]

[Reported [1911] 2 K.B. 314; 80 L.J.K.B. 955; 103 L.T. 763; 75 J.P. 105; 9 L.G.R. 917]

Railway—Trespass—Ouster of court's jurisdiction—Claim of right to be on railway—Dedication of public right of way over railway—Power of railway company—Dedication prior to Regulation of Railways Act, 1868 (31 & 32 Vict., c. 119).

Where a person charged before magistrates with trespass on a railway claims a right to be on the railway and on the evidence the claim is bona fide and one which is capable of existing at law, the jurisdiction of the magistrates is ousted and they are not entitled to investigate the facts to determine whether the claim of right did exist. But if, on the evidence, the claim is an impossible one at law the justices' jurisdiction to determine the charge is not ousted.

The defendant was charged before justices with trespass on a railway, but contended that he was lawfully on the railway in exercise of a public right of way to pass to and fro along the railway. The railway was a branch line

A used only for goods traffic, but it crossed the main Great Western line. There was evidence that for the past sixty-four years the public had used the branch line by walking along its whole length. The justices dismissed the charge on the ground that their jurisdiction was ousted by the defendant's claim of right.

B **Held:** since at law it was possible for a railway company to dedicate their land as a public right of way, provided dedication was not incompatible with the purposes for which the land was vested in the company, the right claimed by the defendant was capable of existing at law; accordingly, the jurisdiction of the justices was ousted and they were not entitled to determine the question of fact whether dedication of the railway was incompatible with the purposes for which the land was vested in the company.

C *R. v. Leake (Inhabitants)* (1) (1833), 5 B. & Ad. 469, and *Grand Junction Canal Co. v. Petty* (2) (1888), 21 Q.B.D. 273, applied.

Cole v. Miles (3) (1888), 57 L.J.M.C. 132, followed.

D **Notes.** As to ouster of the jurisdiction of the magistrates' court where a person is charged with trespass on a railway, see 31 HALSBURY'S LAWS (3rd Edn.) 672, para. 1050. As to dedication of highways, see 19 HALSBURY'S LAWS (3rd Edn.) 43. For cases on dedication of highways, see 26 DIGEST (Repl.) 290 et seq. For the Regulation of Railways Act, 1868, see 19 HALSBURY'S STATUTES (2nd Edn.) 784.

E Cases referred to:

(1) *R. v. Leake (Inhabitants)* (1833), 5 B. & Ad. 469; 2 Nev. & M.K.B. 583; 1 Nev. & M.M.C. 544; 110 E.R. 863; 26 Digest (Repl.) 298, 198.

(2) *Grand Junction Canal Co. v. Petty* (1888), 21 Q.B.D. 273; 57 L.J.Q.B. 572; 59 L.T. 767; 52 J.P. 692; 36 W.R. 795, C.A.; 26 Digest (Repl.) 299, 199.

F (3) *Cole v. Miles* (1888), 57 L.J.M.C. 132; 60 L.T. 145; 53 J.P. 228; 36 W.R. 784, D.C.; 26 Digest (Repl.) 370, 808.

(4) *Scott v. Baring* (1895), 64 L.J.M.C. 200; 72 L.T. 495; 11 T.L.R. 175; 18 Cox, C.C. 128; 15 R. 216, D.C.; 11 Digest (Repl.) 91, 1092.

(5) *Great Western Rail. Co. v. Solihull R.D.C.* (1902), 86 L.T. 852; 66 J.P. 772; 18 T.L.R. 707, C.A.; 26 Digest (Repl.) 299, 200.

G (6) *A.-G. v. London and South Western Rail. Co.* (1905), 69 J.P. 110; 21 T.L.R. 220; 3 L.G.R. 1327; 26 Digest (Repl.) 300, 213.

H **Case Stated** by justices on an information preferred by the appellant against the respondent under s. 38 of the Great Western Railway (No. 1) Act, 1882, alleging that the respondent unlawfully trespassed upon a certain railway of the Great Western Railway Co. so as to expose himself to danger.

Upon the hearing of the information the following facts were proved. The railway where the alleged trespass took place was the Dafen branch of the Great Western Railway. That branch was about two miles in length, running from Dafen to the docks at Llanely. Within about half a mile of its dock terminus it crossed on the level the South Wales main line of the railway company. The branch railway was used to convey goods traffic only, but in the immediate neighbourhood of the main line it was extensively used for shunting and other purposes. It was formerly a horse tramway. The undertaking was originally created by a statute of 1828 (9 Geo. 4, c. xci.), whereby powers were granted to the Llanely Railway and Dock Company to construct a railway or tramroad for the conveyance of mineral and other produce. The quantity of traffic conveyed along the tramway was very small. Until about 1852 it was conveyed in waggons drawn by horses. By a statute of 1889 (52 & 53 Vict., c. xxxiii) the undertaking was amalgamated with the Great Western Railway Co. The respondent was on the branch

railway on the date alleged without any right other than the right of way claimed by him. It was proved to the satisfaction of the justices that the notices warning persons not to trespass, required by s. 38 of the Act of 1882, were in the proper position. The public had used the branch railway in its whole length by walking on it for the past sixty-four years without cessation. The number of persons using it daily was at least 200. The branch railway was extensively used by the public at the time the South Wales main line of the company was made in 1852. The expression used by a witness, whose evidence the justices accepted, was that when the main line was marked out the Dafen Branch was "free like a turnpike road." During recent years attempts had been made by officials of the Great Western Railway Co. to stop the user by the public of the Dafen branch, particularly in the neighbourhood of the main line, but the user had continued practically unabated until the date of the alleged trespass.

For the appellant it was contended that the right of way claimed was impossible in law, on the ground that a right of way could not be acquired by the public on land belonging to a statutory railway.

For the respondent it was contended that a bona fide claim to a right of way had been set up, and that the jurisdiction of the justices was ousted. The respondent did not contend that the right was in existence before 1828.

The justices came to the conclusion upon the evidence, in the first place, that the claim set up by the respondent was not impossible in law, since on the authority of *R. v. Leake (Inhabitants)* (1) and *Grand Junction Canal Co. v. Petty* (2) it was possible for a statutory corporation to dedicate (and for the public to acquire) a right of way, provided it was not inconsistent with the purposes for which the land was acquired by the corporation. The judgment in *Scott v. Baring* (4) appeared to make it unnecessary where the claim was not on the face of it impossible in law, for justices to inquire into all the circumstances to see if the claim was impossible. In the present case it appeared to the justices that it was possible for the public to have acquired a right of way upon the Dafen branch railway. Such a right was not inconsistent with the purposes for which the land was acquired in 1828, because for many years after that date the land was used, under statutory powers, for haulage over it by horses of a small quantity of traffic, and the justices observed that in *Great Western Railway Co. v. Solihull R.D.C.*, (5), COLLINS, M.R., said: "Obviously where a horse and man could go members of the public could without doing damage." The evidence given before the justices in the present case proved to their satisfaction that the public, by 1853, were using the branch railway like a highway. Upon the facts and in view of the cases referred to, the justices held that the right of way claimed was a possible one in law. They also found that to decide the issues raised necessitated a careful investigation of the sixteen statutes referred to and the taking of evidence, which would amount to an inquiry into a question of title, and that the inquiry was, therefore, outside their jurisdiction.

Bailhache, K.C., and *Schiller* for the appellant.

Shearman, K.C., and *R. M. Montgomery* for the respondent.

RIDLEY, J.—In this case a summons had been taken out under s. 38 of the Great Western Railway (No. 1) Act, 1882, for trespass upon a branch line of the railway company called the Dafen Branch, which is about two miles long, and which runs from Dafen to the docks at Llanely and crosses the main line of the South Wales portion of the Great Western Railway in its course, on the level. The branch line is only used for goods traffic. Originally it had been a horse tramway until the year 1852 or thereabouts. During that period it seems to have been used a great deal by people passing to and fro—that seems not to be in dispute. About that year a statute was passed and there were subsequent Acts of Parliament regulating it. At the hearing before the justices, it was contended for the respondent that he was there in exercise of the rights of the public, there being a right in the public to pass to and fro along the railway;

A and the justices came to the conclusion that the claim to the right of way was a bona fide and honest claim.

The present question arises upon that finding, and it is argued that the justices could not have dismissed the case upon that footing, because the claim was an impossible one; impossible for two reasons—first of all, because it is not compatible with the rights given to a railway company and the powers which it exercises in running trains, that the public should also have a right of passing to and fro on the railway; and, secondly, in consequence of certain statutes—namely, the Regulation of Railways Act, 1868, and the earlier statute, the Railway Regulations Act, 1840. As to the first point, a company can dedicate a way over their property to the public provided it is not incompatible with the use for which the property has been given to them. The authority for that proposition is *R. v. Leake (Inhabitants)* (1). That was a case of commissioners who had to drain a district, and who, in making these drains, put up a bank alongside one of the drains and allowed the public to pass to and fro along the top of the bank. PARKE, J., said (5 B. & Ad. at p. 478):

D “If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power.”

E I need not read the judgment further, but that is the way in which PARKE, J., deals with this point. The trustees would, he says, have been incapable in point of law of dedicating the land. It is a point of law when you have got to that point, but there is a question of fact which is connected with it, and that is the question whether or not dedication is incompatible with the authority's statutory powers. I do not see how that is a question of law, but in order to get at the decision in point of law that the dedication is a bad one, and that the public have not got their right, you have first of all to find out whether, as a fact, dedication was incompatible with the use by the authority of their property. When you have got to that decision, the law says it is a bad dedication, but not till then.

G That is, I think, the foundation of the matter, and it seems to me to be supported by the subsequent cases; I am not proposing to quote them at any length, because it is not necessary to go deeply or fully into the matter to-day, but *Grand Junction Canal Co. v. Petty* (2) deals with this matter as applied to a canal company, and in that case it was held that the public might have dedicated to them along the towing path a right of way for a footpath, or a right of passing by foot, and I am not sure that it might not be extended, if the facts allowed it, to horses as well, though possibly not because of the stiles. LORD H Esher, M.R., used one or two sentences which seem to me to point out clearly what I am saying. He said (21 Q.B.D. at p. 276):

I “It must be, I think, a dedication to the public of the towing path for the purpose of such user as a footpath as will not interfere with its ordinary use as a towing path by the company. I do not think that the public walking on the towing path are entitled to say that the towing must be regulated with reference to their convenience. The public in accepting the dedication must be taken to accept it as a limited dedication, and cannot set up a right to prevent or limit the user of the towing path by the company. If the horse or the tow-rope and the foot-passenger are in one another's way, the foot passenger must look out for himself and get out of the way.”

The other lords justices deal with the matter on the same footing, and it is unnecessary to quote them. If you apply this reasoning to the case of a public

railway in full and general use for passenger trains, goods trains, fast trains and slow trains, it is obvious that the question whether there can be dedication to the public of a general right of way along the railway must be considered by reference to the question of fact: Would dedication be compatible with user of the railway as a railway? I should have thought that question was difficult to answer in the affirmative, but other people may come to a different conclusion. There are railways of quite a different sort, where it is not incompatible with their use that the public should have rights alongside the railway, or perhaps to cross it, because the same considerations of danger would not apply. In the present instance that was one of the points that was taken before us. The other point taken was under the statutes which I have mentioned of 1840 and 1868. A

That being so, was the jurisdiction of the magistrates ousted in consequence of the setting up of this claim to a public right of way? I think *Cole v. Miles* (3) is authority to say that it was, and therefore the decision of the justices was right. That case deals with both the questions that have been before us, and its effect is this. If, as in the present case, the question whether there is a real claim of right, a legal claim of right, depends partly upon a question of fact, the justices' jurisdiction is ousted; but if it is a case in which, upon consideration of the admitted facts it appears certain that the law does not admit of such a claim, jurisdiction is not ousted. In such a case as I have last mentioned there is not a bona fide claim of right at all. In the present case it is impossible to say that it was not arguable that there was a claim of right. There might have been a claim because the court might have allowed that such a public right was not incompatible with the use of the railway, which, after all, is not a railway in full use such as I have been describing; and it appears from *Cole v. Miles* (1) that the Act of 1868, I think, and also that of 1840, were not intended to deprive the public of their rights of walking upon the railway. For these reasons I think the decision of the justices was right. B

PICKFORD, J.—I am of the same opinion. The respondent claimed as one of the public a right of user of a public highway. It is said that that was an impossible claim, because there could not be a public highway over this railway. If it was an impossible claim in law, then there is ample authority to show that the jurisdiction of the justices was not ousted; but if it were a possible claim in law, then, although it might turn out to be bad, and might very probably be bad on the face of it, it has been decided that that question is not for the justices to try. In order to have a dedication there must be two things, first, evidence, leading to the conclusion that there was a dedication, and, secondly—I perhaps ought to have put it firstly, but, anyhow, secondly—a person capable of dedicating. It seems to me in this case both of those questions are questions of fact. I do not see that it is possible to say that in no case can a public highway and a railway co-exist; it seems to me to be opposed to the cases which have been decided on the subject. I need not mention more than one of them, the judgment of **FARWELL, J.**, in *A.-G. v. London and South Western Rail. Co.* (6). He was dealing there with a railway. It is true he was dealing with a level crossing, and not such a right as was claimed here of going through the whole length of this branch railway. He said: C

“A statutory company can dedicate a footway so long as its user is not inconsistent with the objects and obligations of the company. This being so, the question is really reduced to one of fact.” D

One of the matters to be decided on the question of fact is whether the user by the public was or was not incompatible with the objects of the railway, and, secondly, whether there was such a user as led to an inference of dedication. Junior counsel for the appellant has argued that the justices were bound at any rate to go so far with the investigation of fact as to see whether the user was incompatible or not. That seems to me to say they were to try E

A half the question of title, and not the other half, and as I understand these cases, if there is a possibility in law, assuming the fact to be found in favour of the claimant to the right, of the right existing, then the justices are not to go into investigation of fact. Therefore, in this case it seems to me that the justices were not entitled to go into either of the branches of investigation of fact which were necessary to decide the question, because, assuming that all those facts were found in favour of the claimant, then there would not be an impossibility in law of dedication. No doubt junior counsel for the appellant has used very powerful arguments indeed to show that any tribunal ought reasonably to find that such a right as is claimed is in fact incompatible with the user of the railway, looking not only at this present user, but looking, as you have to do, at all the possibilities of statutory user which exist, and possibilities of extension of the present user. But that is not a question which we have to decide, nor is it a question, as I understand the authorities, which under these circumstances is to be tried by the justices, and therefore, I agree that the justices were right here in saying there was such a bona fide claim of right as ousted their jurisdiction.

HAMILTON, J.—I am of the same opinion. The question is whether the justices were right in holding that their jurisdiction was ousted. They found that there was a bona fide claim, and the claim of right that was made before them by the respondent was clearly one which involved an elaborate investigation both of fact and of law. The claim might still be one which did not oust the jurisdiction, if it was one which was legally unsustainable. The claim was that the Great Western Railway Co. and/or their predecessors in title had at some date since 1828 dedicated the land which was vested in them by the various Acts of Parliament for the special purposes of a tramway and railway to the use of the public as a highway. If there was so great incompatibility between the special purposes for which the Acts of Parliament vested the land in the railway company and the public use of that land as a highway that the two could not co-exist together, then in law no doubt the railway company would have been incapable of dedicating and creating the alleged right of way. It is, however, not possible to say that eo ipso the conjoint user of the same strip of land as a public highway and as a railway is in law necessarily incompatible one with the other, and it appears to me that the test of incompatibility is not inconvenience of the conjoint user, nor is incompatibility limited to cases in which the public user would absolutely prevent the use by the railway company, or, alternatively, the use by the railway company would involve a physical interruption of the public right of user. The question is, therefore, one of fact, and a complete question of fact. It is, however, alleged that it was for the justices to have investigated the facts for the purpose of ascertaining whether in this particular case the inconvenience was so great as to amount to that incompatibility which would have prevented the dedication from being legally valid. It appears to me that that is an unfounded contention. Such an investigation is, after all, only directed for the purpose of discovering whether the dedicator was capable of making the dedication, which is in itself a conclusion of law, and I do not think that it is within the long-established practice of justices of petty sessions that they should investigate complicated questions of fact, the object of which is to determine whether a particular statutory corporation is or is not capable in law of dedicating a portion of the land vested in it. The suggestion, therefore, that the claim was one which is legally invalid fails. The other way of putting the case was that the claim was one which upon the facts, if the right in the public ever arose, had been subsequently extinguished by reason of the various Acts of Parliament. It is not necessary to consider the effect of the statute of George IV and the subsequent statute of William IV under which the Llanelly Railway was made and regulated, because it is now admitted that the material parts of those Acts were repealed by the Great Western Railway Company's Act of 1853, c. clxix., and therefore, whatever might have been the incapacity to dedicate imposed

by those Acts, on their true construction, upon the railway company in question, from 1853 until 1868 there was no statutory incapacity imposed upon them, and there was no evidence which was sufficient to raise a claim of right to a dedication, and the acquisition of a public right in that interval. *Cole v. Miles* (3), which is an authority binding upon us upon the question of the justices' right and obligation to refuse to investigate the facts relating to the incompatibility, also is an authority for saying that s. 23 of the Regulation of Railways Act, 1868, does not extinguish any public right of way acquired by reason of a prior dedication, and therefore it is clear that there is no statute which makes it impossible for the respondent to contend that a dedication has taken place and that the right granted has not been extinguished as the result of any subsequent legislation. On both grounds, therefore, the appellant's contention fails and the justices were right.

Appeal dismissed.

Solicitors: *L. B. Page; Lloyd George, Roberts & Co.* for *H. W. Spowart*, Llanelly.

[Reported by *W. de B. HERBERT, Esq., Barrister-at-Law.*]

BAKER v. SNELL

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.J.J.), July 16, 1908]

[Reported [1908] 2 K.B. 825; 77 L.J.K.B. 1090; 99 L.T. 753;
24 T.L.R. 811; 52 Sol. Jo. 681; 21 Cox, C.C. 716]

Animal—Dog—Liability of owner for injury to plaintiff—Dog known to be dangerous—Voluntary intervention of third person.

Animal—Fera naturæ—Mansuetæ naturæ known to be dangerous—Liability of owner—Injury to plaintiff—Voluntary intervention of third person.

Master and Servant—Liability of master for act of servant—Dog entrusted to servant's care—Dog known to be dangerous—Injury to third person caused by act of servant—Scope of authority.

A dog known by the owner to be savage was entrusted to the custody of a servant who incited it to fly at the plaintiff and bite her. She brought an action in the county court for damages, but the judge nonsuited her.

Held: (i) there must be a new trial, as the question whether the servant's wrongful act was done in the course of his employment, or whether it was done for purpose of his own, ought to have been left to the jury; (ii) (KENNEDY, L.J., dissenting), that if a man keeps an animal *feræ naturæ*, or an animal *mansuetæ naturæ* which is known to him to be dangerous, he is bound to keep it secure at his peril, and is liable for any injury done by it, though the injury is directly brought about through the intervening voluntary act of a third person.

Notes. Applied: *Lowery v. Walker*, ante p. 12. Explained and followed: *Behrens v. Bertram Mills Circus, Ltd.*, [1957] 1 All E.R. 583. Referred to *Clinton v. Lyons*, [1911-13] All E.R.Rep. 577; *Knott v. London County Council*, [1933] All E.R.Rep. 172; *Rands v. McNeil*, [1954] 3 All E.R. 593.

As to injuries caused by domestic animals, see 1 HALSBURY'S LAWS (3rd Edn.) 663 et seq.; and for cases see 2 DIGEST (Repl.) 379 et seq.

A Cases referred to:

- (1) *May v. Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 2 Digest (Repl.) 329, 216.
- (2) *Jackson v. Smithson* (1846), 15 M. & W. 563; 4 Dow. & L. 45; 15 L.J.Ex. 311; 7 L.T.O.S. 231; 153 E.R. 973; 2 Digest (Repl.) 333, 239.
- (3) *Nichols v. Marsland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, 421.
- (4) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154, 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest (Repl.) 328, 215.
- (5) *Filburn v. People's Palace and Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 38 W.R. 706; 6 T.L.R. 402, C.A.; 2 Digest (Repl.) 329, 219.

Also referred to in argument:

- Cheshire v. Bailey*, [1905] 1 K.B. 237; 74 L.J.K.B. 176; 92 L.T. 142; 53 W.R. 322; 21 T.L.R. 130; 49 Sol. Jo. 134, C.A.; 34 Digest 132, 1015.
- Sanderson v. Collins*, [1904] 1 K.B. 628; 73 L.J.K.B. 358; 90 L.T. 243; 20 T.L.R. 249; sub nom. *Saunderson v. Collins*, 52 W.R. 354; 48 Sol. Jo. 259, C.A.; 34 Digest 140, 1100.
- Barnes v. Lucille, Ltd.* (1907), 96 L.T. 680; 23 T.L.R. 393; 2 Digest (Repl.) 384, 580.
- Smith v. Pelah* (1747), 2 Stra. 1264; 93 E.R. 1171; 2 Digest (Repl.) 379, 546.
- Styles (Stiles) v. Cardiff Steam Navigation Co.* (1864), 4 New Rep. 483; 33 L.J.Q.B. 310; 10 L.T. 844; 28 J.P. 646; 10 Jur.N.S. 1199; 12 W.R. 1080; 2 Digest (Repl.) 384, 581.
- Brook v. Copeland* (1794), 1 Esp. 203.
- Charlwood v. Greig* (1851), 3 Car. & Kir. 46; 18 L.T.O.S. 186; 2 Digest (Repl.) 383, 573.

F Appeal from a decision of the Divisional Court ordering a new trial in an action for damages.

The plaintiff was a barmaid in the employment of the defendant, a licensed victualler. The defendant kept on his premises a dog which was savage to his knowledge, and had bitten the plaintiff and other people on previous occasions.

G It was the duty of the potman at the establishment to let the dog out for a run every morning, and then to chain him up before the plaintiff and the other maids came down to breakfast. On the occasion in question the potman brought the dog into the kitchen, where the plaintiff and other maids were at breakfast, and said, "I bet the dog won't bite anyone," and then let the dog go and said, "Go it, Bob," upon which the dog bit the plaintiff. The plaintiff then brought an action for damages in the Bow County Court.

H The county court judge withdrew the case from the jury holding that the defendant was not liable, on the ground that the act was a wilful and malicious one on the part of the potman, and amounted to an assault by him. The plaintiff appealed to the Divisional Court (CHANNELL and SUTTON, JJ.) who ordered a new trial on the grounds that it should have been left to the jury whether the potman was acting in the course of his employment, and that the owners of an animal known by him to be savage must keep it secure at his peril, and is liable for all injuries caused by it unless the party injured brought the injury upon himself. From this decision the defendant appealed.

McCall, K.C., and *Abinger* for the defendant.

Profumo for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This is an appeal from a decision of the Divisional Court, who directed a new trial of an action commenced in the

county court by a young woman who had been bitten by a dog, owned by her master, and known by that master to be ferocious and given to bite. The learned county court judge nonsuited the plaintiff on the ground that the conduct of the potman who had the dog in charge amounted to an assault by him. In the Divisional Court both the learned judges thought that there had not been a satisfactory trial, and that the action must go down for a new trial. CHANNELL, J., based his decision on the ground that the potman was the defendant's servant, and was entrusted by him with the custody of the dog, and instead of performing his duty of keeping the dog securely, he incited it to fly at the plaintiff, and the question whether the defendant was liable for that depended upon whether the man's wrongful act was done in the course of his employment or whether it was for purposes of his own. He said that if it could be shown that the man did it maliciously to gratify some grudge against the plaintiff, his master would not be liable, but there was no evidence of that, and in his view the potman's act amounted to nothing more than a foolish and wanton act done in neglect of his duty to keep the dog safe; and if that was the right view the defendant would be responsible, but the question was one of fact, which ought to have been left to the jury.

I entirely adopt that view, and that, no doubt, is in itself a sufficient reason for affirming the decision of the court below, but as a matter of general interest had been raised, and as it has been dealt with by CHANNELL and SUTTON, JJ., I think it right to state, shortly, my view on the point. If a man keeps an animal whose nature is ferocious, or an animal of a class not generally ferocious, but which was known to the owner to be dangerous, is the owner of that animal liable if he neglects his duty of keeping it safe, or is negligent in the discharge of that duty, or is he bound to keep it secure, at his peril? In my opinion, the latter is the correct proposition of law, and I think that it is not open to the court to decide the other way. In 1846, in *May v. Burdett* (1), the law was laid down by the Court of Queen's Bench in the case of a monkey. The action was brought by a man and his wife to recover damages for a bite to the female plaintiff, and the declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large, and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff. The case was elaborately argued. DENMAN, C.J., in delivering the judgment of the court, said (9 Q.B. at pp. 110, 111):

"A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with a knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities."

Again at the end of his judgment, after referring to a passage in HALE'S PLEAS OF THE CROWN, vol. 1, p. 480b, he said (*ibid.* at p. 113):

"It was said, indeed, further, on the part of the defendant, that the monkey being an animal *feræ naturæ*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection; for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant

- A kept it; we are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events."

The next case in point of time was *Jackson v. Smithson* (2) which raised the point in a very neat form. The action was for injury to the plaintiff's wife, and the declaration alleged that the defendant did wrongfully and injuriously keep a certain ram, he (the defendant) well knowing that the said ram then was, and continued to be, prone and used and accustomed to attack, butt, and injure mankind. There was no allegation of negligence, no allegation beyond this, that the defendant knew that the ram was prone and used and accustomed to attack and injure mankind, and that he wrongfully kept it. There was a judgment in favour of the plaintiff at the assizes, and a rule was obtained to arrest the judgment on the ground that the declaration was bad for omitting to aver that the defendant negligently kept the ram. The matter came before the Court of Exchequer, consisting of POLLOCK, C.B., ALDERSON and PLATT, BB., and POLLOCK, C.B., said (15 L.J.Ex. at p. 312):

- C "The case of *May v. Burdett* (1), in the Queen's Bench, is decisive, and we must leave the parties to go to a court of error, if they think that they have any ground for reversing our judgment, by which this rule is discharged."

ALDERSON, B., said (*ibid.*):

"I am of the same opinion, and think that we are bound by that case. I can see no distinction between the case of an animal which breaks through the tameness of its nature, and is known to be fierce, and one that is feræ naturæ."

- E PLATT, B., said (*ibid.*):

"No doubt a man has a right to keep an animal which is feræ naturæ, and no one has a right to interfere with him in doing so until some mischief happens; but as soon as it has done an injury, then the keeping it becomes, as regards that person, an act for which he is responsible."

- F The matter came up, not directly, but in a shape which led to some observations by the court, in *Nichols v. Marsland* (3). There the defendant had stored water on her own land. By reason of excessive rainfall the embankments were carried away and the water injured the plaintiff's adjoining property. It was held that the action was not maintainable. The judgment of the court in that case, which consisted of KELLY, C.B., BRAMWELL and CLEASBY, BB., was delivered by G BRAMWELL, B., and the whole reasoning of the judgment seems so much in point that it ought to be referred to in some detail. BRAMWELL, B., said (L.R. 10 Exch. at p. 259):

- H "What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that if it was let loose it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be."

- I Then, after saying that for such a question there was no difference between a reservoir and a stack of chimneys, he continued (*ibid.*):

"The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion."

And later in his judgment he said (*ibid.* at p. 260):

"This case differs wholly from *Fletcher v. Rylands* (4). There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel

which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger and lightning broke his chain and he got loose and did mischief the man who kept him would not be liable. But this case, and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case."

That case came before the Court of Appeal, where MELLISH, L.J., delivered the judgment of the court. He said (2 Ex.D. at pp. 4, 5):

"The ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any fault of his own by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act."

If it be true, as I think it is, that it is a wrongful act for a person to keep an animal which he knows to be dangerous, that is an authority, not merely of the Court of Exchequer, but also of the Court of Appeal, that the person so keeping it is liable for the consequences of his wrongful act, even if the immediate cause of damage is the act of a third party.

Filburn v. People's Palace and Aquarium Co. (5) is also a strong authority for the same proposition. In that case the action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant which was the property of the defendants and was being exhibited by them. The defendants did not know the elephant to be dangerous, but they were nevertheless held liable, because the elephant was of a class of animals which were dangerous by nature. LORD ESHER said in his judgment in that case (25 Q.B.D. at p. 260) that the law recognised two distinct classes of animals, animals which were dangerous by nature and animals which were generally not dangerous; but where animals of the latter class were dangerous to the owner's knowledge he put them into the same class as animals which were dangerous by nature; and then, after referring to certain descriptions of animals which were not dangerous, he continued (*ibid.*):

"Unless an animal is brought within one of these two descriptions—that is, unless it is shown to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself."

On those authorities, and in accordance with what in my judgment is settled law, I think the matter ought to go down for a new trial, not merely on the ground stated by CHANNELL, J., though I agree that is sufficient, but also on the ground as to which he expressed some doubt, but on which SUTTON, J., appears to have based his decision.

A FARWELL, L.J.—I agree. I take the same view which CHANNELL, J., took as regards the potman's authority, but I do not agree with what he said when he declined to accept the view that the liability of the keeper of a savage animal extended to damage directly brought about by the intervening voluntary act of a third party. SUTTON, J., obviously did not agree with him, because he bases his judgment on *May v. Burdett* (1). The cases, in my opinion, establish that the law recognises two classes of animals—animals *feræ naturæ* and animals *mansuetæ naturæ*. Any animal of the latter class may, if it is known to its owner to be dangerous, fall within the former class, and anyone who keeps a beast of that nature does a wrongful act, and is liable for the consequences, under whatever circumstances arising, except when the plaintiff by his own conduct has brought the injury on himself. That is laid down in *Jackson v. Smithson* (2). The exact point of that decision was that an action for injury caused by a ram known to its owner to be dangerous would lie without any averment of negligence because the wrongful act was keeping a savage beast. The same principle was laid down by LORD DENMAN in *May v. Burdett* (1). LORD DENMAN in his judgment (9 Q.B. at p. 112) refers with approval to a passage in HALE'S PLEAS OF THE CROWN, vol. 1, p. 430b, which concludes as follows:

"And therefore, in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him safe from doing hurt, for though he uses his diligence to keep him up, if he escape and do harm the owner is liable to answer in damages."

E It appears to me to be absolutely immaterial, if a man who chooses to keep a dangerous animal does so at his own peril in all circumstances, whether the injury arises from the actual negligence of the owner or from the act of a third person. The wrong is in keeping the fierce beast, and the person who chooses to keep it is responsible for the injury arising from his own wrongful act, and such *prima facie* responsibility can be got rid of only in the manner pointed out by BLACKBURN, J.,—namely, by showing that the escape was due to the plaintiff's own default, or perhaps was caused by *vis major* or the act of God. The wrongful act of a third person is no defence.

G KENNEDY, L.J.—This case I agree should go down for a new trial. As at present advised, I agree with the view of CHANNELL, J., which I think on the whole is in accordance with the authorities. There is no doubt that the keeper of a ferocious dog, if he knows the dog to be ferocious, is in exactly the same category as the keeper of a naturally wild animal. That appears from the judgment of BOWEN, L.J., in *Filburn v. People's Palace and Aquarium Co.* (5). He says (25 Q.B.D. at p. 261):

H "If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief."

I Therefore a dog known by its owner to be dangerous is exactly in the same position as an animal *feræ naturæ*.

But there is nothing culpable or wrong in keeping an animal *feræ naturæ*. That appears from *Jackson v. Smithson* (2). PLATT, B., there says (15 L.J.Ex. at p. 312): "No doubt a man has a right to keep an animal which is *feræ naturæ*, and no one has a right to interfere with him until some mischief happens."

But then it is said that directly the animal does mischief the person who keeps it is liable, and, broadly speaking, I do not doubt that that is true. That is to

say, it does not lie on the injured party to allege and prove any want of care on the part of the keeper, because in the case of an accident the keeper is liable for all damage done by the animal, and it is no defence to say he took reasonable care to keep it secure. The gist of the action is scienter, and in *Jackson v. Smithson* (2) it was held a good declaration to aver that an animal known by the defendant to be ferocious was kept by him and did damage. The same thing was decided in *May v. Burdett* (1). There also the declaration was held good, although there was no allegation of negligence; but the language of LORD DENMAN, which has been referred to by the MASTER OF THE ROLLS, appears to me to be strongly in favour of the view of the law so clearly expressed by my brother CHANNELL, because LORD DENMAN (9 Q.B. at pp. 110, 111) states the result of the authorities to be

"that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it."

The very introduction of the term *primâ facie*, as I read it, shows that there may be an answer to the action; that the keeping of such an animal with knowledge of its propensities is not conclusive, although the keeper is *primâ facie* liable in an action on the case. Those words could not, in my opinion, be properly used if the view is correct that whatever happens the owner is liable; if, for example, to use the illustration of CHANNELL, J., the animal was set on by a thief to bite a policeman who was following him.

That being so, upon the whole, as at present advised I am inclined to agree with my brother CHANNELL in declining to accept the view intimated by BRAMWELL, B., in *Nichols v. Marshland* (3) that the liability of the keeper of a savage animal extends to damage directly brought about through the intervening voluntary act of a third person. I may observe that the view of BRAMWELL, B., is put by CHANNELL, J., a little more strongly than the words actually used by the learned baron seem to warrant, because all that he said was: "I am by no means sure, etc." Whatever may be the value of that dictum, I desire to say that if authority be referred to, we have the authority of BLACKBURN, J., delivering the judgment of the Court of Exchequer Chamber in *Fletcher v. Rylands* (4) for saying that whatever a man keeps which is likely to do mischief he is subject to an equal degree of liability, and that judgment was expressly referred to and approved by LORD CAIRNS in the House of Lords. BLACKBURN, J., says—I am reading from the extract in LORD CAIRNS' judgment in the House of Lords (L.R. 3 H.L. at pp. 339, 340):

"We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. [That does not mean that the owner is liable in all cases, for he proceeds to mention two cases in which the owner might not be liable.] He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God."

Then, later on in his judgment, he shows that no distinction can be drawn between the various classes of things which may cause mischief if allowed to escape. After giving several instances in which a man would be responsible for bringing a dangerous thing on his property in the event of its escape, he goes on (*ibid.* at p. 340):

"But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief

A may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.

Then LORD CAIRNS adds (*ibid.*): "My Lords, in that opinion I must say I entirely concur." Therefore, he fully indorses the opinion of BLACKBURN, J., that a wild beast is to be regarded in the same light as anything else which may do harm if allowed to escape. If so, it appears to me to follow that the view expressed by BRAMWELL, B., cannot be law. But, putting aside any possible distinction between the storage of water and the keeping of wild animals, we have it established that it is not unlawful for a man to keep an animal *feræ naturæ*; but if it injures his neighbour the keeper of the animal is *primâ facie* liable for the result. The question here is whether the crime of a third person is one of those things which would absolve the owner from his *primâ facie* liability. The inclination of my opinion is that it would. It is not necessary to decide the point in this case, but, speaking for myself, with great deference to the other members of the court, I should have thought that not only on grounds of justice, but according to the law as stated by LORD DENMAN and BLACKBURN, J., if it could be shown that it was the criminal act of a third party which made an animal, otherwise harmless, dangerous, and the injury to the plaintiff was the direct result of that act, then the keeper of the animal would have a good defence to an action such as the present.

Solicitors: *Philbrick & Co.; H. F. Strouts.*

[*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.*]

F

WEINER v. HARRIS

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), November 17, 18, 1909]

[Reported [1910] 1 K.B. 285; 79 L.J.K.B. 342; 101 L.T. 647; 26 T.L.R. 96; 54 Sol. Jo. 81; 15 Com. Cas. 39]

Agent—Mercantile agent—Goods entrusted to mercantile agent for sale—Goods stated to be held by agent "on sale or return"—True construction of contract—Authority of agent to pledge goods—Factors Act, 1889 (52 & 53 Vict., c. 45), s. 1 (1), s. 2 (1).

By s. 1 (1) of the Factors Act, 1889: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority . . . to sell goods . . ." By s. 2 (1): "Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall . . . be as valid as if he were expressly authorised by the owner of the goods to make the same. . ."

The plaintiff, a manufacturing jeweller, entrusted goods to a commercial traveller on the terms of a letter written by the traveller in which he acknowledged that he had the goods from the plaintiff "on sale or return" and admitted that they were the property of the plaintiff and were to remain so until sold or paid for, "they being only left with me for the purposes of sale or return, and not to be kept as my own stock." The goods were to be entered at cost price and the traveller's remuneration for selling them was to be one-half the

profit. The defendant advanced money to the traveller on the security of certain of the goods in good faith and without notice of any disability on the part of the traveller to deal with the same.

Held: by the use of a well-known legal phrase a transaction could not be converted into a transaction of the character described by that phrase, and the fact that in the letter of July 31, 1905, the transaction between the plaintiff and the traveller was described as one in which the traveller had the goods "on sale or return" did not make the transaction one in which the goods had been taken on sale or return; on a proper construction of the letter it was never contemplated that the traveller should be the purchaser of the goods; he was employed only as an agent to sell and had no right to buy; he was, therefore, a mercantile agent within s. 1 (1) of the Act of 1889 and as such he had statutory authority to pledge the goods to the defendant.

Hastings, Ltd. v. Pearson (1), [1893] 1 Q.B. 62, overruled.

Weiner v. Gill (2), [1906] 2 K.B. 547, distinguished.

Notes. Applied: *Janesich v. Attenborough* (1910), 102 L.T. 605. Distinguished: *Kempler v. Bravingtons* (1925), 133 L.T. 680. Referred to: *Lowther v. Harris*, [1926] All E.R.Rep. 352.

As to mercantile agents, see 1 HALSBURY'S LAWS (3rd Edn.) 151; and for cases see 1 DIGEST (Repl.) 383 et seq. For the Sale of Goods Act, 1893, s. 18, see 22 HALSBURY'S STATUTES (2nd Edn.) 996; and for the Factors Act, 1889, s. 1, see *ibid.* vol. 1, p. 29 et seq.

Cases referred to:

(1) *Hastings, Ltd. v. Pearson*, [1893] 1 Q.B. 62; 62 L.J.Q.B. 75; 67 L.T. 553; 57 J.P. 70; 41 W.R. 127; 9 T.L.R. 18; 36 Sol. Jo. 866; 5 R. 26, C.A.; 1 Digest (Repl.) 387, 515.

(2) *Weiner v. Gill*, *Weiner v. Smith*, [1906] 2 K.B. 574; 75 L.J.K.B. 916; 95 L.T. 438; 22 T.L.R. 699; 50 Sol. Jo. 632; 11 Com. Cas. 240, C.A.; 39 Digest 509, 1263.

(3) *Oppenheimer v. Attenborough & Son*, [1908] 1 K.B. 221; 77 L.J.K.B. 209; 98 L.T. 94; 24 T.L.R. 115; 52 Sol. Jo. 76; 13 Com. Cas. 125, C.A.; 1 Digest (Repl.) 392, 541.

Also referred to in argument:

Wood v. Rowcliffe (Roelcliffe) (1846), 6 Hare, 183; 11 Jur. 707; on appeal (1847), 2 Ph. 382; 17 L.J.Ch. 83; 10 L.T.O.S. 281; 11 Jur. 915; 41 E.R. 990; 1 Digest (Repl.) 385, 502.

Hayman v. Flewker (1863), 13 C.B.N.S. 519; 1 New Rep. 479; 32 L.J.C.P. 132; 9 Jur.N.S. 895; 143 E.R. 205; 1 Digest (Repl.) 384, 496.

Tremouille v. Christie (1893), 69 L.T. 338; 37 Sol. Jo. 650; 1 Digest (Repl.) 386, 513.

Kirkham v. Attenborough, *Kirkham v. Gill*, [1897] 1 Q.B. 201; 66 L.J.Q.B. 149; 75 L.T. 543; 45 W.R. 213; 13 T.L.R. 131; 41 Sol. Jo. 141, C.A.; 39 Digest 508, 1252.

Lamb v. Attenborough (1862), 1 B. & S. 831; 31 L.J.Q.B. 41; 8 Jur.N.S. 280; 10 W.R. 211; 121 E.R. 922; 1 Digest (Repl.) 386, 510.

Cole v. North Western Bank (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733, Ex. Ch.; 1 Digest (Repl.) 385, 501.

Appeal from a decision of PICKFORD, J., in favour of the plaintiff in an action to recover articles pledged with the defendant by the plaintiff's agent.

The plaintiff was a jeweller, and Fisher, who was likewise engaged in the jewellery trade, travelled with articles of jewellery entrusted to him by the plaintiff. He sold the articles, and accounted for the proceeds of sale to the plaintiff. In 1904 the plaintiff dealt with him by sending goods on the terms contained in an "appro. note" under which the property in the goods did not pass to Fisher until they were either paid or charged for. Subsequently, however, the terms on which

A the plaintiff and Fisher did business were altered. A letter, dated July 31, 1905, was written to the plaintiff by Fisher as follows :

B "I acknowledge that I have had from you on sale or return the goods entered up to this date in the book labelled 'Goods sent to Mr. Fisher,' which is in your possession, and which I have examined, and I admit that I have to account to you for such goods. The goods referred to in the book mentioned, and all further goods you may hereafter send to me, I admit are your property, and to remain so until sold or paid for, they being only left with me for the purposes of sale or return, and not to be kept as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one-half of the profit—i.e., I retain one-half of the difference between the price at which I sell each article and the cost price of it, and immediately I receive the price of any article sold I am to remit to you the cost price and one-half of the profit as above. It is clearly understood you have no interest in my business, and I have none in yours, and that no partnership of any kind is existing or to exist between us, and that any goods I may at any time have from you are to be returned on demand."

D The defendant, who was a moneylender, advanced money to Fisher upon the security of certain articles of jewellery in good faith and without notice of any disability on the part of Fisher to deal with the same.

E An action was brought by the plaintiff to recover the articles which had been so pledged with the defendant. The defendant claimed to be entitled to hold the articles because they had been pledged with him by the authority, express or implied, of the plaintiff given to Fisher. In May, 1909, the action came on for trial before PICKFORD, J., sitting without a jury in Middlesex. His LORDSHIP was of opinion that, so far as the passing of the property in the goods to Fisher was concerned, notwithstanding that Fisher could sell on credit, the effect of the letter of July 31, 1905, as a whole, was substantially the same as the "appro. note." The learned judge was not satisfied that an authority to Fisher to pledge goods had been established, or that the plaintiff had held out Fisher as having authority. He also came to the conclusion that there was no partnership between the plaintiff and Fisher, and that Fisher was not a "mercantile agent" entrusted with the goods for sale within the meaning of s. 1 of the Factors Act, 1889. In these circumstances His LORDSHIP decided that the defendant was not entitled to keep the articles of jewellery in question; and that, therefore, judgment must be entered for the plaintiff with costs. From that decision the defendant now appealed.

G *J. B. Matthews* for the defendant.

Rawlinson, K.C., and *Harry Dobb* (with them *Reginald J. White*) for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This appeal raises only one question for our decision, and that is a question which is undoubtedly one of some difficulty, because the document upon which everything depends has been construed in two cases by two learned judges—BRAY, J., and PICKFORD, J.—for whom I have the most profound respect, in a manner which I am unable to adopt. [His LORDSHIP stated the facts and continued:] The only point which arises for consideration before us is what is the meaning and legal effect of a letter of July 31, 1905, upon the faith of which the business relations between Weiner and Fisher were carried on. That involves this important consideration. Was the transaction the ordinary well-known transaction of goods taken on sale or return, or was it a transaction under which Fisher was constituted agent for sale, with authority to sell, and bound to account to his principal for the proceeds of such sale? If it was the former, it is quite plain that the property never has passed from the plaintiff, Weiner, and that Weiner is entitled to recover it. The Factors Act, 1889, is then altogether out of the question, and does not require any consideration from us. If it was the latter, the Sale of Goods Act, 1893, is then equally out of the question, and we have only to consider what is the true meaning and effect as between the

plaintiff and the defendant of the Factors Act, 1889, in one or two sections to which A
I shall have to refer.

In my opinion, this is not a transaction of goods taken on sale or return. It is quite plain that by the mere use of a well-known legal phrase you cannot convert a transaction into that which you attempt to describe by that phrase. Perhaps the commonest instance of such a use which has come before the courts in many cases arises in this way. Two parties enter into a transaction and in effect say: "It is hereby declared that there is no partnership between us." The court pays no regard to that. The court looks at the transaction and considers whether in point of law there really is a partnership. It is not in the least conclusive because the parties have used a term or language intended to indicate that the transaction is not that which in law it is. So here the mere fact that goods are said to be taken on sale or return is not in any way conclusive of the real nature of the contract. C
The court must look at the contract as a whole and see whether that is the real meaning and effect of it. [His LORDSHIP read the letter of July 31, 1905, and continued:] In my opinion, it is impossible to say, on the fair construction of that letter, that it was ever contemplated or intended that Fisher should be the purchaser of the goods, because on the very terms of it the price could not be ascertained until after he re-sold the goods, and he was not to put them into his stock. In the ordinary transaction of purchase and sale, directly one party to the contract says that he will not return the goods, but will elect to take them, he becomes the buyer. This is plainly, as it seems to me, a transaction in which Fisher had no right to buy. Fisher only had a duty towards Weiner to sell, and he was to be remunerated for his services in selling the goods by half the excess of the cost price—no more. It is all the more extraordinary because he was not even accountable to Weiner for the so-called purchase price—that is to say, the cost price plus half the sale price—until he actually received the money from the buyer. I do not say "the ultimate buyer," because I do not consider that he was the ultimate buyer. Take another instance. You never hear in respect of an ordinary transaction of sale and return that the goods are only left with a person for the purpose of sale or return and not to be kept in his own stock. Then there was the phrase—although I do not attach too much importance to it—of accounting for the goods which is not used in a simple transaction of sale and return. I have come unhesitatingly to the conclusion that this was a transaction in which Fisher was not and could not become the buyer of the goods, but a transaction in which Fisher was employed as agent, and only as agent, and as agent was to be remunerated by a certain percentage. And the very fact that he was to be remunerated for his services is alone, I think, almost sufficient to show that he could not be a buyer; because it is quite plain that no person who is an agent, or is to be remunerated as agent, can be allowed to buy that which he is instructed and authorised to sell. F

Then it is said that even if this is not an ordinary transaction of sale or return—even if it did constitute Fisher agent—still this case is not within the Factors Act, 1889. It is necessary for that purpose to refer only to ss. 1 and 2 of that Act. H
Section 1 enacts that:

"For the purposes of this Act—(1) The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority . . . to sell goods"

—that is the only part which is material. Then s. 2 (1) enacts that: I

"Where a mercantile agent is, with the consent of the owner, in possession of goods or of documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same."

Apply that first section. Many thousand pounds' worth of goods were handed over by Weiner to be dealt with on the footing of this letter. I am bound to say I

A cannot imagine a mercantile agent within the meaning of the section if Fisher was not. He was sent all over the country by Weiner for the very purpose of disposing of the goods upon the footing of the transaction, and to say that his business was that of a shopkeeper is altogether irrelevant to any question that we have to decide here.

B We were referred to three definitions of the term "mercantile agent" given by three judges of the Court of Appeal in *Oppenheimer v. Attenborough & Son* (3). They are not precisely the same, but every one of them is couched in such language as plainly covers the position of Fisher. And, even apart from that authority, I should have had no doubt that Fisher was within the meaning of the definition in the Factors Act, 1889, a "mercantile agent." There is only one authority which throws any doubt upon the matter, and that is *Hastings, Ltd. v. Pearson* (1).

C There the plaintiffs, a firm of jewellers, employed Brooke at a small salary to sell goods for them, by retail, on commission. He pawned the goods. It was held by the Divisional Court that Brooke was not a "mercantile agent" within the meaning of the Act, on the ground, apparently, that the Act applies only to persons of the class ordinarily carrying on the business of mercantile agents, and that it has no reference to a man in such a position as Brooke was. It was laid down that there

D is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent. I think it is quite clear that LORD ALVERSTONE, C.J., in *Oppenheimer v. Attenborough & Son* (3) indicated in no doubtful language that he did not altogether approve of the decision in *Hastings v. Pearson* (1). In my opinion, that case ought not to be treated as good law, and it really was not relied upon by counsel for the plaintiff in support of the decision of the court below. I think that it ought not to stand in our way or prevent us from saying that the defendant, having regard to the provisions of the Factors Act, 1889, has a perfectly good title to this pledge. I come to the conclusion, therefore, that this appeal should be allowed.

FLETCHER MOULTON, L.J.—I am of the same opinion. The question depends entirely upon the interpretation of the letter of July 31, 1905, from Fisher to the plaintiff. The only difficulty in construing that letter arises from the use of the words "sale or return." I fully agree with what the MASTER OF THE ROLLS has said, that no phrase can enable a person to misdescribe the contract, but that you must look at what the contract really is and not at what the parties say it is. Of course in ascertaining the contract in the present case you must give weight to all

G the phrases in the letter of July 31, 1905. But it is on consideration of the whole letter that you have to decide what the contract is. The MASTER OF THE ROLLS has cited the instance of persons saying there shall be no partnership. That statement has to be put on one side, and the court has to consider whether that which is established is or is not a partnership. The court is not guided by the words disclaiming a partnership. Another very common instance, and one very well known

H to those practising on the common law side, is where in a contract certain fixed damages are declared to be liquidated damages and not a penalty. But it is for the court to decide whether the sum named is in fact liquidated damages or penalty. The possibility of the use of this phrase "sale or return" in other than its ordinary sense arises from this. If you look, for instance, at s. 18, r. 4, of the Sale of Goods Act, 1893, you will see it begins thus: "When goods are delivered to the buyer on

I approval or 'on sale or return.' " The ordinary case of the use of the words "on sale or return" is when the goods are entrusted to the prospective buyer on sale or return, and then it means sale to him. He is to be the buyer or he is to return them. But, so far as the literal logical meaning of the words is concerned, you can imagine a man saying: "I have delivered these goods to my selling agent on sale or return—that is to say, he is either to sell them, or, if he does not sell them, he is to return them, but he is not intended to buy them."

In my opinion, this letter confuses the words "on sale or return." I am not investigating the reason for using the phrase; it obviously refers to a sale by Fisher

and not a sale to Fisher. If you read the whole of the letter you will find the words "sale," "sell," "selling," used repeatedly. In every case "sale or return" perfectly clearly means a sale by Fisher. Under these circumstances, taking the phrase "sale or return" and reading it with the context, I am satisfied that "sale" there meant sale by Fisher and not sale to Fisher. The letter has been examined by the MASTER OF THE ROLLS, and, therefore, I need not go into it. The use of such phrases as "the goods I admit are your property and to remain so," and "my remuneration"—most decisive words—"for selling the goods," and "the price at which I sell," and "immediately I receive the price of any article sold," shows that the sale is a sale in which Fisher operates as a seller arranging a price with the buyer. Throughout it is quite evident that "sale" means sale by Fisher. And, if we could venture to look at the course of business, we find that, so far from Fisher having the right to take at the price at which the goods were sent, which is essential to a case where the goods are delivered to the buyer on sale or return—whatever the price may be he obviously has a right to take at that price—we find that he was obliged to pay a small profit if he wanted to take them. Surely that was never contemplated by the parties to the arrangement. Therefore, in my opinion, Fisher is simply agent for sale.

Then we come to a most extraordinary argument which has been put before us in connection with the Factors Act, 1889. It is suggested that a man who has a stock for sale is not a "mercantile agent" within the meaning of that Act. I must say that I cannot see how anyone could put any meaning on the term consistent with such an argument as that. Fisher, if the goods were consigned to him as agent for sale, was, if ever man was, a "mercantile agent" within the meaning of the Factors Act, 1889. I quite agree with the MASTER OF THE ROLLS when he says that that is inconsistent with the decision of the Divisional Court in *Hastings, Ltd. v. Pearson* (1). But, in my opinion, that decision is not good law, and the same must be considered as overruled. For these reasons I think that the appeal should be allowed.

FARWELL, L.J.—I so entirely agree with the judgments of my brethren that I have very few words to add. It is true that "on sale or return" are technical words. But they are only so when used in reference to a buyer. And if, on the true reading of this letter of July 31, 1905, there is no buyer, no particular importance can be attached to those words as having a technical meaning. The question really turns on the construction of the letter, in the second paragraph of which this phrase occurs:

"They being only left with me for the purposes of sale or return, and not to be kept as my own stock."

That phrase clearly excludes the idea of Fisher being a buyer. He is not to buy in any event, but is to sell for Weiner or return. Then he was to have a remuneration for selling. This is consistent with his being agent for sale, but quite inconsistent with his being owner. An owner is not remunerated for selling his own goods. The argument on behalf of the plaintiff is founded on a misreading of *Weiner v. Gill* (2)—a case which really has no bearing on the present. In that case there was a buyer, and the goods were sent on sale or return to that buyer, but the operation of the Act was excluded by the express provision that the property was not to pass until the goods were paid for. He had possession of but not the property in the goods. If and when the goods were paid for, however, the property in them passed to him. In the present case the property never passes at all to Fisher. He simply receives the goods as Weiner's agent for the purpose of sale by him on Weiner's account or return by him, and not to be kept by him as his own property. That disposes of the case, but I would add—as the plaintiff appears to rely on the document in *Weiner v. Gill* (2)—that I do not think that there is any mode by which the Factors Act, 1889, can be used to evade the law of estoppel by enabling the owner of goods to invest another with the apparent property in and

A possession of them for the purpose of selling them on behalf of the owner without taking the risk of such person's want of honesty. The Act does not enable an owner of goods to insure the honesty of his own agent for sale at the expense of the public to whom the goods are offered. There are, of course, different sorts of dealing on sale or return. If a tradesman sends me goods on sale or return, he intends that I shall buy them myself, not that I shall sell them either for him or for myself so as to enable myself to pay him. But if he sends them to a retail dealer or the like on sale or return for the purpose of his selling them to other persons as if they were his own goods, I think that the ordinary doctrine of "holding out" would apply. I agree with my brethren that *Hastings, Ltd. v. Pearson* (1) cannot be considered as good law, and must be overruled.

C

Appeal allowed.

Solicitors: *Davenport, Cunliffe & Blake*, for *Yorath & Jones*, Cardiff; *Julius Alfred White*.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

D

E

PEGG AND JONES, LTD. v. DERBY CORPORATION

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Jelf and A. T. Lawrence, JJ.), June 18, 1909]

F

[Reported [1909] 2 K.B. 511; 78 L.J.K.B. 909; 101 L.T. 237; 73 J.P. 413; 7 L.G.R. 922]

Public Health—Privy—Cleaning—Undertaking by local authority to clean privies in their district—Refusal to clean on ground of non-approval of construction—"Reasonable excuse"—Public Health Act, 1875 (38 & 39 Vict., c. 55), ss. 42, 43—Derby Improvement Act, 1879 (42 & 43 Vict., c. ccxv), s. 67.

G

A corporation, whose local Act required that the construction of every water-closet, privy, ashpit, and cesspool should be subject to their approval, undertook, under s. 42 of the Public Health Act, 1875, for the whole of their district the cleansing and emptying of all privies, ashpits, and cesspools which had received their approval. The appellants, who occupied premises in the borough, laid an information under s. 43 of the Act of 1875 against the corporation for failing to have their privies cleansed. The privies had not been approved by the corporation.

H

Held (JELF, J., dubitante): the words in s. 42 of the Act of 1875, "any part of the district," did not enable the corporation to say that they would not cleanse the privies in certain premises in the district while cleansing them in other premises in the district, and, since their undertaking applied to the whole district, their non-approval of the appellants' privies under the local Act was not a "reasonable excuse" for not complying with the appellants' notice under s. 43 of the Act of 1875.

I

Notes. Sections 42 and 43 of the Public Health Act, 1875, have been repealed. See now s. 72 of the Public Health Act, 1936.

As to cleansing of conveniences, see 31 HALSBURY'S LAWS (3rd Edn.) 127 et seq.; and for cases see 38 DIGEST (Repl.) 213, 214. For the Public Health Act, 1936, s. 72, see 19 HALSBURY'S STATUTES (2nd Edn.) 366.

Cases referred to in argument:

Stainland Industrial Corn and Provision Society v. Stainland U.D.C., [1906] 1 K.B. 233; 75 L.J.K.B. 190; 94 L.T. 214; 70 J.P. 150; 54 W.R. 282; 50 Sol. Jo. 207; 4 L.G.R. 295, D.C.; 38 Digest (Repl.) 214, 347.
Collins v. Paddington Vestry (1879), 48 L.J.Q.B. 345; 40 L.T. 843; 43 J.P. 367; 27 W.R. 504; 38 Digest (Repl.) 212, 338.

Case Stated by justices for the county borough of Derby.

At a court of summary jurisdiction sitting at Derby, the appellants, Pegg & Jones, Ltd., preferred an information against the respondents, the mayor, aldermen, and burgesses of the borough of Derby acting by the council as the urban sanitary authority of the borough of Derby, charging that the respondents, having themselves undertaken or contracted for the removal of house refuse from premises and the cleansing of earth-closets, privies, and ashpits and cesspools, did unlawfully and without reasonable excuse, after notice in writing from the appellants, the occupiers of the Morledge Mills in the county borough of Derby, duly served on them on Feb. 9, 1909, requiring them to cleanse the privies and empty the tub closets at their premises, the Morledge Mills, and used by the occupiers thereof, fail to cause them to be cleansed or emptied within seven days from the service of such notice or at all, contrary to the provisions of s. 43 of the Public Health Act, 1875. The following facts were proved or admitted. The appellants were the occupiers of a paint and colour factory, known as the Morledge Mills, in the county borough of Derby. Belonging to the factory and used by the occupiers thereof, there were four privies—namely, three tub closets used by the workmen employed there, and one tub closet used by the clerical staff. The privies and tub had not been approved by the respondents in accordance with the Derby Improvement Act, 1879, s. 67. The respondents had themselves undertaken for the whole of their district the removal of house refuse from premises and the cleansing and emptying of all privies, ashpits and cesspools which had received the approval of the corporation. On Feb. 9, 1909, the appellants served a notice on the respondents, pursuant to s. 43 of the Public Health Act, 1875, requiring them to cleanse the privies at the Morledge Mills. The respondents failed to cause the privies to be cleansed or emptied within seven days from the service of the notice or at all.

It was contended on behalf of the appellants that the fact of the non-approval by the respondents of the privies and closets in accordance with s. 67 of the Derby Improvement Act, 1879, was not "a reasonable excuse" for non-compliance by the respondents with the appellants' notice under s. 43 of the Public Health Act, 1875, and that the same was not, within the meaning of that section, or in fact, a reasonable excuse. It was contended on behalf of the respondents that the non-approval by them, as the corporation acting under the Act of 1879, of the privies and closets in accordance with s. 67 of that Act did constitute in law and in fact "a reasonable excuse" for their non-compliance with the appellants' notice under s. 43 of the Public Health Act, 1875.

The justices dismissed the information and the appellants now appealed.
 By the Public Health Act, 1875:

"42. Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for—The removal of house refuse from premises; The cleansing of earth closets privies ashpits and cesspools; either for the whole or any part of their district. . . 43. If a local authority who have themselves undertaken or contracted for the removal of house refuse from premises, or the cleansing of earth-closets privies ashpits and cesspools fail, without reasonable excuse, after notice in writing from the occupier of any house within their district requiring them to remove any house refuse or to cleanse any earth-closet privy ashpit or cesspool belonging to such house or used by the occupiers thereof, to cause the same to be removed or cleansed, as the case may be, within seven days, the local authority shall be liable to pay to the occupier of such house a penalty not exceeding five shillings

A for every day during which such default continues after the expiration of the said period."

By s. 67 of the Derby Improvement Act, 1879 :

B "The situation, dimension, materials, and construction of every water-closet, privy, ashpit, and cesspool shall be subject to the approval of the corporation, and every water-closet or privy shall have an opening as near to the top as practicable, communicating directly with the external air, or shall be otherwise furnished with sufficient means of ventilation, and every water-closet shall be provided with a water-waste preventing cistern of such size and description as shall be determined by byelaws, and every ashpit shall be covered over and due provision shall be made for the proper ventilation thereof."

C *Macmorran, K.C.* (*S. Chetwynd Leech* with him), for the appellants.
Danckwerts, K.C. (*Etherington-Smith* with him), for the respondents.

D LORD ALVERSTONE, C.J.—In this case, the point raised is by no means free from difficulty. Speaking for myself, I have a clear opinion on it, but it does not follow that, because I have a clear opinion on it, it will ultimately be found to be right. The Case is stated, and it may be that the facts of the case are recited in a way that leaves me in a difficulty. I refer to the words :

E "The respondents have themselves undertaken for the whole of their district the removal of house refuse from premises, and the cleansing and emptying all privies, ashpits, and cesspools which have received the approval of the corporation."

F I accept, and act on the statement of counsel for the respondents, and it is clearly the conclusion I should have drawn myself from the Case so stated, that that means that the corporation only cleanse those privies, ashpits, and cesspools which they have approved, and that the fact that they only cleanse those is well known in the borough of Derby. I think it is quite plain that the word "undertaker" in that paragraph does not refer to any formal notice or document issued by the respondents, otherwise it would have been exhibited to the Case, or we should have been told about it.

G The question which we have to consider is whether the respondents, having given notice that they will for the whole of their district remove the house refuse and cleanse and empty all privies, ashpits, and cesspools, may undertake to do so, and then go on to limit their obligation by saying that they will only cleanse and empty those privies, &c., which have received their approval. The duty of the respondents in this matter arises under s. 42 of the Public Health Act, 1875. [HIS LORDSHIP read the first part of s. 42, and continued :] When the section says that the local authority may themselves undertake or contract for the removal of house refuse, &c., H "for the whole or any part of their district," I am quite clear that the power to undertake that duty for "any part" of their district does not mean that they are to have the power of picking out a particular house and refusing to cleanse the privies, etc., of that house. I do not think that it would be a proper construction of this section to read those words as giving the local authority power to say "We will do the cleansing of earth-closets, privies, &c., over our district except house A, or house B, or house C." I What, then, is the conclusion I come to on the construction of these words in the section? In my opinion, the section means that the local authority may do this work for the whole of their district, or they may do it for a part of their district, but I do not think that they can pick out a house here and a house there in their district and refuse to do this work for those houses while doing it for the other houses in the district. Still less do I agree with the argument put forward by counsel for the respondents that the local authority might say that they would cleanse four privies in a house and leave uncleansed one which they did not approve of. I do not think that would be a proper exercise of their authority

under the section; but that, no doubt, is rather an extreme case, and possibly counsel need not have gone so far as that for the purpose of his argument. **A**

Then, if the local authority, having themselves undertaken to do the cleansing, do not do the cleansing, what is to happen? Section 43 deals with that, and says that, if a local authority who have themselves

"undertaken or contracted for . . . the cleansing of earth-closets privies ashpits and cesspools fail without reasonable excuse after notice in writing . . . to cause the same to be . . . cleansed, as the case may be, within seven days, the local authority shall be liable to pay to the occupier of such house a penalty." **B**

Is it a "reasonable excuse" within the meaning of that section that the privy, ashpit, or cesspool has not been approved by the local authority? It seems to me that, in this particular case, the respondents have mistaken their remedy. They ought, in my opinion, to deal with this particular matter under other powers, it may be under the Public Health Act, or it may be under their local Act; but it is sufficient to say that they have a clear and particular remedy under their local Act. Section 67 of that Act says that the construction of every water-closet, privy, ashpit, and cesspool shall be subject to the approval of the corporation, and every water-closet or privy shall have an opening as near to the top as practicable, communicating directly with the external air, or shall be otherwise furnished with sufficient means of ventilation, and every water-closet shall be provided with a water-waste preventing cistern of such size and description as shall be determined by byelaws. It is quite plain that the respondents can make byelaws under the Public Health Act, and, therefore, even assuming—though I am not prepared to assent to it for the moment—that the penalty clause as framed does not apply, it is clear that it can be made to apply by the respondents carrying out their other powers. It seems to me that the remedy of the respondents was to make the occupiers put their privies in a proper condition. In my opinion, the respondents, having themselves in practice been doing this work for the whole of their district, ought not, under the powers given by s. 42, to get out of their obligation under s. 43 by limiting their duty to the cleansing of those privies, etc., which have been properly constructed, where they are themselves doing the work in that part of their district. There is a proper way of enforcing the duty of removing the stuff from privies, but not by saying to the occupiers that the privy is not properly constructed, and, therefore that the respondents will not remove the stuff from it. In the public interest I should read the words in s. 42, "every local authority may themselves undertake or contract for" the removal of house refuse, etc., as if the word "may" were almost equivalent to "must," because the Local Government Board might have ordered the local authority to do the work, and, although they have not so ordered in this case, the local authority have taken on themselves the duty of cleansing these privies. **C** **D** **E** **F** **G**

In my judgment, the case ought to go back to the magistrates to be dealt with on the ground that it is not lawful for the local authority, when cleansing earth-closets and privies in a part of the district in which they have undertaken to cleanse the same, to say, "We will not cleanse the privies which are not properly constructed; we have not put in force our other powers, and we decline to cleanse out the privies and remove this stuff." **H**

JELF, J.—Though I do not go so far as to say that I clearly differ from my Lord, yet I have considerable doubt on the matter with regard to both s. 42 and s. 43. It seems to me that it may well be the meaning of s. 42 that there is an undertaking by the local authority by practice whereby they do take on themselves an obligation, or a partial obligation, to remove house refuse and to cleanse earth-closets, and so on, in the whole of their district or in any part of their district. It is conceded that the undertaking may be as to part of the district, but it would be difficult to extend that so far as to enable the local authority to pick out separate houses in the district, or possibly even separate conveniences in the same house. I do feel, after **I**

A the judgment of my Lord, that there is a strong argument *ab inconvenienti* for that construction which he has given as to the meaning to be put on the words "part of the district" in s. 42, and I merely say that I have some doubt about the matter.

With regard to the other point raised by counsel for the respondents, I certainly have a stronger doubt, as there the words which we have to construe are "without reasonable excuse." When the local authority have stated what they have done
B and what they intend to do, that they do not consider that these particular privies, improperly constructed, ought to be used at all, and that they refuse to have anything to do with them or to clean them out, I should have thought there was a great deal to be said for the contention that it was a reasonable excuse for the local authority to say to the occupier, "No, you do not choose to have these privies according to the construction which they ought to have, and, therefore, we shall in
C that case ask that that be treated as a 'reasonable excuse.'" A great deal may be said on the other side, but I do not propose to go further than to say that, on both these points, I doubt whether this decision ought not to be upheld.

A. T. LAWRENCE, J.—I am of opinion that the justices were wrong in their determination of this case. I think that there is no reasonable excuse for the
D position that the respondents have taken up. In my opinion, the Public Health Act, 1875, contemplates the privies and cesspools being cleaned out in one or other of three ways: either it is done by the local authority themselves or it is done by a contractor, or the local authority make byelaws which cast the duty on the occupier. In this case, they have not made such byelaws; they have not entered into a contract with a contractor to do it; they have undertaken the performance of
E the duty themselves, and the question is whether they can pick and choose and leave some cesspools uncleansed and cleanse others, merely because there is some construction or other with regard to the ventilation of the privies or cesspools of which they do not approve. I do not think that the local authority can do anything of the sort. Their remedy for that state of things is of a different nature. They should proceed to put in force their remedies which will affect the individual com-
F mitting the offence while saving the rest of the community harmless, and not take this obstinate method of bringing pressure to bear by leaving a privy or cesspool there which might at any moment cause a serious illness in their community. In my opinion, it is not a reasonable but an absurd excuse.

Appeal allowed.

G Solicitors: A. R. & H. Steele, for Eddowes & Sons, Derby; Sharpe, Pritchard & Co., for Town Clerk, Derby.

[Reported by W. W. ORR, ESQ., Barrister-at-Law.]

WILLEY v. HUCKS

[KING'S BENCH DIVISION (Biggam and Walton, JJ.), January 28, 1909]

[Reported [1909] 1 K.B. 760; 78 L.J.K.B. 513; 100 L.T. 333;
53 Sol. Jo. 288; 16 Mans. 106]

Bankruptcy—Antecedent transaction—Execution for sum exceeding £20.—Discharge by payment—Additions to judgment debt—Poundage and execution expenses—Bankruptcy Act, 1890 (53 & 54 Vict., c. 71), s. 11 (2).

In determining whether an execution is "for a sum exceeding £20" within the meaning of s. 11 (2) of the Bankruptcy Act, 1890 [now s. 41 (2) of Bankruptcy Act, 1914], in a case in which the debtor discharges the execution by payment, only poundage and the execution expenses actually incurred up to the date of payment may be added to the judgment debt.

Notes. Section 11 (2) of the Bankruptcy Act, 1890, was re-enacted in identical terms by s. 41 (2) of the Bankruptcy Act, 1914.

As to duties of sheriff under executions, see 2 HALSBURY'S LAWS (3rd Edn.) 545-7; and for cases see 5 DIGEST (Repl.) 889-890. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to in argument:

Re Bullen, Ex parte Liverpool Loan Co. (1872), 7 Ch. App. 732; 42 L.J.Bey. 14; 27 L.T. 669; 20 W.R. 1028, L.J.J.; 5 Digest (Repl.) 889, 7392.

Howes v. Young, Howes v. Stone (1876), 1 Ex.D. 146; 45 L.J.Q.B. 499; 34 L.T. 739; 24 W.R. 738; 5 Digest (Repl.) 889, 7393.

Re Grubb, Ex parte Sims (1877), 5 Ch.D. 375; 46 L.J.Bey. 103; 36 L.T. 340; 25 W.R. 453, C.A.; 5 Digest (Repl.) 890, 7395.

Turner v. Bridgett (1882), 8 Q.B.D. 392; 51 L.J.Q.B. 374; 46 J.P. 343, D.C.; 5 Digest (Repl.) 890, 7401.

Appeal by the defendant, a high bailiff, from the decision of the learned Common Serjeant sitting at the Mayor's Court.

An action was brought by the plaintiff, one Willey, who was, as a result of proceedings in the City of London Court, a judgment creditor, against the defendant, one Hucks, the high bailiff of the Clerkenwell County Court, to recover as money had and received for his use the amount to which he was entitled under his judgment, which had been collected by the defendant from the judgment debtor. The amount to which the plaintiff was entitled as the result of the action in the City of London Court was £16 13s. 2d., and, the judgment debtor having no goods within the jurisdiction of that court, the warrant of execution was sent to the registrar of the Clerkenwell County Court, within the jurisdiction of which the debtor had goods, and was by him issued to the high bailiff of that court pursuant to the provisions of s. 158 of the County Courts Act, 1888.

The warrant of execution directed the defendant "to make and levy by distress and sale of the goods the sum stated at the end of this warrant, being the amount due to the execution creditor, together with the costs of this execution." The amount of the debt, £16 13s. 2d., was set out at the bottom of the warrant, and a sum of £1 2s. was added for poundage, and the total amount was expressed to be £17 15s. 2d. The warrant contained the words "total amount to be levied, £17 15s. 2d.," and then in brackets the words "With the fees for execution of warrant as endorsed herein." Then there followed an endorsement which specified no figures, but gave particulars setting out what further sums might in certain events be raised by the officers of the court out of the goods of the judgment debtor. These included possession money at 6d. in the pound per day for not exceeding seven days, calculated upon the value of the goods seized and dependent upon the length of time during which the officer of the court remained in possession of the goods; a sum, also uncertain, for the costs of the

A appraisement of the goods; and the costs of a possible sale of the goods, which amount would also be uncertain. The high bailiff seized goods for the sum of £23 1s. 3d., made up as follows: Debt and poundage, £17 15s. 2d.; seven days' possession money £3 10s.; appraisement and stamp duties, 13s. 1d.; sale fees, £1 3s. The County Courts Act, 1888, s. 154, provides that no sale of any goods which shall be taken in execution shall be made until after the end of

B the five days at least next following the day on which such goods shall have been so taken. Taking into consideration the amount for which the warrant of execution was expressed upon its face to be issued, and adding thereto the cost of five days' possession during which the high bailiff was bound under the above section to hold the goods, and certain other charges for appraising the goods and the costs of a possible sale, which might or might not arise according to circum-

C stances, the total sum for which the high bailiff would have to seize in order to provide against these possible expenses would exceed £20.

By the Bankruptcy Act, 1890, s. 11 (2).

D "Where under an execution in respect of a judgment for a sum exceeding £20 the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

E The warrant of execution having been placed in the hands of the officer of the court, he went to the premises of the execution debtor, who immediately paid the sum for which it was made out on its face—namely £17 15s. 2d.—and the officer thereupon left the premises. The amount due not having been handed over to the plaintiff, he commenced his action against the high bailiff before

F the expiration of the fourteen days for which the high bailiff would have been compelled to hold it if the execution had been in respect of a judgment for a sum exceeding £20.

G It was contended on behalf of the defendant before the learned Common Serjeant that the plaintiff was not entitled to bring his action against the high bailiff before the expiration of fourteen days, since the contingent expenses for which he was bound to make provision, when added to the amount for which the warrant was made out on its face, made the execution one in respect of a judgment for a sum exceeding £20 within the meaning of s. 11 (2) of the Bankruptcy Act, 1890. At the trial of the action there was a dispute whether the money had not been paid by the judgment debtor without any seizure, but the learned Common Serjeant without deciding that question held that in any

H event the execution was not for a sum exceeding £20, and that the high bailiff was not entitled to retain the money. He, therefore, gave judgment for the plaintiff. The defendant appealed.

Rowlatt for the defendant.

G. W. H. Jones for the plaintiff.

I **BIGHAM, J.**—The question in this case is whether there was an execution for a sum exceeding £20 upon the goods of this debtor within the meaning of sub-s. (2) of s. 11 of the Bankruptcy Act, 1890. Now, the facts as far as we can gather them, were these. The execution creditor had recovered judgment against the execution debtor for a sum of £16 13s. 2d., and he then applied to the high bailiff of the county court to issue a warrant to levy the amount of that debt, and accordingly a writ of execution was issued and it was

"to make and levy by distress and sale of the goods the sum stated at the

end of this warrant, being the amount due to the execution creditor, together with the costs of this execution."

Then the amount of the debt was put at the bottom, £16 13s. 2d., "with poundage for issuing this warrant, £1 2s.," and £17 15s. 2d. as the total amount. All these figures appear upon the face of the warrant, and that is what the high bailiff is directed to levy, but the warrant contains these further words, "total amount to be levied, £17 15s. 2d.," and then in brackets, "with the fees for execution of warrant as indorsed herein," and then there is an endorsement which contains no figures, but which contains the directions as to what further sums may, in certain events, be raised by the officers of the court out of the goods of the judgment debtor. There is possession money which apparently is calculated upon the value of the goods seized, and which also depends upon the length of time that the officer of the court is in possession of the goods. There is also a sum contemplated for the costs of the appraisal of the goods which, of course, is also uncertain, because it is not known what goods will be available for seizure, and therefore, of course, it is not known what the value of the goods will be. There are also the costs of a possible sale of the goods which may take place which are also uncertain, because no one knows what goods will ultimately be sold. The warrant is an authority to the officer of the court to seize for what the execution creditor requires for the satisfaction of his claim, and also to levy upon the goods so as to obtain the amount of possible additional expenses in the event of such additional expenses being incurred. Whether there was a seizure or not in this case is perhaps doubtful. The learned Common Serjeant seems to have thought that whether there was or not was a matter of no importance, because he was of opinion that the execution in this case was for a sum of less than £20. I should add this further fact, that as soon as the officer of the county court went to the premises of the execution debtor he at once received the amount for which the warrant was made out on its face—namely, £17 15s. 2d.—and forthwith he went away with the money.

I come to the words of the Act of Parliament. Section 11(2) of the Bankruptcy Act, 1890, says:

"Where under an execution . . . the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid."

What does the execution, there mentioned, mean? I am of opinion that it cannot mean anything more than the amount which is due in law to satisfy the execution, and which is capable of satisfying the execution. Here the sum of £17 15s. 2d. discharged the execution, and the execution came to an end as soon as that money was paid. In these circumstances it seems to me impossible to say that the execution was for more than that amount. I, therefore, think the learned Common Serjeant was right when he said that this was not an execution for more than £20, and did not come within the provisions of sub-s. (2) of s. 11 of the Bankruptcy Act, 1890. That being so, I think the appeal must be dismissed.

WALTON, J.—I agree. Under s. 87 of the Bankruptcy Act, 1869, under which most of the cases cited to us in argument were decided, the words corresponding to those in s. 11 of the Bankruptcy Act, 1890, were: "Where the goods of any trader have been taken in execution of a sum exceeding £50 in respect of a judgment and sold. . . ." Under that section the question arose how the words "for a sum exceeding £50" were to be read, and it was held that they were to be read together with the words "taken in execution," and it read, "Where the goods of any trader have been taken in execution for a sum exceeding £50 and sold." Therefore the question was for what sum were the goods taken in execution. Further, under s. 87 of the Act of 1869 it was held that the costs of execution included not merely the costs incurred up to the date of the seizure—applying that to the present case it would be £16 13s. 2d., plus the poundage

- A** charged—but, in addition, all the costs incurred up to the date of the sale of the goods. It is obviously important to observe that under s. 87 of the Act of 1869 the obligation to retain did not arise unless the goods were taken in execution and sold. Therefore the section did not apply unless there was a sale, and it was held that the costs up to the date of the sale might be added, because the bailiff or sheriff would have a charge on the goods for costs up to that date.
- B** Then came the Act of 1890, in which the following words are added:

“Where under an execution in respect of a judgment for a sum exceeding £20 the goods of a debtor are sold or money is paid in order to avoid sale. . . .”

- The important difference is this, that the obligation to retain the goods arises not merely where there has been an execution followed by a sale, but where there has been an execution and the money is paid in order to avoid a sale.
- C** Now, it seems to me that, applying the principle of construction adopted in the cases under the Act of 1869, which is that the expenses up to the date of sale might be included, to the present case, where the words of the Act are sale or payment, the expenses up to the date of the payment are those which must be included when the alternative is payment. In that way the actual charge
- D** on the goods can be arrived at, and it seems to me that the true meaning of the section is that where on the execution there is an actual charge on the goods for any sum exceeding £20, the money must be held by the high bailiff for fourteen days. That seems to me to be a logical application of the principle established by the cases under the old section to the words of the present section. It also seems convenient, because it enables the bailiff to know, when the
- E** money comes into his hands as the result of a sale or by payment, quite clearly and without complication whether the money is to be retained by him or not. I agree with the judgment of my brother BIGHAM that the appeal must be dismissed.

- BIGHAM, J.**—We must not be taken as holding that this action was properly brought against the high bailiff for money had and received by him for the use of the judgment creditor. It must be treated as if it were an action for damages against him for detention of the goods. In the present case the damages would be nominal only, and our judgment must be for the plaintiff for such damages.
- F**

Appeal dismissed.

- G** Solicitors: *Bruce, Searle & Co.*; Treasury Solicitor.

[Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law.]

MERCANTILE STEAMSHIP CO. v. HALL

[KING'S BENCH DIVISION (Pickford, J.), April 27, May 25, 1909]

[Reported [1909] 2 K.B. 423; 78 L.J.K.B. 812; 100 L.T. 885;
25 T.L.R. 623; 53 Sol. Jo. 562; 11 Asp.M.L.C. 273;
14 Com. Cas. 208]

Shipping—Seaman—Terms of service—Agreement between master and crew—Stipulation “contrary to law”—Inconsistency with statutory provisions on same subject—Merchant Shipping Act, 1894 (57 & 58 Vict., c. 6), ss. 113, 114 (3), 221 (b).

By s. 114 (3) of the Merchant Shipping Act, 1894: “The agreement [as to terms of service between the master of a ship and the crew] shall be so framed as to admit of such stipulations, to be adopted at the will of the master and seaman in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law.”

Stipulations contained in agreements between masters and crews of vessels are “contrary to law” within the meaning of s. 114 (3) when they are inconsistent with provisions on the same subject contained in the Act, e.g. provisions for penalties for not joining the ship and for absence without leave which are inconsistent with those of s. 221 (b) of the Act.

Notes. As to terms of employment of officers and crew, see 35 HALSBURY'S LAWS (3rd Edn.) 140-147; and for cases see 41 DIGEST 217-218. For the Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to in argument:

Great Northern Fishing Co. v. Edgehill (1883), 11 Q.B. 225, D.C.; 41 Digest 251, 923.

Frazer v. Hatton (1857), 2 C.B.N.S. 512; 26 L.J.C.P. 226; 30 L.T.O.S. 165; 22 J.P. 114; 3 Jur.N.S. 694; 5 W.R. 632; 140 E.R. 516; 41 Digest 218, 571.

Special Case stated for the opinion of the court and tried by PICKFORD, J.

The plaintiffs were the master and owners of the steamship *Lena*, and the defendant was the superintendent of the Mercantile Marine Office at Barry. On Oct. 6, 1908, the *Lena* was at Barry loading a cargo of coal for shipment to Port Said, for the purpose of which voyage a crew of twenty-seven hands was required, and the plaintiff Dale, as master, had arranged for a crew of that number to serve on board the *Lena* on the terms of an agreement which contained (inter alia) the following stipulation:

“The said master shall be entitled to deduct from the wages of any member of the said crew the following amounts—viz., for not joining at the time specified in column two, two days' pay, or, at his option, any expenses which have been properly incurred in hiring a substitute; and for absence at any time without leave from his ship or from his duty, a sum equal to two days' pay for any period of absence not exceeding twenty-four hours, and a further sum equal to four days' pay for each succeeding completed or uncompleted period of twenty-four hours' absence.”

The plaintiff Dale and the proposed crew attended at the Mercantile Marine Office at Barry for the purpose of signing the proposed agreement, but the defendant, acting on the instructions of the Board of Trade, refused to allow the agreement to be signed in his presence or to attest it, on the ground that the

A proposed stipulation was contrary to law. The question for the opinion of the court was whether the stipulation was contrary to law.

The Attorney-General (Sir W. S. Robson, K.C.), and Rowlatt for the defendant. Atkin, K.C., and Roche for the plaintiffs.

Cur. adv. vult.

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May 25, 1909. **PICKFORD, J.**, read the following judgment.—This is a Special Case stated in an action brought by the plaintiffs against the defendant, who was the superintendent of the Mercantile Marine Office at Barry, on the ground of his refusal to allow a certain stipulation to be inserted in an agreement with the crew of a vessel, and to test the agreement or any agreement containing such stipulations. The reason for the defendant's refusal was that he was instructed by the Board of Trade to so refuse, on the ground that the stipulation attempted to be introduced into the agreement was contrary to law by virtue of a section of the Merchant Shipping Act, 1894, to which I will refer later. The defendant does not admit that any action would lie against him for such a refusal, but he does not take that point in this case, because both parties wish to have the opinion of the court whether the Board of Trade were right in saying that that stipulation was contrary to law.

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The stipulation is set out in the Special Case, and is to this effect: [His LORDSHIP read it, and continued:] That was the stipulation which the master and owners of the ship wished to put into the agreement with the crew, and the defendant, as represented by the Board of Trade, says that that stipulation ought not to be inserted. These matters relating to the engagement of seamen are governed by part of the Merchant Shipping Act, 1894, beginning at s. 113. That section provides that the master of every ship shall enter into an agreement with the crew in accordance with the Act. Section 114 provides for things which it is necessary should be inserted into the agreement, and thus under sub-s. (3) it is provided that

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“the agreement with the crew shall be so framed as to admit of such stipulations, to be adopted at the will of the master and seamen in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law.”

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I do not think anything was said about the matter, but I take it that the seamen were prepared to enter into the agreement if the representative of the Board of Trade allowed the stipulation to be inserted. What is said is that it is inconsistent with the provisions of the Act contained in s. 221 (b), and is, therefore, contrary to law. I reserved judgment in this case because I wanted to see if I could get from any of the authorities any guidance as to what was the exact meaning attached by the law to the words “contrary to law”; but I have not got much assistance from the cases, because they do not turn on facts and circumstances such as arise in this case. The stipulation may, of course, be contrary to the law generally, or it may be contrary to certain express provisions of the Merchant Shipping Act, 1894, to which I need not refer more particularly, because there are provisions which say that no other stipulations shall be inserted in certain respects other than those provided in the Act. There is

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no express provision prohibiting stipulations such as this, and I have, therefore, to consider whether, if stipulations are not expressly prohibited by the Act, they are contrary to law if they are inconsistent with the provisions of the Act on the same subject. I think they are, and the question, therefore, now comes down to this: Is this stipulation inconsistent with the stipulations on the same subject in the Merchant Shipping Act, 1894?

When going through the sections, the provisions with which these stipulations are said to be inconsistent are contained in s. 221 (b). That subsection provides

for the same event of absence without leave, and provides a punishment by forfeiture of wages; or, if the court thinks fit, by imprisonment for such absence. A
It is in these terms:

"If he neglects, or refuses without reasonable cause, to join his ship, or to proceed to sea in his ship, or is absent without leave at any time within twenty-four hours of the ship's sailing from a port, either at the commencement or during the progress of a voyage, or is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall, if the offence does not amount to desertion, or is not treated as such by the master, be guilty of the offence of absence without leave, and be liable to forfeit out of his wages a sum not exceeding two days' pay, and in addition for every twentyfour hours of absence, either a sum not exceeding six days' pay, or any expenses properly incurred in hiring a substitute; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour." B C

That subsection constitutes an offence of absence without leave, and provides for certain consequences which shall follow. The stipulation proposed to be introduced into the agreement provided also for consequences that will follow on absence without leave, and they are different consequences from those mentioned in the subsection. The subsection provides that for absence without leave he shall pay out of his wages a sum not exceeding two days' pay, and, in addition, for every twenty-four hours of absence, either a sum not exceeding six days' pay or any expenses properly incurred in hiring a substitute. The agreement provides that he shall forfeit a sum equal to two days' pay, fixing it absolutely, and for every period of arrears a sum equal to four days' pay for each succeeding completed or uncompleted period of twenty-four hours' absence. That fixes a sum equal to four days instead of a sum not exceeding six days. It, therefore, provides different consequences from those provided by the Act. These must be in addition to or in substitution for the provisions of the subsection. If they are in substitution they amount to a repeal of the subsection, which it is not competent for the parties to do. If they are in addition, the seaman is not to be punished in accordance with the provisions of the Act, but something different; and therefore I think they are inconsistent with the provisions of the subsection. D E F

But counsel for the plaintiffs says that the stipulation is justified by another section in the Act which, he says, allows these stipulations to be inserted. This section is s. 226, and provides that G

"nothing in the last-preceding section or in the sections relating to the offences of desertion or absence without leave shall take away or limit any remedy by action or by summary procedure before justices which an owner or master would but for those provisions have for any breach of contract in respect of the matters constituting an offence under those sections, but an owner or master shall not be compensated more than once in respect of the same damage." H

Now, he says this stipulation merely amounts to the fixing of an amount of the damages that can be recovered for the offence of being absent without leave, and that, therefore, it is within the provisions of s. 226, because it is only allowing the shipowner to recover the damages for breach of contract which he could have recovered without the section of the Merchant Shipping Act, 1894, fixing the damages. Now, if that were the effect of the section, there might possibly be something in the argument, but in my opinion it does a great deal more. It does not leave the shipowner to recover the amount which is fixed as a deduction by this stipulation by action, but provides an agreement by which it is to be deducted from wages by the master, and, although I do not think the master is made the final judge, this agreement provides a machinery of I

A deduction for the offence of absence without leave, and does not fix the amount which is to be recovered in the action. The subsequent provision that the owner or master is not to be compensated more than once in respect of the same damage does not, I think, affect the question, because the question is whether the shipowner is entitled to enforce penalties in a different way from those provided by the Merchant Shipping Act, 1894. I think these provisions were inconsistent with the provisions of s. 221 (b) of the Merchant Shipping Act, 1894, and therefore, they are contrary to law within the meaning of s. 114 (3). I think, therefore, that the defendant was justified, and my answer to the Special Case is that this stipulation was contrary to law.

Solicitors: *Botterell & Roche*; Solicitor to the Board of Trade.

[Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.]

Re PEARCE

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), May 10, 11, 1909]

[Reported [1909] 2 Ch. 492; 78 L.J.Ch. 628; 100 L.T. 792;
16 Mans. 191]

Bankruptcy—Secured creditor—Separate securities—No right of consolidation—Proof for one aggregate amount secured by one aggregate security.

Where a creditor of a bankrupt is entitled to a small debt charged upon a property of large value and to a large debt charged upon a property of small value, and has no right to consolidate, the trustee in bankruptcy cannot allow him to prove for one aggregate amount stating that he holds one aggregate security, and thus give him the benefit of consolidation, so as to take the unsecured balance of the large debt out of the surplus value of the security in the case of the security for the small debt.

Bankruptcy—Secured creditor—Power of trustee to create rights in creditor for security not held before bankruptcy—Mortgage—Different properties secured in one deed—Right of trustee to compel mortgagee to put separate value on properties.

Prior to his adjudication in bankruptcy P. contracted to purchase certain shares in steamships from B.K. & Co. who remained the registered owners of the shares and had a vendor's lien for the unpaid purchase money. P. subsequently mortgaged to B.K. & Co. two life assurance policies, a debt, and certain freehold property. In the bankruptcy B.K. & Co., as secured creditors, sent in their proof, assessing the value of all their securities as a lump sum. The trustee in bankruptcy asked for details of the values of the various securities and these were assessed. There was, however, no objection to the proof being made for the lump sum, nor were B.K. & Co. required to specify the particular debts and the values of the securities in the proof. A composition was subsequently made and approved by the court, the bankruptcy was annulled, and all the outstanding estate of P. was re-vested in him. A subsequent mortgage of the freehold property claimed an account of what was due to B.K. & Co. on the mortgage, and redemption. It was contended on behalf of B.K. & Co. that redemption could only be obtained on payment of the aggregate assessed value of all the securities.

Held: a trustee in bankruptcy was not entitled to create a right in a secured creditor, adversely to other creditors, for a security which he did not have before the date of the bankruptcy, nor could he compel a mortgagee to put a separate value on different properties when a security given upon them was contained in one deed; the mortgage of the debt, policies and freehold land could, therefore, be redeemed for its assessed value less the sum which had already been paid on it.

Notes. As to right of debtor to redeem, see 2 HALSBURY'S LAWS (3rd Edn.) 501; and for cases see 4 DIGEST (Repl.) 405-6.

Cases referred to in argument:

Pearce v. Bullard, King & Co., [1908] 1 Ch. 780; 77 L.J.Ch. 340; 98 L.T. 527; 24 T.L.R. 353; 62 Sol. Jo. 301; 15 Mans. 88; 4 Digest (Repl.) 393, 3564.

Re Burr, Ex parte Clark (1892), 67 L.T. 232; 40 W.R. 608; 8 T.L.R. 671; 36 Sol. Jo. 628; on appeal 67 L.T. 465, C.A.; 4 Digest (Repl.) 373, 3397.

Re Smith, Ex parte Logan (1895), 72 L.T. 362; sub nom. *Re Smith and Logan, Ex Parte Fletcher v. Brandon*, 43 W.R. 413; 39 Sol. Jo. 349; 2 Mans. 70; 4 Digest (Repl.) 403, 3610.

Re Morris, James v. London and County Banking Co., [1898] 2 Ch. 413; 67 L.J.Ch. 534; 5 Mans. 216; affirmed [1899] 1 Ch. 485; 68 L.J.Ch. 299; 80 L.T. 37; 47 W.R. 324; 43 Sol. Jo. 260; 6 Mans. 178, C.A.; 4 Digest (Repl.) 313, 2842.

Re Vautin, Ex parte Saffery, [1899] 2 Q.B. 549; 68 L.J.Q.B. 971; 48 W.R. 96; 43 Sol. Jo. 706; 6 Mans. 391; 4 Digest (Repl.) 405, 3618.

Appeal from a decision of WARRINGTON, J., in favour of Henry Pearce, formerly a metal merchant, who carried on business in co-partnership with one Sharp under the style or firm of Pearce, Sharp & Co.

On Nov. 13, 1893, one sixty-fourth share in the steamship *Umfuli* was agreed to be sold by Bullard, King & Co., who were shipowners, to Pearce for £568 14s. 3d. On Mar. 26, 1896, one sixty-fourth share in the steamship *Umtali* was similarly agreed to be sold for £598, and on Aug. 20, 1896, one sixty-fourth share in the steamship *Umvoti* for £595. Bullard, King & Co. remained the registered owners of these steamship shares, and the purchase money was not paid.

By an indenture of mortgage dated Dec. 24, 1898, Pearce mortgaged to Bullard, King & Co. two life assurance policies, a debt due from the firm of Pearce, Sharp & Co., and certain freehold property situate in Devonshire to cover a guarantee which they had given to Pearce's bankers. The mortgage deed contained a declaration that, notwithstanding s. 17 of the Conveyancing Act, 1881, [see now the Law of Property Act, 1925, s. 93] the mortgagor, his heirs, executors, administrators, or assigns should not be entitled to redeem that mortgage or charge, or any mortgage created in pursuance of such indenture, without at the same time redeeming every or any existing or future mortgage for the time being held by the mortgagees, or either of them, their or either of their executors, administrators, or assigns on other property then or at any time thereafter belonging to the mortgagor, his heirs, executors, administrators, or assigns, or to redeem any other such mortgage without at the same time redeeming that present mortgage.

On April 19, 1899, a receiving order was made against Pearce on a petition in bankruptcy, and on Aug. 26, 1899, he was adjudged bankrupt. At the date of the receiving order Pearce was indebted to Bullard, King & Co. for a sum of money made up of various debts which were partly secured and partly unsecured, including the sum due to them for the price of the three steamship shares sold by them to Pearce. On May 1, 1900, Bullard, King & Co. as secured creditors sent in their affidavit of proof for £8,206 14s. 2d. In proving they lumped together their various debts and various securities respectively. They assessed the value of all their securities at £3,806 15s., and claimed to prove for the balance. The trustee in bankruptcy reduced their claim to £6,497 18s. 2d., and on July 31, 1900,

A duly admitted the proof to rank for £2,691 3s. 2d., being £6,497 18s. 2d. less the assessed value of the securities. On May 10, 1900, the trustee in bankruptcy wrote asking Bullard, King & Co. for details of the value of the respective securities which they held under the various documents mentioned in their proof, and also for the separate value of each of the steamship shares in respect of which they claimed a vendors' lien. These values were furnished to the trustee in bankruptcy by Bullard, King & Co., and they assessed the value of their vendors' lien on the three steamship shares at £1,325. The trustee in bankruptcy, however, did not object to the proof being made for a lump sum, or require Bullard, King & Co. to distinguish and specify the particular debts and the values of the securities for the same respectively in the proof; and in fact on July 31, 1900, the proof was admitted without any such separation being made. A composition was subsequently duly accepted by the creditors in the bankruptcy, and was approved by an order of the court dated Feb. 1, 1901, the terms of the composition being that (after withdrawal of certain claims, not including any of Bullard, King & Co.'s claim) the other creditors should be paid a composition of 9s. in the pound, making with a dividend of 3s. in the pound then already paid, a composition of 12s. in the pound; and that no further portion of the estate should be realised, and that on payment of the composition the same should be transferred to Pearce and the bankruptcy annulled. On Feb. 23, 1901, the trustee in bankruptcy out of the moneys in his hands being proceeds of the sale of the debt from Pearce, Sharp & Co., paid to Bullard, King & Co. the sum of £2,276 15s., representing the assessed value of the debt owing by Pearce, Sharp & Co. and of the Devonshire freehold property, and also paid to them a dividend of 12s. in the pound on the sum of £2,691 3s. 2d., the unsecured balance of their debt. The composition having been duly paid, the receiving order was, by an order dated Mar. 6, 1901, rescinded and the order for adjudication annulled, and all the outstanding estate of Pearce was revested in him. Since the date of the composition Bullard, King & Co. received the profits on the steamship shares.

F In 1904 Pearce created certain further charges on the Devonshire freehold property and again became bankrupt. In 1908 the Devonshire freehold property was sold by the first mortgagees, and the balance of the proceeds of sale was paid into court. A second mortgagee claimed an account of what was due on the mortgage of Dec. 24, 1898, and redemption. It was decided by WARRINGTON, J., on the authority of the decision of JOYCE, J., in *Pearce v. Bullard, King & Co.*, that by virtue of the proceedings in bankruptcy and the composition and subsequent bankruptcy Bullard, King & Co. were entitled to hold the steamship shares and the policies and Devonshire freehold property comprised in the mortgage of Dec. 24, 1898, as security for the principal sum of £3,806 15s., the amount at which they valued their several securities in the aggregate in their proof. From that decision the second mortgagee now appealed.

H *Cave, K.C.* (with him *George Henderson*), for the second mortgagee.
Rowden, K.C., and *T. L. Wilkinson* for the company.

SIR HERBERT COZENS-HARDY, M.R.—This is a case which in some aspects is very complicated. But, having listened with all the attention I could to the arguments which have been addressed to us, the case does not now present to me such difficulty as it did in the first instance.

I A Mr. Pearce, who became twice a bankrupt, executed a considerable number of mortgages. He mortgaged in 1896 to Bullard, King & Co. a policy of life assurance in the Lancashire Life office, certain shares in a company which are now of no value; and a debt due from the firm of Pearce, Sharp & Co. which was at one time doubtful, but which turned out in the result to be much more valuable. He likewise mortgaged certain freehold property in Devonshire. The petitioners here are the second mortgagees of that property. There was a transfer of the first

mortgage, and the question is as to the balance of the money. Bullard, King & Co. having that security, gave a guarantee to Pearce's bankers for a current account. That I think may be disregarded because they did not in the event prove in the bankruptcy in respect of that; I presume that the bankers themselves did so. Then came a mortgage of Dec. 24, 1898, also by Pearce to Bullard, King & Co., first to secure the liability under the guarantee which I say disappeared, next on the policy of the Lancashire Life office, next on the shares, next on a policy in the Sceptre Life office for £3,000, next on Pearce, Sharp & Co.'s debt, and lastly on the Devonshire freehold property, subject of course, as expressed to the prior mortgage. There was a clause in that deed expressly excluding the operation of s. 17 of the Conveyancing Act, 1881, [now the Law of Property Act, 1925, s. 93]. Now we are threatened with a big problem as to the meaning and effect of that clause in the deed. But, as counsel very properly admitted when the thing was really looked at, that clause had nothing to do with the present case, and could not apply to a claim to consolidate the different properties to which I am about to refer. It was admitted to be altogether contrary to the idea of consolidation, and it was not contended that the clause could operate to consolidate what is called the "vendor's lien" in respect of the sale of certain shipping shares which I now mention.

It appears that Pearce had contracted to buy from Bullard, King & Co., at three different times, beginning in 1893 and going on to 1896, certain shares in certain ships. In respect of those shares Bullard, King & Co. said that they had a lien for unpaid purchase money. They may or may not have had; but they said they had. There were other money transactions between the parties. A receiving order was made against Pearce in April, 1899. In August, 1899, Pearce became bankrupt, and Bullard, King & Co. put in a proof in the bankruptcy for £8,206. They stated that they valued their securities at £3,806 15s., and exhibited an account, going into great detail with reference to various particulars, and at the end they gave a summary claiming a balance on the first particulars of £2,196 odd, on the second of £1,509 odd, and on the rest of £4,500 odd. That having been done, the proof having been sent in on that footing, the trustee wrote ten days after the proof was received referring to the creditors' assessment of the value of their securities at £3,806 15s., and asking them to give him details of the value of the respective securities which they held under the various documents mentioned in their proof and also the separate values of each of the steamship shares in respect of which they claimed a vendors' lien. The trustee also asked them to indicate how they proposed to allocate the respective securities in respect of the three items shown in their "summary of balances due." That was replied to by a letter stating that with reference to the sum of £3,806 15s. at which the creditors valued their entire security the amount was apportioned as follows. Sceptre life policy, £5, Lancashire life policy, £200, the shares in the three ships lumped together for the purposes of convenience, £1,325, Devonshire property and Pearce, Sharp & Co., £2,276 15s. That statement was acquiesced in by the trustee. He got the answer to the question. He did not require, and the creditors did not volunteer, to go through the mere form of amending the proof to make it accord with the statement which the trustee had asked for, and which the creditors had given. The proof was admitted and the creditors were treated as unsecured creditors for £2,691. The £3,806 15s. was treated as the value of their securities and the gross proof having been reduced, under circumstances about which we need not trouble ourselves, from the larger figure of £8,206 to £6,497, dividends have been received in respect of the unsecured debt. What was the effect of that transaction? It is said—and the learned judge in the court below has taken this view by the order now under appeal—that the effect of this transaction was to give to Bullard, King & Co. a security to which it is conceded they were not entitled but for the proceedings in bankruptcy. I certainly should not be the first to sanction the view that it is competent for a trustee in bankruptcy to give away from the unsecured creditors, and to confer

A upon secured creditors part of the bankrupt's property to which the secured creditors are not entitled. I do not think that the trustee in bankruptcy ever contemplated doing that, and I think therefore that the claim which has been given effect to by the order now under appeal must be wrong. That declaration says that by virtue of the proceedings in bankruptcy and the composition and the subsequent bankruptcy Bullard, King & Co. became entitled to hold the shares in the steamships and the policies and the hereditaments, aggregating them all together for the aggregate sum, including the so-called vendors' lien upon the steamship shares. That, it seems to me, must be wrong, and it must be set right.

But then we have also heard an argument from counsel for the second mortgagee which I am unable to adopt to the full extent. He says that the effect of the two letters to which I have referred, the creditors' reply and the acquiescence of the trustee in it was that they valued the Devonshire property and Pearce, Sharp & Co.'s debt together at only £2,276 15s., and that is the only amount for which credit can be had. I think that there is a fallacy in that. There is no power under the Bankruptcy Acts, as I read them, when a security is given upon Blackacre and Whiteacre in one deed for the trustee to compel the mortgagee to put a separate value upon Blackacre and a separate value upon Whiteacre. It is all one security, although it contains several parcels, and it seems to me the true effect of the letter was to say that the creditors valued the property comprised in the mortgage of Dec. 24, 1898, at the aggregate sum of £2,481 15s., that being the aggregate value put upon all the items comprised in the security.

That being so, we must have regard to this, that it was a mortgage debt, carrying interest of course. It was a mortgage debt comprising, amongst other things, policies of life assurance in respect of which premiums were payable, and in respect of which there would be, or might be, a lien upon it. It is a security which has been partly realised—realised to an extent which I will now deal with. It was realised so far as Pearce, Sharp & Co.'s debt was concerned in this very remarkable way. The debt turned out to be more valuable than was anticipated. In fact I gather that 20s. in the pound were received in respect of it. At all events £6,000 were received in respect of it, and out of that £6,000 the precise sum mentioned in this document, £2,276 15s., was paid to Bullard, King & Co., the balance being paid to Pearce at the time when a composition was entered into. I think, therefore, that what we ought to do is to take account of what is due under the mortgage of Dec. 24., 1898, having nothing whatever to do with the question of consolidation at all, but simply taking account of what is due under that mortgage. There will be credited on the one side the interest of course on the total debt of £2,481 15s. There will be credited on the date when the £2,276 15s. was paid—that would be credited as a receipt. When premiums were paid on the policies they would be put on one side of the account, and the money received from the sale of the policies will, of course, be put on the other side of the account. The ultimate result, including, of course, any mortgagees' costs properly incurred in reference to the securities, will show what, if anything—and as far as I can see there will be something—is due to Bullard, King & Co. in respect of their security of Dec. 24, 1898, and that amount must be paid out of the funds in court and the balance paid to the second mortgagee, who are the encumbrancers immediately behind.

I **BUCKLEY, L.J.**, stated the facts and continued. The contention seemingly presented to the judge in the court below, and, I think, adopted by him was that, for some reason, which I am unable to follow, the creditors were entitled to consolidate their vendors' lien in respect of unpaid purchase money upon the three one-sixty-fourth shares in the steamships with the debt which was due in respect of the mortgage deed of Dec. 24, 1898. There is a clause in that deed allowing the mortgagees to consolidate any mortgage upon other property of the mortgagor. Ultimately we were told that that contention would not be pressed.

It was not finally contended that consolidation was possible, and that point was dropped. That being so, we have here two securities—one, a vendors' lien, and the other a mortgage—which, cast together, make an aggregate sum of £3,806 15s. What subsequently took place was this. The sum of £6,000 was raised in respect of the debt owing by Pearce, Sharp & Co., which had been supposed not to be worth much, but turned out to be worth a great deal. Thereupon the trustee in bankruptcy paid to the creditors, Bullard, King & Co., the estimated figure of £2,276 15s., which they placed upon the debt owing by Pearce, Sharp & Co., and the Devonshire freehold property. Of course the result of that was not to redeem the mortgage of Dec. 24, 1898, because the amount—the arbitrary amount—that they placed upon it was £2,481 15s. The trustee in bankruptcy if he had tendered the creditors that amount would have been entitled to redeem. But he did not; he tendered only £2,276 15s., and the creditors accepted that. Years went on, and in 1903 the other two parcels included in the deed of Dec. 24, 1898—the Sceptre life policy and the Lancashire life policy—were sold by the mortgagees, and they got some money out of those. In that way they received all the proceeds of the parcels included in the deed of Dec. 24, 1898, upon the hypothesis that the two parcels—the debt owing by Pearce, Sharp & Co., and the Devonshire freehold property—were worth £2,276 15s., and nothing more.

At that stage upon that arbitrary assumption, the mortgage, it seems to me, was redeemed. But now, in point of fact, the right of the mortgagees is to keep up the policies of life assurance by paying the premiums upon them. Their interest in respect of the unpaid balance of £2,481 15s. was running on, and they were entitled to certain sums which have not been paid. As to that, I apprehend that there must be an account to see what is due in respect of that, and I suppose the contention will be that as against the balance and the sum produced from the debt owing by Pearce, Sharp & Co., and the Devonshire freehold property they will be entitled to recover the amount so found due to them in respect of that security. It has been contended before us that, somehow or other, a trustee in bankruptcy is entitled to do this. If a creditor is entitled to a small debt charged upon a property of large value, and is entitled to a large debt charged upon property of small value, and has no right to consolidate, the trustee may allow him to prove for one aggregate amount stating that he holds one aggregate security, and thus give him the benefit of consolidation so as to take the unsecured balance of the large debt out of the surplus value of security in the case of the security for the small debt. I am not aware of any authority for that proposition. It seems to me an extraordinary one that the trustee in bankruptcy should be entitled to create a right in the secured creditor, adversely to other creditors, for a security which he had not before the date of the bankruptcy.

It is only upon that ground that any contention has been raised before us as to the right to consolidate the vendor's lien in respect of the steamship shares, which I think must be wrong. It seems to me that the declaration made in the court below does not work out the rights of the parties. I think that the account must be taken in the way that the MASTER OF THE ROLLS has stated. It will be taken that the sum of £2,276 15s. was paid—and in point of fact that sum was paid—and, of course, the subsequent interest on the mortgage debt will be diminished because it will only be interest on the balance. Then the mortgagees will be entitled to charge their subsequent payments of premiums subject to accruing interest, and in the result an account will be taken which will lead to working out what are the rights of the parties in respect of the security of Dec. 24, 1898.

KENNEDY, L.J.—I agree.

Appeal allowed.

Solicitors: *H. J. Mannings; Robert Greening.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

A

PARSONS v. BARCLAY & CO., LTD. AND ANOTHER

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), July 16, 18, 1910]

B

[Reported 103 L.T. 196; 26 T.L.R. 628]

Bank—Duty of bank—Inquiry into financial position of customer—Information provided by bank's books and manager's personal knowledge—Need to make extraneous inquiries.

C

Where information is asked by one banker, acting on behalf of a customer, of another banker concerning the financial position of one of the latter's customers it must be shown, in order to render the banker receiving the inquiry liable for misrepresentation, that a statement which he makes in reply is fraudulent in a legal sense, i.e., that it was incompatible with an honest belief on his part. It is in no way the duty of a banker who receives such an inquiry to make extraneous inquiries into the position of the customer. If such inquiries are to be made it is for the banker putting forward the original inquiry to make them. It is sufficient if the banker receiving the inquiry gives the information which is supplied by the books of account of the bank and any information which he can give from his personal knowledge of the customer and his affairs.

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Notes. Followed: *Hedley Byrne & Co., Ltd. v. Heller and Partners, Ltd.*, [1961] 3 All E.R. 891.

As to a banker's duty in answering inquiries, see 4 HALSBURY'S LAWS (3rd Edn.) 241, 242; and for cases see 3 DIGEST (Repl.) 344.

Cases referred to:

(1) *Swift v. Jewsbury and Goddard* (1874), L.R. 9 Q.B. 301; 43 L.J.Q.B. 56; 30 L.T. 31; 22 W.R. 319, Ex. Ch.; 3 Digest (Repl.) 170, 265.

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(2) *Derry v. Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, 185.

Appeal from an order made by RIDLEY, J., in an action tried by him with a jury.

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The plaintiff, William Steel Parsons, who had been a marine engineer, was desirous to go into an engineering business of some kind on shore. In September, 1906, he was introduced to the managing directors of a company known as Gilletts, Ltd., who were at that time carrying on the business of motor and general engineers. He requested a friend of his, who was an accountant, to go through the books of Gilletts, Ltd., and, as that investigation did not turn out entirely to the plaintiff's satisfaction, he asked Gilletts, Ltd., for references. They referred him to the defendants, Barclay & Co., Ltd., as their bankers, stating they were banking at the Feltham branch of that bank. On Oct. 8, 1906, the plaintiff wrote to the manager of the Chipping Norton branch of the Metropolitan Bank of England and Wales, Ltd., with whom he had an account, as follows:

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"I shall feel obliged if you will be good enough to make an inquiry for me through Messrs. Barclay & Co., Ltd., Feltham Branch, as to the general standing, respectability, and present financial position of the firm of Messrs. Gilletts, Ltd. . . . I am thinking of joining them in connection with a general motor-car business, and should have to invest money with them if my plans are carried out, but before deciding I am anxious to obtain as full a report as possible. I shall esteem it a favour, therefore, if you can kindly give me the benefit of your services as far as possible in the matter, and shall be glad if you will send me your report as soon as received."

On Oct. 9 the manager of the Chipping Norton branch of the Metropolitan Bank wrote to the defendant, Stephen Ernest Goddard, who was the manager of the

Feltham branch of the defendants, Barclay & Co., Ltd., as follows:

"Would you oblige us with your opinion in strict confidence as to the standing and financial position of Messrs. Gilletts, Ltd. . . . A customer of ours has been offered a position in the firm on condition he invests certain capital. This he is willing to do on ascertaining that their bona fides are genuine. Kindly give us as much information as you can compatible with custom."

On Oct. 10, the defendant, Goddard, replied:

"Messrs. Gilletts, Ltd., keep a satisfactory account with us here. They appear to be doing a genuine and increasing business, and their two managing directors are experienced men in their business. The firm was reconstructed about six months ago as additional working capital was required. This information is for your private use only, and is given without any responsibility on our part."

On Oct. 11 the manager of the Chipping Norton branch of the Metropolitan Bank wrote to the plaintiff as follows:

"Re Gilletts, Ltd. Referring to your favour of the 8th inst., we have received a satisfactory report from Messrs. Barclay & Co., Ltd., as to the respectability and financial position of the above-named firm. They are doing a genuine and increasing business under good management. Their two managing directors are spoken of as experienced men in their business. Please treat this in the strictest confidence."

The plaintiff alleged that in consequence of this report, and acting upon the faith of it, he invested the sum of £1,100 in the business of Gilletts, Ltd., and subsequently lent them further sums of money and securities.

The plaintiff alleged that at the time when the defendants Barclay & Co., Ltd., made the above-stated representation, Gilletts, Ltd., were not in a satisfactory position as regarded respectability and/or financial standing, nor were they doing a genuine and/or increasing business under good management or otherwise, nor had the two managing directors the reputations of experienced men in the business of the company, nor could the company be safely trusted with money or securities, as the defendants Barclay & Co., Ltd., well knew, and that, by reason of the premises, the plaintiff had lost the advances and investments before mentioned amounting in all to upwards of £3,000, and he had thereby suffered damage. Alternatively, the plaintiff alleged that the representation was fraudulently made to him by the defendant Goddard in the letter dated Oct. 10, 1906, written and signed by that defendant, and addressed and sent by him to the Metropolitan Bank of England and Wales, Ltd., Chipping Norton, the plaintiff's agents in that behalf. The plaintiff brought this action claiming as against the defendants Barclay and Co., Ltd., and/or as against the defendant Goddard damages. The defendants denied the allegations of the plaintiff, and objected that his statement of claim disclosed no cause of action against the defendants or either of them. The defendants Barclay & Co., Ltd., further said that the alleged representations, if made at all, which was denied, were representations or assurances within the meaning of s. 6 of the Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act) and not otherwise, and that none of such representations was in writing signed by the defendants Barclay & Co., Ltd., who relied upon that section. The action was dismissed as against the defendants, Barclay & Co., Ltd., on the ground set up by them in their defence upon the authority of the decision in *Swift v. Jewsbury and Goddard* (1) and the case was continued against the defendant Goddard personally.

At the conclusion of the evidence the following questions were left by the learned judge to the jury whose answers are appended: (i) Did the defendant Goddard make the representation with the intention that it should be passed on

A as his or as the representation of the Metropolitan Bank?—Goddard meant it to be acted on as his own representation. (ii) Was the representation made by the Metropolitan Bank substantially the same as the one made by the defendant Goddard?—Yes. (iii) Were the statements made by the defendant Goddard fraudulent?—The statements were made recklessly and carelessly, he not having fully satisfied himself of the accuracy of his report. (iv) Had the defendant Goddard the honest belief that it was true?—No. The jury found a verdict for the plaintiff against the defendant Goddard, with damages amounting to £1,100. Judgment was ordered to be entered for the plaintiff accordingly and for the defendants Barclay & Co., Ltd. The defendant Goddard now applied for judgment or a new trial.

C *Eldon Bankes, K.C.*, and *G. W. Ricketts* for the defendant.
Tindal Atkinson, K.C., and *Walter H. Moresby* for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This is an appeal from a verdict and judgment in an action which was brought by Mr. Parsons against Mr. Goddard. It was originally brought also against Barclay & Co., Ltd., but they have been got rid of, and I shall treat it solely as an action brought by Mr. Parsons against Mr. Goddard, who is a local branch manager of Barclay's Bank. It is an action based upon fraud, and, unless it can be established that Mr. Goddard was guilty of fraud, it must fail. If it can be established, on the evidence, that he was guilty of fraud then it will succeed. When I say "fraud," I, of course, mean fraud in the authoritative sense as defined in *Derry v. Peek* (2). I need not repeat the words there used; but it will not be forgotten that in using the words "fraud" or "fraudulent" I intend to indicate what was said in *Derry v. Peek* (2).

E The matter arose in this way. There was a small company known as Gilletts, Ltd., which carried on business—a comparatively small business—as motor vendors and motor repairers. The business consisted mainly, I think, of buying and selling secondhand cars and doing repairs. The plaintiff, Mr. Parsons, was familiar with that company's business in the sense that he had been repeatedly to the company's place of business; that he had been taught to drive a motor car himself there; that he knew two of the directors of the company; and that he was thinking of investing some money in the company because he knew that the company wanted further capital. The company certainly did not in any way keep back or fail to disclose everything, so far as they were concerned, that was material. Mr. Parsons employed a gentleman whom he was content to treat as a competent accountant, and whom there is no reason to suppose was not a competent accountant for the purpose for which he was consulted. The bankers' pass-book issued to the company was produced to that gentleman, and information regarding everything relevant was furnished to him by the company. But it was thought by Mr. Parsons, apparently on the suggestion of this gentleman, that it would be well to hear what the bankers said, and Mr. Parsons, who lived and banked at Chipping Norton, asked his bankers—the Metropolitan Bank of England and Wales, Ltd.—to communicate with the branch of Barclay's Bank where the company's banking account was kept, and the letter written by the branch manager of the Metropolitan Bank, dated Oct. 9, 1906, was as follows: [His LORDSHIP read that letter.] I lay emphasis on the words "Would you oblige us with your opinion?" Ordinarily, of course, a bank would not feel themselves at liberty to give any information with respect to a customer without that customer's consent. But one of the directors of Gilletts, Ltd., told Mr. Goddard that an inquiry was coming. Mr. Goddard answered on Oct. 10, 1906: [His LORDSHIP read the letter of that date]. That was sent direct to the Metropolitan Bank. That bank's letter to Mr. Parsons dated Oct. 11 is not an accurate repetition of the letter which Mr. Goddard had sent. I find nothing about "financial position" in Mr. Goddard's letter. But, of course, Mr. Goddard cannot be in any way made responsible for any difference between the letter

which he wrote to the Metropolitan Bank, and the interpretation which the Metropolitan Bank put upon that letter, when they addressed Mr. Parsons. A

The real question is, not what would have been the effect if Mr. Goddard's letter of Oct. 10 had been in the terms of the letter of Oct. 11, but what was the true effect of the letter of Oct. 10. Was what Mr. Goddard said in that letter, or was it not, a "fraudulent" statement, bearing in mind the meaning in which, as I have said, I use that word. Was there any evidence of "fraud"? In my opinion, there was not a scintilla of evidence worth the consideration of the jury in this matter. It is only, and purports only to be, an expression of Mr. Goddard's opinion, and that was all he was asked for. What he said was that "Messrs. Gilletts, Ltd., keep a satisfactory account", and "they appear to be doing a genuine and increasing business, and their two managing directors are experienced men in their business." There is no question about the managing directors being "experienced men," and there is no question about the business being a "genuine and increasing business." I scarcely like, therefore, to waste words upon "they appear to be doing a genuine and increasing business," because, although Mr. Helmore, an accountant, who was one of the witnesses, said that he did not think that it was an "increasing business," he added that he should not call anybody fraudulent who took a different view. The question consequently reduces itself to this: Is there any evidence that this statement of Mr. Goddard's opinion that "Messrs. Gillett's, Ltd., keep a satisfactory account with us here" was a statement "fraudulent" in the sense in which I have used that word. I do not find a particle of evidence that it was. In the first place, a "satisfactory account" is a banker's phrase, and means, no doubt, satisfactory in the opinion of the bank. A large account is, no doubt, *cæteris paribus*, more satisfactory to a bank than a small account; and it is common ground that this was a small business and a small account. But is there any evidence whatever worth a moment's attention that this was other than a "satisfactory account" in the honest opinion of Mr. Goddard, and in the honest opinion of bankers, whose opinion alone is material in the present case? There is no banker called to say that this was not a "satisfactory account" in the opinion of a banker. It was a small account. It was the account of a business which was increasing—I think the wages show that plainly. It was an account which had been overdrawn, it is true, for very small amounts and for very short periods, but under circumstances which do not in the least prevent this account from being in the opinion of a banker a "satisfactory account." The witness, Mr. Helmore, takes up a position which, although I do not pretend to be a banker, seems to me to be a most extraordinary one. He seems to think that this is not a "satisfactory account" because it shows that the credit balance was reduced, and the expenses of the business were really paid out of capital. If I know anything about business, capital is brought in for the very purpose of being expended in the business. You do not carry on business by investing your capital in Consols and merely applying the dividends on the Consols to the business. The very essence of a business of this kind is that fresh capital is got into the business in order that it may be used in the conduct of the business. That being the opinion of Mr. Helmore—he not being a banker, and he giving evidence which seems to me to be plainly and obviously contrary to the common sense of the matter—I come to the conclusion that it was altogether wrong to say that Mr. Goddard was guilty of "fraud" in making a statement which seems to me to have been perfectly honest, perfectly fair, and perfectly right. B C D E F G H I

I desire for myself to repudiate entirely the suggestion that when one banker is asked by another who is acting on behalf of a customer such a question as was asked here, it is in any way the duty of the banker to make inquiries into matters other than those which arise on the books of account before him, or to give information other than what he is acquainted with from his personal knowledge. I repudiate altogether the idea that it is any part of the obligation of a banker

A on his receiving a letter of this kind to make further inquiries, or that he is to be found guilty of fraudulent conduct unless he goes about and makes inquiries, such as: "Is yours a profitable business, or is it a paying business, or is it a business in which I should be inclined to invest money myself?" I think that, if we were to take the contrary view, which commended itself to RIDLEY, J., in his summing-up to the jury we should necessarily be putting a stop to that

B very wholesome and useful habit by which one banker answers in confidence, and answers honestly, another banker, the answer being given at the request and with the knowledge of the first banker's customer. If he answers honestly according to his own knowledge of what he learns from the books before him and from any other actual knowledge he has, it would be most dangerous for us to do anything which would prevent that wholesome and businesslike practice

C from being pursued. In my view, there was no evidence fit for the consideration of the jury in this case; and Mr. Goddard ought to be clearly, frankly, and finally exempted from any charge of fraudulent conduct. In my opinion, therefore, this appeal should be allowed with costs, and judgment entered for the defendant.

FARWELL, L.J.—I am of the same opinion. I think that there has been

D here a lamentable miscarriage of justice, by which a stigma has been inflicted on a perfectly innocent gentleman. I think, moreover, that, if that judgment were permitted to stand, it would have the most pernicious effect on the custom which is well established among bankers and is known to everybody—except perhaps the persons who took part in the trial in the court below. It is stated by BRAMWELL, B., in *Swift v. Jewsbury and Goddard* (1) that it is a well-known

E custom among bankers. He says (L.R. 9 Q.B. at p. 315):

"It is true that the jury have found that it was within the scope of the manager's authority to give the information asked for, and if the manager were to refuse to give it he would be doing a wrong to the bank which employed him, because he would be refusing a courtesy which it was their habit to show,

F in order that a corresponding courtesy might be shown them; but in no other sense was it his duty or within the scope of his authority to do it."

I thought everyone knew that these inquiries between bankers were well understood, were familiar, and that nobody supposed that one banker could ask another to go and hunt about and make inquiries. If inquiries are to be made, let the inquiring banker make them. What he asks from the banker of whom

G he makes the inquiry is knowledge to be found in his books as to the state of the person concerning whom or the account about which he is inquiring, and it is done, not from any question of duty or any consideration except that mutual courtesy and hope of a quid pro quo to which BRAMWELL, B., refers.

In the ordinary course the question was asked in the present case, and it is in terms said to be according to custom. The first answer was, "In reply to your

H inquiry of the 9th inst. Messrs. Gilletts, Ltd., keep a satisfactory account with us here." That really is the whole gist of the case attempted to be made against the defendants. It is quite plain that that is a statement of the opinion of the gentleman who made it, and it is certainly not enough to show that it was right to convict him of fraud. To do that it must be shown that what he said in the letter was so preposterous as to be absolutely inconsistent with honest dealing.

I There is not a shred of evidence in the present case to suggest anything of the sort. I think that it would be as well if reference had been made by RIDLEY, J., to the decision in *Derry v. Peek* (2) instead of his relying entirely on his recollection. The headnote to the report of that case is this (14 App. Cas. 337):

"In an action of deceit, the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false."

That is paraphrased by the learned judge in his summing-up in this way:

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"In order that the statement should be fraudulent it must be made knowingly, recklessly, or carelessly as to whether it was true or false."

Here we have a question of what the particular banker thought was a "satisfactory account." I apprehend that that means satisfactory in the view of the banker. Mr. Goddard has sworn that in his opinion that was a true statement, that the account was satisfactory. The two managers of Barclay's Bank—the chief local inspector of the bank, and the managing director—both say the same thing. Against that, which I should have thought was overwhelming to show the honesty of Mr. Goddard, nobody is called who is a banker and nobody is called but an accountant, who says that he has the inspection of some banking accounts. It is perfectly obvious from the evidence given that he is quite unfamiliar with banking. But, however that may be, personally I do not think he is to be treated as an expert. Even assuming that he is, he nowhere ventures to say that the gentleman who said that Gilletts, Ltd., kept a "satisfactory account" was so hopelessly mistaken as to be dishonest; that no honest business man could have said that the account was satisfactory. Unless that is proved, there is no ground whatever for convicting the defendant of fraud. The next statement: "They appear to be doing a genuine and increasing business," is a deduction fairly drawn from the account showing a steady increase of wages, with one or two slight fluctuations, and is a perfectly legitimate inference. There is no ground for suggesting that there is anything dishonest in that. I am not at all sure that the jury, if they had been left alone or if they had been properly directed, would not have found the verdict which they ought to have found, because it appears to me from the dialogue which took place at the end of the trial that they shrank from saying that the defendant was guilty of fraud. But they were overruled and coerced into doing so by the learned judge. I think that there is not a vestige of evidence on which anybody can be convicted of fraud, and that the defendant is entitled to have the action dismissed with costs here and below.

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KENNEDY, L.J.—I am of the same opinion. I have had occasion to express before, and I express again, that you cannot be too careful in reviewing in the Court of Appeal the trial of a case at nisi prius. No one is more conscious than myself of the difficulty of entirely realising in some cases the effect of the oral evidence as given. But, starting from that point, I am myself clearly of opinion that in the present case there was not one tittle of evidence that ought to have been treated as evidence to go to the jury. There is a charge against a man, a bank manager, for fraud in the report which he made to another bank manager, at that bank manager's request, on behalf of a customer as regards certain matters affecting a firm. There must be, in my opinion, to justify a case of fraud against a man being left to a jury, at any rate, some evidence that the statement which is charged as fraudulent was incompatible with an honest belief in the person who makes the statement, and I can find none in the present case. I regard with the same distrust that the MASTER OF THE ROLLS, and FARWELL, L.J., have expressed, the evidence, such as it is, of Mr. Helmore. But I cannot find in his statement anything that a hearer who heard it given would come away and be justified in saying: "If Helmore is right, Goddard could not be honest," and that must be the basis upon which a case of fraud, if there is any, should go to the jury.

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In the present case there was an inquiry by the plaintiff in a letter which asked in the first paragraph for an "opinion in strict confidence as to the standing and financial position of Messrs. Gilletts, Ltd." It is obvious, however, from the next two sentences that the main point on which the opinion of the bank manager was asked, was as to the bona fides of the firm, which would, no doubt, include the genuineness of the business that they were carrying

A on. The person to whom that letter was addressed was bound, if he answered it at all, to answer honestly. But he was perfectly entitled to limit the answer in such a way as he thought he ought to limit it, because he had no further knowledge. He does not answer as to the standing and financial position of Messrs. Gilletts, Ltd. He says:

B "In reply to your inquiry of the 9th inst. Messrs. Gilletts, Ltd., keep a satisfactory account with us here. They appear to be doing a genuine and increasing business, and their two managing directors are experienced men in their business."

C I cannot help thinking that the jury were not put in the position in which they should have been put when RIDLEY, J., laid such great stress at the beginning of his summing-up on the duty of the bank manager to whom those inquiries were addressed to make inquiries, as he put it, in order to give a satisfactory answer. In my opinion, bank managers are clearly not bound to make any inquiries. Of course, a bank manager is not entitled to make a statement about facts in answer to some inquiry of him which necessitates his making inquiries without making the inquiries. But he is perfectly entitled to answer only so much of the question as is within his knowledge as a bank manager. Neither D the bank manager as a person, nor the bank, so far as he represents the bank, is bound to make inquiries into the business of a customer because he may be asked some question which, if he answered fully, would cover that. He must simply not answer so much as he is perfectly entitled not to answer. RIDLEY, J., says:

E "The bankers' position is this—they are not entitled to anything that the bank did not know; in other words, if Goddard had not chosen to inform himself as to the financial position of Gilletts, Ltd., he is not entitled to give them any information about it, and the true answer would be: 'We cannot answer this question'; and that would be the proper reply of the bank. Goddard was bound, as it seems to me, to make inquiry if he was going to F answer the question about the financial condition of the company."

He does not make an answer about the financial position of the firm. He states in perfectly clear, unambiguous terms, first, that they keep an account with the bank which they, the bank, deem satisfactory, and, secondly, that they appear to be doing a genuine and increasing business. Those things would come before G the defendant from the accounts of the bank, and, accordingly, he answers the questions, and it appears to me that there is no evidence that he did not answer both those questions correctly. Indeed, although it is referred to in the case, and in the summing-up, I do not think that there is now put before us any attack on the statement as to the "genuine and increasing business," and there could be none as to the experience of the two directors.

H The attack is made on "keeping a satisfactory account with us here." "Satisfactory account" means an account which is, in the view of the person who answers the inquiry one way or the other, satisfactory, not unsatisfactory. But it clearly is a question of opinion, of course honest opinion. And there is really, as I have said, nothing stated in Mr. Helmore's evidence from which any hearer of that evidence would be justified in saying: "I have heard a man who has given I evidence which is incompatible with the honesty of the gentleman who is the defendant in this case." He says something which certainly startled me. I am not going to take upon myself the province of the jury. I have no right to intrude upon that, however unreasonable and unbusinesslike some of the answers appear to be. But if I had to judge for myself of Mr. Helmore I should say, however imperfect his position as a critic of that which he is called upon to criticise, what is pretty clear is that on that evidence there was an account which the bank treated as satisfactory. The best proof of the honesty of the writer is that the bankers never complained of the account. They had not

asked the firm of Gilletts, Ltd., to close the account, and, so far as it appears on the evidence, they never even suggested security, and they had a balance to the good of £65 odd on the date in question. At that date it must be remembered that the balance, which might be small if regarded as a balance of a large concern, was a balance of a concern admittedly a small one, one which was in course of growth and not in perfected development, and a business in which the accounts showed that there was an increase in wages which had varied from time to time during the six months, but had in fact risen from a little over £8 to between £14 or £15. When Mr. Goddard speaks of the business it is the amount of work done he is answering about, which as a banker he stated appeared to be increasing. It was not for him to answer, as RIDLEY, J., seems to have put to the jury, an inquiry whether it was a paying business. Whether it paid or not would depend on circumstances which the defendant neither professed to know nor could know. All he could say was that Messrs. Gilletts, Ltd., had an account which was satisfactory with them, and, if an attack is made on that statement, it appears to me on the evidence to be entirely unfounded.

Appeal allowed.

Solicitors: *Neave, Morton & Co.*, for *H. Merton Taylor*, Feltham; *Firth & Co.*, for *Wilfrid Firth*, Brentford.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

BRITANNIC MERTHYR COAL CO., LTD. v. DAVID

[HOUSE OF LORDS (The Earl of Halsbury, Lord Ashbourne, Lord Atkinson, Lord Gorell and Lord Shaw), December 9, 10, 13, 1909]

[Reported [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 26 T.L.R. 164; 54 Sol. Jo. 151]

Coal mine—Statutory duty—Proof of performance—Onus—Explosion—Death of miner—Coal Mines Regulation Act, 1887 (50 & 51 Vict., c. 58), s. 49, s. 50.

An explosion was caused in a mine belonging to the appellants, as a result of which several miners were killed. The explosion was alleged to be caused by a blasting operation carried out in breach of the rules made under the Coal Mines Regulation Acts, 1887 and 1896. In an action brought against the appellants by the respondent, the widow of one of the miners who were killed, the trial judge directed the jury that the onus of proof that the appellants had not done their duty in taking proper care of the safety of the miners lay on the respondent, and, the respondent not having given any evidence on that point, judgment was entered for the appellants.

Held: the burden of proof lay on the appellants to prove that they had complied with the requirements of the statutes.

Notes. The Coal Mines Regulation Acts, 1887 and 1896, have been repealed. See now the Mines and Quarries Act, 1954, s. 69 and s. 152.

Considered: *Butler (or Black) v. Fife Coal Co.*, [1912] A.C. 149; *Watkins v. Naval Colliery Co.* (1897), Ltd., [1912] A.C. 693; *Rudd v. Elder Dempster & Co.*, [1933] 1 K.B. 566; *Lochgelly Iron and Coal Co. v. McMullan*, [1934] A.C. 1; *Yelland v. Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278;

- A** *Harrison v. National Coal Board*, [1951] 1 All E.R. 1102. Applied: *Jones v. Canadian Pacific Rail. Co.* (1913), 83 L.J.P.C. 18. Referred to: *Clarke v. West Ham Corpn.*, [1909] 2 K.B. 858; *Gibson v. Dunkerley* (1910), 102 L.T. 587; *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1920] 3 K.B. 131; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] All E.R.Rep. 127; *Monk v. Warbey*, [1934] All E.R.Rep. 373; *London Armoury Co. v. Ever Ready Co. (Great Britain), Ltd.*, [1941] All E.R. 364; *Potts (or Riddell) v. Reid*, [1942] 2 All E.R. 161; *Solomons v. Gertzenstein, Ltd.*, [1954] 2 All E.R. 625; *Gough v. National Coal Board*, [1959] 2 All E.R. 164.

B As to general duties and common law obligations of mine-owners, see 26 HALSBURY'S LAWS (3rd Edn.) 564 et seq.; and for cases see 34 DIGEST 738 et seq. For the Mines and Quarries Act, 1954, s. 69 and s. 152, see 34 HALSBURY'S STATUTES

C (2nd Edn.) 570, 623.

Cases referred to in argument:

- Priestley v. Fowler* (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex. 42; 1 Jur. 987; 150 E.R. 1030; 34 Digest 202, 1647.
- Howells v. Landore Steel Co.* (1874), L.R. 10 Q.B.D. 62; 44 L.J.Q.B. 25; 31 L.T. 433; 32 L.T. 19; 33 J.P. 806; 23 W.R. 335; 34 Digest 214, 1767.
- D** *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87; 14 T.L.R. 493; 42 Sol. Jo. 633, C.A.; 34 Digest 219, 1815.
- Hole v. Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest 162, 1263.
- Kelly v. Glebe Sugar Refining Co.* (1893), 20 R. (Ct. of Sess.) 833; 30 Sc.L.R. 758; 1 S.L.T. 88; 24 Digest (Repl.) 1046, *61.
- E**

Appeal by the appellants, *Britannic Merthyr Coal Co.*, from a decision of the Court of Appeal (FLETCHER MOULTON and BUCKLEY, L.JJ., SIR HERBERT COZENS-HARDY, M.R., dissenting), reported, [1909] 2 K.B. 146, allowing an appeal by the respondent, the widow of William David, from a judgment of CHANNELL, J., at the trial before him with a special jury at Swansea Assizes, and ordering a new trial.

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The facts are set out in the opinion of the EARL OF HALSBURY.

B. Francis Williams, K.C., J. Eldon Bankes, K.C., and Trevor Lewis for the appellants.

Sir R. Finlay, K.C., Abel Thomas, K.C., J. Sankey, K.C., and Clive Lawrence for the respondent.

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The House took time for consideration.

Dec. 13, 1909. The following opinions were read.

THE EARL OF HALSBURY.—This is an appeal from the decision of the Court of Appeal directing a new trial in an action by the respondent, the widow of a man employed in a coal mine of the appellants, who was killed, together with several others, by an explosion in the mine on Dec. 14, 1907. It is not now matter of debate that the explosion was caused by a blasting operation—technically called a shot—which was required to remove a piece of rock which rendered it difficult to enlarge the main haulage road of the mine for the purpose of putting in some electric wires required therein. There are certain rules which have the force of a statute applicable to this colliery, and among them are rules applicable to the main haulage roadway and to dry and dusty parts of the mine when blasting operations are required. The place where the operation in this case was performed is both dry and dusty, and it is the main haulage roadway of the colliery. The rules in such cases require that only a particular class of explosives should be used; that, within a certain distance, the intended site of the explosion should be made wet artificially if it is not already wet naturally (which this place was not); that, with some special exceptions, the men should be withdrawn and that the shot should be fired by a particular

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man who should be appointed specially for the purpose; and the shot selected for blasting should be selected by the manager of the mine, who should also see that the proper explosive material was brought into the mine for use. Further, to ensure the proper material being used, as I presume that he cannot be supposed to have sufficient chemical knowledge himself, he is protected if a properly signed certificate by an authority recognised by the rules certifies the genuineness of the authorised explosives. The work in respect of these electric wires began somewhere about July or August before the explosion on Dec. 14. The cause was tried by CHANNELL, J., on July 29, 1908, and it was found that the cause of the explosion was the firing of a shot in a dry and dusty part of the mine; that it was fired in a prohibited area where certain precautions were required to be taken, none of which were taken; and, further, there was evidence that gunpowder was found in two holes bored for the purpose of being fired, and evidence was given rendering reasonably certain that the explosion itself had been caused by gunpowder, a prohibited explosive. It was further found that a man named Watkin Evans, who was seen boring the hole which was to be blasted, gave an order to a man named Miles, a collier, who in consequence fetched two pounds of gunpowder and brought it to his house the day before the explosion.

Under these circumstances, which obviously called for some explanation, the burden of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners lay on the appellants. CHANNELL, J., to my mind, misdirected the jury in placing the burden of proof on the respondent, the plaintiff in the action. I have been thus particular in pointing out why, in my opinion, this verdict cannot be allowed to stand, since I think that the learned judge misdirected the jury as to the onus of proof; and though he left the question to the jury, he left it in such a way and with such a direction that it was hardly possible for them to find any other verdict. Yet, though I am agreeing with the conclusion arrived at by the majority of the Court of Appeal, I am by no means prepared to adopt the reasoning by which that conclusion was arrived at. Indeed, it is not too much to say that I dissent from some of the propositions involved in that judgment. I am very clearly of opinion that there ought to be a new trial, since I think that the conclusion arrived at was a consequence of the misdirection. I am, therefore, of opinion that the appeal should be dismissed, and I move your Lordships accordingly.

LORD ASHBOURNE.—I concur.

LORD ATKINSON.—I concur.

LORD GORELL.—In the circumstances I agree with my noble and learned friend, the EARL OF HALSBURY, that there should be a new trial, and I agree with him in expressing dissent from some of the reasons which were given in the Court of Appeal.

LORD SHAW.—I entirely concur.

Appeal dismissed.

Solicitors: Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare; Smith, Rundell & Dods, for Morgan, Bruce, Nicholas, & James, Pontypridd.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re HURLBATT. HURLBATT v. HURLBATT

[CHANCERY DIVISION (Warrington, J.), October 25, 1910]

[Reported [1910] 2 Ch. 553; 80 L.J.Ch. 29; 103 L.T. 585]

B *Accumulation—Fund to protect trustees against uncertain claims for dilapidations under lease—Bona fide creation of fund—Accumulations Act, 1800, (39 & 40 Geo. 3, c. 98), ss. 1, 2.*

A testatrix who had two sets of leasehold property bequeathed them by her will to trustees upon trust that they should yearly, during the residue of the terms for which the property was held, reserve one-fourth part of the net rents and annual profits arising from the property, and upon further trust pay the remaining three-fourth parts of the rents and profits to her four nieces and her nephew. She directed that the retained one-fourth part should once or oftener every year be invested, that all income arising from the investments should be added to them by way of accumulation, and that the same and all accumulations thereof should be held as a reserve fund to indemnify the executors and trustees from all claims for dilapidations of the leaseholds which might arise. Subject to such indemnity and claims the reserve fund was to be held upon trust for the equal benefit of her four nieces and nephew in like manner as she had declared of the three-fourths of the rents and profits, so that her four nieces and nephew might have the benefit of an accumulated fund to meet the loss of income which would arise at the expiration of the leases of the property. The will also contained a residuary bequest. The testatrix died in 1879, and the period of twenty-one years from her death allowed by the Thellusson Act [the Accumulations Act, 1800] for accumulation terminated in 1900. The last of the leases expired in 1909. A fund of about £1,700 now represented the accumulations of the rents and profits of the leaseholds, after the payment of all claims for dilapidations.

F **Held:** when the purpose of an accumulation was bona fide to create a fund to protect trustees against uncertain claims for dilapidations under a lease the trust to accumulate was not within the Thellusson Act; the direction to create the reserve fund in the present case was made bona fide; and, therefore, the trust was valid for the full term of the leases and not merely up to the year 1900.

G Dictum of ROMILLY, M.R., in *Varlo v. Faden* (1) (1859), 27 Beav. at p. 265, applied.

Notes. The Accumulations Act, 1800, ss. 1 and 2, has been replaced with amendments, by the Law of Property Act, 1925, s. 164 (1) (2) (20 HALSBURY'S STATUTES (2nd Edn.) 771).

H As to restriction of accumulation, see 29 HALSBURY'S LAWS (3rd Edn.) 335 et seq.; and for cases see 37 DIGEST, 130 et seq.

Cases referred to:

(1) *Varlo v. Faden* (1859), 27 Beav. 255; affirmed 1 De G.F. & J. 211; 29 L.J.Ch. 280; 1 L.T. 176; 6 Jur.N.S. 257; 8 W.R. 107; 45 E.R. 339, L.C.; 37 Digest 130, 611.

I (2) *Re Mason, Mason v. Mason*, [1891] 3 Ch. 467; 61 L.J.Ch. 25; 37 Digest 137, 656.

Also referred to in argument:

Re Gardiner, Gardiner v. Smith, [1901] 1 Ch. 697; 70 L.J.Ch. 407; 37 Digest 143, 693.

Adjoined Summons to determine whether a trust for accumulation was valid.

Harriot Gray Hurlbatt by her will bequeathed to her brother Charles Hampton Hurlbatt, and to her nephews Francis Hurlbatt, William Hurlbatt, and Charles

Hurlbatt, all her leasehold premises in Deptford upon trust that they should yearly during the residue of the terms of years for which she held the said leasehold premises retain one-fourth part of the net rents and annual profits which they should receive from her leasehold premises at Deptford after deducting outgoings; and upon further trust to pay the remaining three-fourth parts of the net rents and annual profits arising from the property unto her four nieces Elizabeth May Hurlbatt, Ellen Hurlbatt, Alice Hurlbatt, and Harriot Gray Hurlbatt, and her nephew Charles Hurlbatt, or for such of them as should be living at her decease, in equal shares as tenants in common, with certain provisions to take effect in the event of the death of any of them. As to the said one-fourth part of the rents and annual profits of her leasehold estate at Deptford, she directed that the same should once (or oftener if convenient) in every year be invested by the trustees and that the same moneys and the stocks, funds, or securities in which such moneys should be invested, and all dividends and interest arising therefrom should from time to time be added thereto by way of accumulation; and that the same and all accumulations thereof should be held for the purpose of a reserve fund to indemnify her executors and the said trustees and other the trustees for the time being of the trust estate from all claims which might arise for dilapidations or otherwise in respect of the said leasehold premises at Deptford, and, subject to such indemnity and claims, upon trust for the equal benefit of her said four nieces and her nephew and their children in like manner as she had declared of the other three-fourth parts of the said net rents and profits of the premises at Deptford, and to the end and intent that her said four nieces and nephew or the survivors of them or their children might have the benefit of an accumulated fund to meet the loss or deficiency of income which would arise and accrue to them at the expiration of the leases of her Deptford property. The testatrix also bequeathed to the same trustees her leasehold houses at Newington, to be held upon similar trusts, except that here she omitted the last sentence set out above, beginning with "and to the end and intent" following the words "premises at Deptford." The will also contained a residuary bequest.

The testatrix died on June 21, 1879. Harriot Gray Hurlbatt died intestate and a spinster in 1882. Elizabeth May Hurlbatt died in 1904, leaving a will, and all the trustees except Charles Hurlbatt were dead. A fund of about £1,700 now represented the one-fourth of the rents and profits of the houses which had been regularly carried to a reserve fund as directed by the will and the income accumulated, after payment out of the fund of all claims for dilapidations. The period of twenty-one years from the death of the testatrix allowed by s. 1 of the Thellusson Act for accumulations terminated in 1900, before which time the last of the Newington leases had expired. The last Deptford lease expired in 1909. In a summons taken out by the surviving trustee to determine various questions in the administration of the estate, the question was raised whether the trust for accumulation was to any and what extent invalid, and, if so, whether part of the reserve fund belonged to the residuary legatees or all of it belonged to the nieces and the nephew.

Christopher James for the sole surviving trustee, Charles Hurlbatt, who was also a beneficiary.

C. W. Turner for another beneficiary.

A. M. W. Wells and *W. P. Spens* for other parties in the same interest.

A. Whitaker for the residuary legatees.

WARRINGTON, J.—The question in this case is whether the accumulations since the expiration of twenty-one years from the death of the testatrix pass under the residuary gift contained in her will, or whether the fund arising from the accumulations belongs to the nieces and nephew under the specific disposition in their favour. The testatrix had two sets of leasehold properties with which

A this question is concerned, one consisting of a number of houses at Deptford and the other of some houses at Newington. By her will she disposed of her property at Deptford as follows: [His LORDSHIP read the provisions of the will and continued:] The testatrix disposed of her houses at Newington in almost the same terms, the only material difference being that she omitted the words which began "and to the end and intent"—i.e., that she stopped at the words "the premises at Deptford."

B The first question which arises is whether the trust for the accumulation of this one-fourth part of the rents and profits as and for the purposes of a reserve fund to indemnify the executors and trustees against their liabilities for dilapidations under the leases of the houses at Deptford and Newington is to any extent affected by the provisions of the Thellusson Act, which makes void all accumulations beyond a certain period allowed by the Act. Section 2 contains this provision:

"Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for the payment of debts of any grantor, settlor, or devisor, or other person or persons . . ."

D The first question is whether this is a provision for the payment of the debts of "the devisor or any other person or persons." It is curious that the question of provision for liabilities arising under leases has never actually arisen for decision, but in *Varlo v. Faden* (1) ROMILLY, M.R., in dealing with the question which arose in that case, which was of a rather different nature, put the very point. In the case before him the object of the accumulations was protection against liabilities under shares in the "Globe" newspaper, and it appeared that under the partnership articles the testator might be under considerable liability in respect of them. The Master of the Rolls then said (27 Beav. at pp. 264, 265, 266):

F "The question that arises is really this:—Whether an accumulation for an indemnity fund to protect the property of the testator is within the Thellusson Act or is not. This is strictly a case of that description, everything above £200 a year is to accumulate for the purpose of protecting the shares during the life of the legatee for life. Protecting the shares, I think, means this:—That if there should be any unexpected call on the shareholders, in respect of the partnership, by reason of which, if there were no indemnity fund, some of the shares must be sold; this indemnity fund is applicable to meet that call. G It appears to me to be analogous to a case of this description:—If a testator, for instance, had a long leasehold, of which there were thirty years to run, after his death, directed, by his will, that a certain portion of the rents should be laid out every year to accumulate at compound interest, for the purpose of meeting any liabilities which might ultimately fall on his estate at the termination of the lease in respect of the covenants contained in it, I think, that H within the limits which the law allows, that would be good, notwithstanding the Thellusson Act, and I think that the exception contained in the Thellusson Act allows of that accumulation to be made, and that the expression 'debts of any other person or persons' must mean the liability which would fall on someone to discharge these particular obligations which would affect the property in the event contemplated by the testator. No doubt it must be I bona fide; it must not be merely colourable for the purpose of evading the Act, and the court would have to determine that question when it arose. But in this case, I think there is no doubt about the bona fides, and I am of opinion that the accumulations are good. If the shares be now sold, the accumulations will not be required any longer. I decided, at the hearing, that the widow was not entitled to the amount of the accumulations; but I am of opinion that she is entitled to the interest to be derived from the accumulated fund. The executors must be protected against any liabilities

which they may have incurred or which they may be liable to hereafter; but as this fund will remain in court, that will be sufficient to protect them."

He did not seem to think that it was material to consider or ascertain whether or not at the end of the twenty-one years a further accumulation was required for the protection of the executors against liabilities under the shares.

That came before LORD CAMPBELL on appeal, and he affirmed the decision, although he did not deal with the example which the Master of the Rolls had given. The Master of the Rolls had dealt with it as a perfectly plain case, and it seems that on the authority of that case the court ought to hold that when the purpose of the accumulation is bona fide to create a fund to protect the trustees against uncertain claims for dilapidations under a lease, the trust to accumulate is not within the Thellusson Act at all. It has been contended that the exceptions of s. 2 only apply, if at all, so far as the accumulation is for the purposes of indemnity, and that if the testator expresses any other purpose then the Act will apply to accumulations for that purpose. In the present case it is unnecessary to determine that question. In the rather peculiar case before STIRLING, J., of *Re Mason, Mason v. Mason* (2) the learned judge took the view that a trust for accumulation was valid so far as it was a bona fide provision for the performance of trusts for rebuilding, repairing, and reinstating buildings, and that it was not a direction to accumulate within the Thellusson Act, but that when the purpose was fulfilled the general trust to accumulate did fall within the Act.

The next question I have to determine is whether the direction to create this reserve fund is made otherwise than bona fide by the addition to it of another purpose—viz., of trusts of the fund thus formed. I am of opinion that it is not. It was impossible for the testatrix to know what would be the amount of the dilapidations, and she has only said what is to be done with the fund subject to providing for that liability. I do not think that makes the direction to indemnify the trustees less bona fide. It is said that I cannot take that view, because the testatrix has not said the beneficiaries are to take subject to a legal accumulation, but has expressly postponed the interest of the legatees till a time which may be after the expiration of twenty-one years. I do not think the question really arises. This accumulation is not within the Act at all. By the will, the whole fund, consisting of rents and profits by accumulation or otherwise, are to be accumulated, and afterwards, subject to the indemnity, are to go to the persons to whom the rest of the rents and profits go. I think the words

"to the end and intent that her said four nieces and nephew or the survivors of them or their children might have the benefit of an accumulated fund to meet the loss or deficiency of income which would arise and accrue to them at the expiration of the leases of her said Deptford property"

are merely the expression of the motive or reason for the trust which the testatrix was declaring. I think the trust is valid for the whole term of the leases, but, whether that be so or not, the surplus rents go to the persons entitled to the three-fourths of the rents, and do not go under the residuary gift. The question of the Newington rents is simple because those leases terminated within the period of twenty-one years from the death of the testatrix, and the testatrix omitted in their case the clause beginning "to the end and intent."

Solicitors: *Trinder, Capron & Co.; W. Easton & Son.*

[Reported by H. M. CHARTERS MACPHERSON, ESQ., Barrister-at-Law.]

BURR v. SMITH

[COURT OF APPEAL (Fletcher Moulton and Farwell, L.J.J.), May 7, 1909]

[Reported [1909] 2 K.B. 306; 78 L.J.K.B. 889; 101 L.T. 194;
25 T.L.R. 542; 53 Sol. Jo. 502; 16 Mans. 210]

Libel—Privilege—Absolute privilege—Company—Winding-up—Report by official receiver to creditors and contributories—Report to Board of Trade by Inspector-General in Companies' Liquidation.

An action for libel **held** not to lie against an official receiver in respect of statements contained in a report made by him under para. 3 of Sched. 1 to the Companies (Winding-up) Act, 1890, and sent by him to the creditors and contributories of the company, for, in making such a report, he was acting as an officer of the court in the performance of a statutory duty, and absolute privilege attached to the report. Neither was an action maintainable against the Inspector-General in Companies' Liquidation in respect of a report made by him to the Board of Trade under s. 29 (2) of the Act of 1890 for the purpose of being included by the Board of Trade in its general annual report of matters under the Companies Acts to be laid before Parliament, for in making that report he was acting as an officer of the Board of Trade to enable the Board to perform its statutory duty, and the fact that the report was delivered into the hands of superior officers of the Board of Trade did not constitute publication.

Notes. Paragraph 3 of Sched. 1 to the Companies (Winding-up) Act, 1890, was repealed by the Companies (Consolidation) Act, 1908, and re-enacted as rule 126 (1) of the Companies (Winding-up) Rules, 1949. Sections of the Companies Act, 1948, equivalent to those in the Act of 1890 referred to in this report are stated in the text *infra*.

Referred to : *Re Tweddle*, [1910] 2 K.B. 697.

As to absolute privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 48-54; and for cases see 32 DIGEST 102 et seq.

Cases referred to :

- (1) *Bottomley v. Brougham*, [1908] 1 K.B. 584; 77 L.J.K.B. 311; 99 L.T. 111; 24 T.L.R. 262; 52 Sol. Jo. 225; 32 Digest 102, 1329.
- (2) *Ex parte Barnes*, [1896] A.C. 146; 65 L.J.Ch. 394; 74 L.T. 153; 44 W.R. 433; 12 T.L.R. 239, H.L.; 10 Digest (Repl.) 911, 6206.
- (3) *Scott v. Stansfield* (1868), L.R. 3 Exch. 220; 37 L.J.Ex. 155; 18 L.T. 572; 32 J.P. 423; 16 W.R. 911; 32 Digest 104, 1352.
- (4) *Munster v. Lamb* (1883), 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805; 32 W.R. 243, C.A.; 32 Digest 105, 1368.
- (5) *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 481; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 32 Digest 128, 1592.

Also referred to in argument :

- Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255; L.J.Q.B. 63; 28 L.T. 194; 21 W.R. 544, Ex. Ch.; affirmed (1875), L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 23 W.R. 931; 32 Digest 102, 1339.

Appeal by the plaintiff from an order made by LAWRENCE, J., at chambers directing that the statement of claim in the action be struck out on the ground that it disclosed no reasonable cause of action.

The action to recover damages for libel was brought by the plaintiff, a financial agent carrying on business in the city of London, against John Smith,

the Inspector-General in Bankruptcy and Inspector-General in Companies' Liquidation; George Stapylton Barnes, one of the official receivers under the Companies (Winding-up) Act, 1890, attached to the High Court of Justice; and Harold de Vaux Brougham, who was up to July 1, 1899, one of the official receivers in bankruptcy attached to the High Court of Justice, and subsequently an official receiver in companies' liquidation. In 1896 and subsequent years the plaintiff was concerned in the development of a mineral area in the south of England, afterwards known as the Kent coalfield, and he promoted various companies in connection therewith, some or all of which had since gone into voluntary liquidation. In 1899 a limited company known as the Colliery and General Contract Co., Ltd., which had business transactions with some or all of the said companies, and, among them, with companies known as the Kent Coalfields Syndicate, and the Lands Distribution Co., and Kent Collieries Corpn., Ltd., was compelled to go into liquidation. The defendants severally published their official reports in reference to the liquidation of certain of the said companies, and the plaintiff alleged that certain statements appearing in the said reports were defamatory of him.

Hume Williams, K.C., and J. R. Bell Hart for the plaintiff.

The *Attorney-General* (Sir W. S. Robson, K.C.) and *Rowlatt*, for the defendants, were not called on to argue.

FLETCHER MOULTON, L.J.—I am of opinion that the order of the learned judge in chambers was right, and that this appeal must be dismissed. There is no doubt that the point involved is one of considerable importance. The action is brought by the plaintiff, who was concerned in promoting two colliery companies, the one known as the Kent Coalfields Syndicate, and the other as the Lands and Distribution Co. and Kent Colliers Corpn., Ltd., against Mr. George Stapylton Barnes and Mr. Harold de Vaux Brougham, who are official receivers of this court, and against Mr. John Smith, who is an Inspector-General in Bankruptcy and an Inspector-General in Companies' Liquidation.

I propose to treat the action against the two I have first named separately from the action against Mr. Smith. The alleged libellous publications in the case of the defendants Mr. Barnes and Mr. Brougham are contained in reports made by them as official receivers under para. 3 of Sched. 1 to the Companies (Winding-up) Act, 1890, which runs as follows:

"The official receiver shall also, as soon as practicable, send to each creditor mentioned in the company's statement of affairs, and to each person appearing from the company's books, or otherwise, to be a contributory of the company, a summary of the company's statement of affairs, including the causes of its failure, and any observations thereon which the official receiver may think fit to make. . . ."

I have not the slightest doubt that official receivers are officers of the court which has to do with liquidations; they are officers of this court; and in the case of these companies, where there was a compulsory liquidation under the supervision of the court, they were acting as officers of the court in performing this statutory duty. It is a perilous duty, because it necessitates that they should, with the greatest frankness, put forward all matters they have ascertained of the kind referred to in para. 3 of the schedule, and, in doing that and sending it round, they are performing their duty as officers of the court in connection with an inquiry which, for the purposes of the law of libel, may rightly be called a judicial inquiry. I have no doubt that the performance of such a duty is a matter of absolute privilege. If the court puts one of its officers in the difficult position of having to draw up a report and circulate it, it is quite plain to me that the same protection is extended to him as would be extended to a judge who is,

A if there is a judicial inquiry, doing his duty in the way of fearlessly uttering his judgment on the matters that have been brought before him. I am, therefore, of opinion that the most absolute privilege applies to that report. It would be terrible to contemplate what would be the result of holding it is not a privileged document, and as not being connected with judicial proceedings, because then no one person could show it to another except at the peril of having an action
B for libel brought against him.

This matter has been expressly decided by a court of first instance in *Bottomley v. Brougham* (1), and I think the reasons which CHANNELL, J., gives there, that it is absolutely privileged, are admirably expressed and perfectly accurate. He says ([1908] 1 K.B. at p. 587):

C "It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and, to secure their independence, that their acts and words
D should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious."

I do not think I need say any more about the case as against these two defendants, because I think the point is really too clear for argument. The action as against the other defendant stands in a very different position. Under s. 29 (2) of the
E Companies (Winding-up) Act, 1890 [see now Companies Act, 1948, s. 451] it is provided:

"The Board of Trade shall also cause a general annual report of all matters, judicial and financial, within this Act to be prepared and laid before both Houses of Parliament."

F The Board of Trade can only perform its statutory duty by means of its officers, and, therefore, when the Act says,

"The Board of Trade shall cause a general annual report of all matters . . . to be prepared,"

it means that it shall set its officers to prepare such a report. For the purposes
G of my judgment it is not necessary to consider whether the Inspector-General, who is unquestionably an officer of the Board of Trade, is an officer of the court or not, because the ground on which my judgment is based is that he is an officer of the Board of Trade to prepare this report in order to enable a statutory duty to be performed. When he is doing this and when he is collecting the materials, he is acting as the hand of the Board of Trade in
H doing it, and when he does it and, as we see, reports to the Board of Trade, he is not reporting to any other body than that of which he is, I was going to say, a part. He is, as far as the performance of his duties is concerned, a part of the Board of Trade; and I have no doubt whatever that the written report in this case coming into the hands of, we will say, the superior officers of the Board of Trade constituted no publication at all. It was simply a part of
I the preparing of the report by the Board of Trade under the section.

So far we have no publication. But then the Board of Trade has not only to prepare this general annual report; it has to lay it before both Houses of Parliament. I am satisfied that that is not a publication which can make the Board of Trade, or any of its officers who have been employed by it in preparing this report, liable to any action for libel. The Board of Trade is bound to present it to Parliament, and Parliament orders the report to be printed. Then it is sent round to the members of Parliament, and is sold by the government. Therefore, I am of opinion that there is here no publication by this defendant

of this report at all, and that he cannot be rendered liable in any way whatever for the matters therein contained. The Board of Trade, by adopting it as their report and sending it to Parliament, are solely responsible for it; therefore I say that no action will lie against this defendant in respect of matters contained in it. So long as it concerns him alone, he did not publish it. The Board of Trade in adopting it take it as their report. That report, by statute, is sent to Parliament, and it is not a publication which can bring any liability with it, because it is Parliament which authorises it to be circulated. A
B

The action, therefore, against all three defendants is an action which it is obvious cannot be sustained. This power to stop an action which is frivolous and vexatious because it is clearly unsustainable is an inherent power of the court. In my opinion, it is clear that the cause of action against the defendants fails because there is no libel at all, on account of absolute privilege. Further, it appears to me that it fails against all the three defendants because there is clearly no publication, and for these reasons I think the action as a whole should be dismissed as being frivolous and vexatious. C

FARWELL, L.J.—I have come to the same conclusion. The action, so far as regards the official receivers, Mr. George Stapylton Barnes and Mr. De Vaux Brougham, appears to me to be reasonably plain. Counsel for the plaintiff has argued that under s. 8 (3) of the Act of 1890 there is a discretion, and that makes some difference in the liability of the official, who is undoubtedly an officer of the court, in the exercise of that discretion. In my opinion that is not well founded. In s. 8 (1) the word "shall" is used: D

"The official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the court." E

That is an absolute and positive duty cast upon him. Section 8 (2) runs thus:

"The official receiver may also, if he thinks fit, make a further report or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court." [See now Companies Act, 1948, s. 236 (1), s. 236 (2).] F
G

It is perfectly obvious from the wording of that subsection that the court desires in the case of a winding-up, if it has cause for suspicion, inquiry to be made into the matters in relation to the formation of a company, and a report if there has been any fraud in the promotion of the company. Obviously that is a matter which necessarily leads to many incriminating statements against various persons. It has been held that unless and until the official receiver has made a report in which he states that in his opinion, or to the best of his belief, there is fraud, there is no ground upon which the court can proceed further. Therefore, it is necessary for him to take that step of stating fraud. It is said that he cannot do that unless he likes. That, in my view, is an absolute misapprehension. There is a duty cast upon him; he has a judicial discretion originally, but the moment in the exercise of that discretion in which he finds facts which show that fraud, in his opinion, has been committed, his discretion becomes merged in a duty, and it then becomes his duty to make his report stating that in his opinion fraud has been committed. If authority were necessary for that, it is to be found in LORD HALSBURY's opinion in *Ex parte Barnes* (2) where he says ([1896] A.C. at p. 150): H
I

"The expression 'if he thinks fit' must, of course, mean if he arrives at a judicial conclusion in his own mind that such facts are before him, and in

A proof, that it becomes his duty. It is left to him to do it if he thinks fit; it is not made necessary for him to do it in every case, but only in such cases as in his judgment demand such a course to be pursued."

B That is to say, LORD HALSBURY means that it is necessary that his judgment demands that course to be pursued. That, therefore, disposes of any question of the exercise of judicial discretion being any the more open to attack than the performance of any judicial duty.

C The third defendant, Mr. John Smith, is described as an Inspector-General in Bankruptcy and the Inspector-General in Companies' Liquidation, and the allegation against him is that in August, 1900, in his annual report, he made certain statements which were published, and so on. I have some little difficulty in discovering what the exact functions of an Inspector-General are. He is apparently appointed under s. 71 of the Bankruptcy Act, 1883 [now s. 75 of Bankruptcy Act, 1914], by the Board of Trade, with the approval of the Treasury, for the execution of the Bankruptcy Acts. I confess my difficulty has been to see how he would make any report under that, but he is, in my opinion, an officer of the Court of Bankruptcy appointed as such for the purposes of the Bankruptcy Act, although appointed by the Board of Trade, and if he makes any report in the performance of a statutory duty, he does so as an officer of the court. Under the Companies Acts he appears to be appointed by the Board of Trade under the Companies (Winding-up) Act, 1890, s. 27 [see now s. 363 (1) of Companies Act, 1948]. I think the Attorney-General was under a misapprehension when during the argument he was referring to para. 3 of Sched. 1 to the Act of 1890, because I do not think that any question that I can find alleged touches that at all. I think it is really under s. 27 of the Act of 1890:

"The Board of Trade may, with the approval of the Treasury, appoint such additional officers as may be required by the Board for the execution of this Act, and may dismiss any person so appointed."

F Then the report comes under s. 29, and the Act of Parliament makes it perfectly clear. It is:

"The officers of the courts acting in the winding-up of companies shall make to the Board of Trade,"

C and so on. They are treated and named as officers of the courts, and until I heard counsel on behalf of the Board of Trade during the argument disclaim any subjection to the jurisdiction of the court, I was not aware that it had ever been doubted. All these officers appointed under the Act are officers of the court and subject to the court, even though they be appointed by the Board of Trade; in fact, a perusal of the Act of 1890 shows that the intervention of the Board of Trade was intended for the assistance of the court, partly, no doubt, by relieving it of some of its funds and by enabling better control to be kept over funds which liquidators used to be not so eager to part with, and which the court, having a good many things to do, had at last to inquire into a little more closely. The Board of Trade came in not in substitution for or by way of exclusion of the High Court, but to assist the High Court, and they themselves are subject to the High Court. In my opinion, an Inspector-General acting in this capacity is quite open to make a report as an officer of the court, and, therefore, he comes under the same protection.

I I have just one or two words to add with regard to privilege. That is a most important matter, but as BRETT, L.J., said in speaking of the decision in *Scott v. Stansfield* (3), in *Munster v. Lamb* (4) (11 Q.B.D. at p. 603):

"The ground of the decision was that the privilege existed for the public benefit; of course it is not for the public benefit that persons should be

slandered without having a remedy; but upon striking a balance between convenience and inconvenience, between benefit and mischief to the public, it is thought better that a judge should not be subject to fear for the consequences of anything which he may say in the course of his judicial duty."

SIR EDWARD FRY, speaking on judicial duty, says this, and I am quoting from *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (5) B ([1892] 1 K.B. at p. 447):

"It seems to me that the sense in which the word 'judicial' is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterise proceedings in courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a court."

That appears to me to cover the present case. I see no reason to suppose that there is any difference between an official receiver and an Inspector-General making his report in the way he is required to do under this Act, just in the same way as chief clerks or masters in chambers of the Chancery Division report to a judge. No one would dream of suggesting that an action would lie against them for anything which was done in the course of their duty. On these grounds, without expressing any opinion on the point of publication and other matters in a libel action with which I am not so familiar as my brother, I think this appeal fails. The appeal, therefore, must be dismissed with costs.

Appeal dismissed. E

Solicitors: *W. Stopher; Solicitor to the Board of Trade.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

WIGAN AND OTHERS v. ENGLISH AND SCOTTISH LAW LIFE ASSURANCE ASSOCIATION

[CHANCERY DIVISION (Parker, J.), November 16, 17, 1908]

[Reported [1909] 1 Ch. 291; 78 L.J.Ch. 120; 100 L.T. 34; 25 T.L.R. 81]

Debt—Security—Assignment—Consideration—Need to prove forbearance by creditor—Security assigned without notice to creditor—Avoidance.

The mere existence of a debt is not sufficient valuable consideration for the giving by the debtor to the creditor of a security to secure that debt. For the creditor to acquire an enforceable interest in the security there must be either an express agreement between the parties by which the creditor forebore to seek to recover the debt forthwith and gave the debtor time for payment or circumstances from which the court will imply such an agreement. Where, therefore, the debtor executes a deed assigning to the creditor a security (e.g., an interest under an insurance policy) without informing him of what he has done the deed is purely voluntary and the creditor is not an assignee for value of the security and cannot enforce it.

Notes. Considered: *Glegg v. Bromley*, [1911–13] All E.R. Rep. 1139. Applied: *Re Wethered, Ex parte Salaman*, [1925] All E.R. Rep. 521. Considered: *Holt v. Heatherfield Trust, Ltd.*, [1942] 1 All E.R. 404. Referred to: *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478; *Hambleton v. Brown*, [1917] 2 K.B. 93; *Oliver v. Davis*, [1949] 2 All E.R. 353.

As to consideration for a contract generally, see 8 HALSBURY'S LAWS (3rd Edn.) 113–121, and for cases see 12 DIGEST (Repl.) 196.

Cases referred to :

- (1) *Alliance Bank, Ltd. v. Broom* (1864), 2 Drew. & Sm. 289; 5 New Rep. 69; 34 L.J.Ch. 256; 11 L.T. 332; 10 Jur. N.S. 1121; 13 W.R. 127; 62 E.R. 631; 12 Digest (Repl.) 216, 1556.
- (2) *Fullerton v. Provincial Bank of Ireland*, [1903] A.C. 309; 72 L.J.P.C. 79; 89 L.T. 79; 52 W.R. 238, H.L.; 12 Digest (Repl.) 215, 1547.
- (3) *Cracknall v. Janson* (1879), 11 Ch.D. 1; 40 L.T. 640; 27 W.R. 851, C.A.; 35 Digest 384, 1273.
- (4) *Re Barker's Estate, Jones v. Bygott, Bygott v. Hellard* (1875), 44 L.J.Ch. 487; 23 W.R. 944; 25 Digest 231, 593.
- (5) *Middleton v. Pollock, Ex parte Elliott* (1876), 2 Ch.D. 104; 45 L.J.Ch. 293; 25 Digest 199, 377.
- (6) *New, Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q.B. 19; 66 L.J.Q.B. 554; 76 L.T. 742; affirmed sub nom. *Sharp v. Jackson*, [1899] A.C. 419; 68 L.J.Q.B. 866; 80 L.T. 841; 15 T.L.R. 418; 6 Mans. 264, H.L.; 4 Digest (Repl.) 58, 501.

Also referred to in argument :

- Murray v. Earl of Stair* (1823), 2 B. & C. 82; 3 Dow. & Ry. K.B. 278; 107 E.R. 313; 17 Digest (Repl.) 222, 229.
- Bowker v. Burdekin* (1843), 11 M. & W. 128; 12 L.J.Ex. 329; 152 E.R. 744; 17 Digest (Repl.) 223, 233.
- Doe d. Lloyd v. Bennett* (1837), 8 C. & P. 124, N.P.; 17 Digest (Repl.) 221, 205.
- Doe d. Garnons v. Knight* (1826), 5 B. & C. 671; 8 Dow. & Ry. K.B. 348; 4 L.J.O.S.K.B. 161; 108 E.R. 250; 17 Digest (Repl.) 218, 174.
- Davies v. R. Bolton & Co.*, [1894] 3 Ch. 678; 63 L.J.Ch. 743; 71 L.T. 336; 43 W.R. 171; 10 T.L.R. 604; 38 Sol. Jo. 650; 1 Mans. 444; 8 R. 685; 10 Digest (Repl.) 758, 4932.

Re Ridler, Ridler v. Ridler (1882), 22 Ch.D. 74; 52 L.J.Ch. 343; 48 L.T. 396; 47 J.P. 279; 31 W.R. 93, C.A.; 25 Digest 163, 119. A

Exton v. Scott (1833), 6 Sim. 31; 58 E.R. 507; 25 Digest 199, 372.

Witness Action by the plaintiffs against insurers as assignees of a policy of insurance.

Upjohn, K.C., and *Gatey* for the plaintiffs.

Romer, K.C., and *Maugham* for the defendants. B

PARKER, J.—The plaintiffs, who are the executors of the late Sir Frederick Wigan, sue on a policy of insurance on the life of the late William Henry Hackblock, of which they claim to be the assignees. The policy contains a provision to this effect:

“Policies will also be void and all premiums forfeited if the lives assured die by their own hands, or by duelling, or by the hands of justice, but without prejudice to the bona fide interests of third parties, based on valuable consideration.” C

It is admitted in this case that the insured, William Henry Hackblock, did die by his own hand, and, therefore, if the plaintiffs are to succeed in suing on the policy as a valid policy, they must bring themselves within the clause “without prejudice to the bona fide interests of third parties, based on valuable consideration.” In my opinion, it is reasonably clear what that clause means, and I do not think that any particular point can be made as to the words which are actually used. The intention is that a person who is to be brought within the saving clause must be the purchaser of the interest he claims for value and must have acquired that interest bona fide. The question is, therefore, first, whether the plaintiffs are assigns of the policy as they claim to be; and, secondly, whether, if they are assigns of the policy, the interest they claim under the assignment is an interest which they acquired bona fide for valuable consideration. D

The facts of the case are quite short. It appears that the insured had the misfortune to kill his wife by an accident, and on the day of her funeral he was evidently worrying about various financial matters, among other things a large sum of money which he owed Sir Frederick Wigan—a sum amounting to at least £15,000, and, as I gather, possibly a further sum of a considerable amount. He had given Sir Frederick Wigan some security, though it does not appear exactly what security, for that debt. On Aug. 30, 1906, the day of his wife's funeral, he wrote to his solicitors in effect telling them to prepare an assignment of this policy of insurance, which he inclosed in the letter, to Sir Frederick Wigan, or to themselves in trust for Sir Frederick Wigan, to secure Sir Frederick Wigan's debt. I think it is quite clear that that letter was received by Mr. Lightly, a member of the firm who were then acting for the insured, and that he on those instructions did prepare a draft assignment. It was originally dictated to a shorthand clerk, who copied it out, and Mr. Lightly revised it in his own handwriting. It purports to be the draft of an indenture executed between the insured, William Henry Hackblock, and Sir Frederick William Wigan. It contains a recital to the effect that the mortgagor is indebted to the mortgagee, the mortgagor being defined as William Henry Hackblock, and the mortgagee as Sir Frederick William Wigan. F G H

It contains a recital that:

“The mortgagor is indebted to the mortgagee in sums amounting to upwards of £15,000, and the mortgagee has requested the mortgagor to give him further security for the repayment thereof.” I

That recital is not true. There had been no question as to further security, though possibly there had been some question as to payment of the existing debt. It is witnessed:

“That in pursuance of the said agreement, and in consideration of the premises, the mortgagor, as beneficial owner,”

A conveys the policy to Sir Frederick Wigan, the mortgagee, subject to a proviso for redemption on payment of the moneys to Sir Frederick Wigan. That document having been prepared was engrossed, and the engrossment was forwarded on Aug. 31, 1906, to the insured, William Henry Hackblock. He returned it executed and attested in the usual way in a letter of Sept. 1, and I see no reason to doubt that the engrossment so forwarded to him was actually executed by him in the usual way. A question may arise whether it was executed upon some condition which may or may not have taken effect, but that question I postpone for the present.

C The solicitors entered into negotiation with Sir Frederick Wigan's firm with a view to obtaining further time for the payment of the money which was due to Sir Frederick Wigan or his firm from the insured, and they had this assignment of the policy in their pocket at the time of the negotiation, to be used if it were necessary. It was not necessary and it was not used, and it remained for some days afterwards in the hands of the solicitors for the insured. On Sept. 13 the gentleman who had charge of the matter destroyed the document upon the express instructions of the insured; he entered a note on the back of the draft to the effect that the original had been destroyed by the instructions of the insured, and nothing further was done in the matter. The insured some days afterwards died by his own hand, and his estate, as I understand it, is being administered in this Division of the court. In the process of that administration Sir Frederick Wigan or his firm put in a proof, and in the course of investigating the claims of creditors the facts which I have just detailed came to the notice of the master, and he directed that notice of them should be given to the firm. Notice of these facts was accordingly given to the firm, and the firm claimed to be assignees of the policy under this deed which was destroyed and of which they subsequently gave notice to the insurance society.

F Two points arise. The first is whether this document was executed and delivered as a deed to be binding, or whether it was executed and delivered upon a condition which would make it an escrow, in which case it would not operate until that condition was fulfilled. The second question is whether under the circumstances Sir Frederick Wigan, the mortgagee, can be said to have acquired his interest under the deed, if it did operate, bona fide for valuable consideration within the meaning of the clause in the policy to which I have referred. It is admitted by all parties that no communication was made to Sir Frederick Wigan or to anyone on his behalf of the contents of the document until after the death of Mr. Hackblock, and until in the course of the administration of the estate the master directed that the facts which had come to his knowledge should be circulated. I am bound to say at once that, in my opinion, I should have thought there could be no possible ground for maintaining under the circumstances to which I have referred that Sir Frederick Wigan, the mortgagee, gave any consideration at all for the interest which he had acquired, if he did acquire any interest, under the deed in question. H It appears to me to be reasonably clear that the mere existence of a debt from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt. But if such a security is given, it may, of course, be given upon some express agreement to give time for the payment of the debt, or to afford consideration for the security in some other way, or if there be no express agreement, the law will very readily imply an agreement to give time. I It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given. Further than that, if there is no express agreement, and if an agreement cannot be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, and then, I think, it appears on the cases that there is sufficient

consideration, though in a sense it is an ex post facto consideration, for the security which is given. On the other hand, it appears to me that where there is no communication of the security, where there is no express agreement, or where there are no circumstances from which the courts can imply any agreement, then there is no possibility of its being said with any justice that any security has been given at all. A

That that is the state of the law upon this particular point is, I think, reasonably clear from the authorities which have been quoted to me in argument, beginning with *Alliance Bank, Ltd. v. Broom* (1). In that case a customer had been called on by his bankers to give security for money due from him on a loan account, and he agreed by letter to give security. A bill which had been filed to enforce such agreement was demurred to on the ground that the agreement to give the security was without consideration. It was held in that case that the forbearance of the bank to enforce payment of the existing debt in consequence of the agreement was a sufficient consideration to support it, and the demurrer was overruled. That case would have been wholly unnecessary and the arguments would have been wholly improper if the mere existence of the debt without any forbearance to sue was a sufficient consideration for the security which had been agreed to be given. In that case *KINDERSLEY, V.-C.*, says (2 *Drew & Sm.* at p. 292): B C D

"It appears to me, that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement." E F

That judgment of *KINDERSLEY, V.-C.*, was approved by the House of Lords in *Fullerton v. Provincial Bank of Ireland* (2). There *LORD MACNAGHTEN*, on the point which had been raised, says ([1903] A.C. at p. 313) it was settled by authority. G

"In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it." H

The other Lords use language very much to the same effect. There is also *Cracknell v. Janson* (3), in which *FRY, J.*, deals with the law upon the subject in the same way. I

Lastly, there is *Re Barker's Estate* (4), in which *SIR GEORGE JESSEL, M.R.*, also deals with the subject. In that case the circumstances were to a considerable extent analogous to the circumstances in this case, and, therefore, I will deal with that in somewhat greater detail than I have done with the other cases. In that case a solicitor had mortgaged an estate to the trustee of his settlement, and, notwithstanding that, he fraudulently deposited the title deeds with another creditor of his own, fraudulently because the title deeds were in his possession as solicitor for the mortgagees, and he had no business or right to deal with them. In 1871 he mortgaged certain other lands which did belong to himself by way of demise in order to secure the persons wronged from injury by reason of his having disposed of the title deeds of the estate which had been mortgaged as I have mentioned.

A There was no consideration stated in the deed, and he obtained the deed without making any communication at all to the person in whose favour it was executed. The decision of SIR GEORGE JESSEL, M.R., was that, that deed not having been communicated, and there having been no forbearance, the settlement was an entirely voluntary deed, and being a voluntary deed was void as against a subsequent purchaser for value. He says (44 L.J.Ch. at p. 489):

B "This being so, if the deed of Nov. 24, 1860, be voluntary, the statute 27 Eliz., c. 4 [relating to voluntary dispositions to defraud a subsequent purchaser; repealed by Law of Property Act, 1925, of which see now s. 173] avoids it by relation, the doctrine being that, however honest, as this was—for, in truth, it was an attempt to repair the consequences of a dishonest act by the person who had committed it—yet, in contemplation of law, the person who has
C executed the voluntary deed, and at any time after, conveys away the estate, although he gives notice to the purchaser of the voluntary deed, is presumed to have had in his mind, at the time of executing the voluntary deed, a fraudulent intent, that is, an intent to cheat the purchaser who bought the estate afterwards, with notice of the voluntary deed, and of the whole of the
D transaction. That is the law, and I must follow it. Consequently, as there is no consideration, the deed is a void deed."

He proceeds to deal with the question whether there had been constructive notice of the deed to the person in whose favour it had been executed, and goes on—and this is, perhaps, the most material part of the judgment—on the supposition that had he had constructive notice to discuss what would have happened. He
E says (*ibid.* at p. 490):

"But supposing he had, it would not carry the case a bit further. You cannot have consideration without either contract, in the first instance, or such notice on the part of the person benefited by the voluntary instrument after knowledge of it, as changes his position. That is, in fact, contract also, but implied contract. If you have express contract, *cadit quaestio*, and there is nothing to
F argue. In the case of further security, the lender gives time and forbearance, or he gives some other advantage to the person giving the further security, and that is valuable consideration. But if, without that, after the voluntary instrument has been executed, its contents are communicated to the person taking the benefit of it, and acting upon the faith of it he does substantially alter his position, that is, he does communicate to the donor his acceptance of the
G further security, and by so doing he gives value to the donor, being the value which the donor expected him to give, he has, in fact, accepted the voluntary instrument as a consideration for the action he takes upon the faith of it. In that way it comes back again really to contract, and upon that ground it is that the courts have refused to disturb voluntary deeds where consideration has been given for them, so to say, *ex post facto*. But where the lender has
H no knowledge, it is impossible that he can give consideration in that way, and, therefore, I hold that mere constructive notice would not be sufficient."

It appears to me that that is a clear decision that, where a deed giving further security is executed, but the person executing it holds it back and does not communicate it in any way to the person in whose favour it is executed, there being no express agreement to give further time or to forbear to sue, there being no
I circumstances upon which such an agreement can be implied, and the fact that no notice was given being absolutely inconsistent with any such *ex post facto* consideration as is mentioned by SIR GEORGE JESSEL, M.R., in such a case the deed is purely voluntary, and would be held so by the courts.

If that is a true statement of the law, it appears to me that in this case there is nothing which can be seized upon as valuable consideration for the interest which the plaintiffs have acquired, if they have acquired an interest, in this policy. It is true that some cases were called to my attention which were said to be incon-

sistent with the law as laid down in the cases I have already mentioned. One of those cases was *Middleton v. Pollock* (5). In that case SIR GEORGE JESSEL, M.R., came to the conclusion that there had been what he refers to as good consideration, and what, no doubt, was a valuable consideration for the purposes of the question he was considering, which question arose under the statute of 13 Eliz., c. 5 [relating to fraudulent conveyances: repealed by Law of Property Act, 1925, of which see now s. 172]. I am not quite sure that I entirely understand the case, because it will be remembered that the statute of Elizabeth by s. 1 avoided all conveyances and transfers of property which were made with the intent to defraud and delay creditors, but by s. 5 it excepted it from the provisions of the Act any transfer or conveyance made bona fide for good consideration to a person having no notice of the fraudulent intent. I am not entirely satisfied whether the Master of the Rolls, in his judgment, is dealing with the question whether there was a fraudulent intent, or whether he is dealing with the question whether, admitting there was a fraudulent intent, the persons claiming were within the protective proviso. But of this I am certain—that, on the particular circumstances of the case, which I need not go into, SIR GEORGE JESSEL, M.R., did come to the conclusion that there was good consideration, and, that being so, he practically held that the case was not the same sort of case as *Re Barker's Estate* (4) which he had shortly before decided.

I had also called to my attention another case where VAUGHAN WILLIAMS, L.J., used some expressions with regard to consideration, from which I was asked to infer that, in his opinion, the mere existence of a debt was sufficient consideration for a conveyance without any actual forbearance or promise to forbear. I do not so read the remarks of the learned judge, and as he held in that case that there was good consideration, it can only amount to a dictum, and I do not think it is a dictum I ought to follow in face of all the other authorities which appear to go in the other direction. It was also said that if I examined *New, Prance, and Garrard's Trustee v. Hunting* (6), and also in the House of Lords under the name of *Sharp v. Jackson* (6), I should find that it must have been assumed throughout that case that a security given by deed, but not communicated, was given for valuable consideration, the valuable consideration consisting of an antecedent debt. As a matter of fact, I find no such thing in the case itself. The case itself turns entirely upon what is or what is not fraudulent preference for the purposes of the administration of the law in bankruptcy. But I am asked to infer that the judges in the case must have thought that an antecedent debt was good consideration for a further security, because it is said that, if they had not done so, the particular security which was in question there would have been voluntary, and, therefore, bad in bankruptcy under a different section of the Act. I do not know how that may be, but I do not think that any inference can be drawn from a case of that sort which would justify me in treating it as a decision of law on a matter with which the judges were evidently not intending to deal in the slightest degree.

It seems to me, therefore, that there is no authority against, and a great many authorities in favour of, the proposition that in order to have a consideration for a further security there must be an agreement, express or implied, to give time or some further consideration, or else there must be an actual forbearance which ex post facto may become the consideration to support the deed. None of those things exists in this case; therefore, I am bound to hold that the deed was purely voluntary, and that the interest which was acquired under it, if they did acquire any interest under it, by the persons in whose favour it was executed was not an interest acquired for value. That being the case, I do not think it is necessary for me to give a decision on the other point—namely, whether the deed itself was executed upon a condition which was not fulfilled and is merely an escrow, or whether it was executed unconditionally to take effect in any event. I do not intend to go into those questions, because I am satisfied that, in any event, even if I treat the deed as having been delivered unconditionally, the plaintiffs are not

A assigns for value within the meaning of the exception contained in the policy, and, therefore, the policy is, as between the insurance society and them, void under the condition. This action must be dismissed.

Solicitors : *Wigan, Champernowne & Prescott; Capron & Co.*

[Reported by R. C. CARTER, ESQ., Barrister-at-Law.]

B

C

SMITHIES v. NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS AND OTHERS

[COURT OF APPEAL (Vaughan Williams, Buckley and Kennedy, L.JJ.), October 27, 28, 29, 30, November 2, 3, December 21, 1908]

D

[Reported [1909] 1 K.B. 310; 78 L.J.K.B. 259; 100 L.T. 172; 25 T.L.R. 205]

Trade Union—Branch—Relationship with union—Principal and agent—Request by branch for sanction to strike—Imputation to union of knowledge of branch—Duty of branch to disclose all material facts.

E

The knowledge of an agent, when such knowledge is the knowledge of something material to the particular transaction and something which it is the agent's duty to communicate to his principal, is a matter by which the principal will be affected, and, if it is the agent's duty to make the communication, the principal is affected with notice whether the communication was in fact made or not. But, per VAUGHAN WILLIAMS, L.J., and KENNEDY, L.J.,

F

the fact that a branch of a trade union is asking the union to sanction a strike does not cause the union and the branch to stand in the relation of principal and agent, or in such a relation that the duty to communicate would justify the imputation of the knowledge of the branch as the knowledge of the trade union. The position would seem to be that, the two bodies having a common object, the one engages with the other that it will not take a course which will in all probability throw an obligation to make money payments for maintenance on the other body without the sanction of that other body. The body asking for the sanction is plainly bound to make full disclosure of all material facts, especially in the case in which the course for which sanction is asked is a course which, if taken without sufficient cause, may damage third persons and possibly throw liabilities on both the body asking the sanction and the body giving its sanction. But the general proposition that, where a person asks for sanction and it is given, the person giving it must have imputed to him all the knowledge of the petitioner is too wide.

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Per BUCKLEY, L.J. : Where, on the construction of the rules of a trade union, the effect of the rules was that the branch stood towards the union in such a position as that the branch was a member of the union which owed to the union the duty of communicating to the union all material facts within their knowledge relevant to the question whether the union should or should not sanction a strike, if the branch, with the sanction of the union, declared a strike, such knowledge as the branch at that time had of facts material to the strike was, for purposes of liability, to be attributed to the union.

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Trade Union—Branch—Ratification by union of action of branch—Liability of union for illegal action—Tort—Inducement to break contract—Justification—Breach by party to contract of independent contract with party procuring breach.

By an agreement dated April 12, 1904, and made between a federation of employers in the plasterer's trade and a trade union, disputes between employers and employed were to be referred to arbitration. A dispute arose in or about December, 1904, between the plaintiff, a member of the masters' federation, and his workmen, and by a resolution passed by the branch committee of the trade union, acting with the sanction of the trade union, the workmen in the plaintiff's employ were called out on strike. Of these workmen two were employed under agreements which were still running, but when they sanctioned the strike the trade union were not aware of the existence of these agreements. When, however, they became aware of them they continued to pay strike pay to all the workmen in order to keep them out on strike. Both the trade union and the branch committee had a bona fide belief that the plaintiff was seeking to avoid having recourse to arbitration as provided by the agreement of April, 1904. In an action by the plaintiff against the trade union and the branch secretary for damages for procuring the workmen to break their contracts of employment with him.

Held: the trade union, by continuing to pay strike pay after knowledge of the existence of the workmen's contracts, had ratified the action of the branch in procuring the breaches of contract; the honest belief of the local branch and the trade union that the plaintiff intended to evade the settlement of the dispute by the means laid down by the agreement of April 12, 1904, did not justify either the action of the branch in calling the men out on strike or the ratification of that action by the union, the branch at the time of their action and the union at the time of their ratification knowing of the contracts of the two workmen which were then still in existence; and, therefore [the action having been brought before the passing of the Trade Disputes Act, 1906] the union was liable to the plaintiff in damages.

Per VAUGHAN WILLIAMS, L.J.: I should have arrived at the same conclusion even if the plaintiff had in fact refused to arbitrate.

Per BUCKLEY, L.J., and KENNEDY, L.J.: Even if the plaintiff was in fact in breach of the agreement of April 12, 1904, that fact would not justify the defendant union in procuring the two workmen to break their contracts with the plaintiff.

Notes. In view of the provisions of s. 3 of the Trade Disputes Act, 1906 (25 HALSBURY'S STATUTES (2nd Edn.) 1269), that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or is an interference with the business or employment of some other person" this case must be read as applying to cases other than those in which a trade dispute is in contemplation or existence.

Considered: *Camden Nominees, Ltd. v. Slack*, [1940] 2 All E.R. 1. Referred to: *Gosney v. Bristol Trade and Provident Society*, post p. 868; *Long v. Smithson* (1918), 88 L.J.K.B. 223; *Pratt v. British Medical Association*, [1918-19] All E.R. Rep. 104; *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142; *Bents Brewery Co. v. Hogan*, [1945] 2 All E.R. 570.

As to torts arising out of the operations of trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 516 et seq., and for cases see 43 DIGEST 112 et seq.

Cases referred to:

- (1) *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A.C. 384; 75 L.J.K.B. 961; 95 L.T. 561; 22 T.L.R. 543, H.L.; 43 Digest 95, 994.
- (2) *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K.B. 732; 71 L.J.K.B. 994; 87 L.T. 493; 51 W.R. 115; 19 T.L.R. 20; 47 Sol. Jo. 29, C.A.; 43 Digest 116, 1204.

A Also referred to in argument :

South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 43 Digest 114, 1186.

Bawden v. London, Edinburgh and Glasgow Assurance Co., [1892] 2 Q.B. 534; 61 L.J.Q.B. 792; 57 J.P. 116; 8 T.L.R. 566; 36 Sol. Jo. 502, C.A.; 29 Digest 60, 200.

B

Quinn v. Leathem, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, 1179.

Allen v. Flood, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, 1164.

C

Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 43 Digest 118, 1226.

Mogul Steamship Co. v. McGregor, Gow & Co., [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp. M.L.C. 120, H.L.; 43 Digest 10, 51.

Hirey v. Weighill (1905), 49 Sol. Jo. 279, C.A.; 43 Digest 125, 1269.

D

Lodge Holes Colliery Co., Ltd. v. Wednesbury Corpn., [1908] A.C. 323; 77 L.J.K.B. 847; 99 L.T. 210; 72 J.P. 417; 24 T.L.R. 771; 52 Sol. Jo. 620; 6 L.G.R. 924, H.L.; 26 Digest (Repl.) 346, 637.

Appeal by the plaintiff from a decision of LORD ALVERSTONE, C.J.

The plaintiff, William Smithies, was a master plasterer carrying on business at Birmingham, under the style of C. Smithies & Co. In the course of his business he undertook contracts for plastering and scagliola work in connection with buildings in the course of erection, and to fulfil such contracts it was necessary for him to employ skilled workmen and labourers. He was a member of the National Association of Master Plasterers. The defendant association, the National Association of Operative Plasterers, was a registered trade union having as its object the protection of the interests of operative plasterers. The affairs of the association were regulated by an executive council whose meetings were held in London. Local branches of the association were appointed by the executive council and existed in most large towns in the United Kingdom, including Birmingham, at which branches matters arising in the particular district were dealt with by a committee selected from the local members of the association, who acted under the surveillance of the association and its executive council. By cl. 5 of an agreement, dated April 12, 1904, which was headed "National Agreement, otherwise General Rules, as agreed between the National Federation of Building Trade Employers of Great Britain and Ireland, the National Association of Master Plasterers, and the National Association of Operative Plasterers":

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"In the event of any dispute arising on any job or works, the district officials of the National Association of Operative Plasterers shall send written notice to the local Association of Master Builders and Master Plasterers, who shall inform them whether the said employer is a member of either of these bodies. If so, a strike shall not be sanctioned by the National Association of Operative Plasterers until six clear working days have expired from receipt of such notice, during which time the matter shall be considered by a joint committee of employers of plasterers and members of the operatives' union (such committee to be elected annually) with a view to an amicable settlement; failing a local settlement, reference shall immediately be made to a standing joint committee, consisting of members of the employers' and operatives' central bodies, and until they have met and discussed the grievance, no strike or lock-out shall be sanctioned either by the National Association of Operative Plasterers or by the Employers' Association. With regard to the alleged refusal of members of the National Association of Operative Plasterers to work with

workmen who may not belong to a trade union, it is understood the men the operative plasterers object to work with are defaulters, and other men who have been shown to the employers to have made themselves specially objectionable to the union men." A

The plaintiff had in his employment as skilled plasterers and scagliola workers, John William Forrester, who was engaged for five years by the plaintiff under an agreement in writing dated Dec. 23, 1901, and William Henry Ecclesby, who was similarly employed under a three years' agreement in writing with the plaintiff dated Mar. 5, 1904. In September, 1904, the plaintiff engaged as a foreman one Gibbs who was a "defaulter" within cl. 5 of the National Agreement. On Nov. 28, 1904, Duckett, the secretary of the local branch of the association, wrote to the secretary of the Birmingham Master Builders' Association complaining that the plaintiffs had a defaulter in his employ, and asking for a meeting of the standing joint committee under cl. 5 of the agreement of 1904. On Dec. 1, 1904, a meeting of the local conciliation committee, consisting of six masters and six men, met, when the masters excluded the men from their discussion and determined that under the Birmingham and district trade rules they had no power to deal with the question which had arisen, because the work on which the foreman was engaged was more than five miles distant from Birmingham. On Dec. 6, 1904, Mr. Hassal, secretary of the master plasterers, wrote to Mr. Bigwood, secretary of the local master builders, suggesting that if a settlement could not be effected the matter should be referred to the standing joint committee, and this suggestion was communicated to Duckett by Bigwood on Dec. 14, 1904, and approved by Deller on behalf of the National Association of Operative Plasterers on Dec. 17, 1904. On Dec. 30, 1904, Deller wrote to Hassal expressing the willingness of the men to meet the masters, but for some unexplained reason that letter was not reported to the Employers' Association in the proper way. On Jan. 11, 1905, Duckett wrote to Bigwood demanding a meeting of the joint committee under cl. 5 within six days from that date. On Jan. 12, 1905, notice was sent by Duckett to the men in the plaintiff's employment, including Forrester and Ecclesby, to attend a meeting of the Birmingham local branch of the Operatives' Association. On Jan. 13, 1905, the executive council of the Operatives' Association resolved to indorse the action of Duckett and the branch, and on the same date this resolution was by letter communicated to the branch. On Saturday, Jan. 14, 1905, a meeting of the committee of the Birmingham branch was held, which several of the trade unionists working for the plaintiff attended, and they were told that unless they received instructions to the contrary they were to give an hour's notice on the following Tuesday, Jan. 17. The result was, on Jan. 17, 1905, all the workmen in the employment of the plaintiff, with two exceptions, left their employment, and they were all paid and continued to be paid strike pay by the defendant association. On Jan. 24, 1905, the plaintiff brought the present action against the defendant association; Michael Deller, the general secretary (since dead); H. Duckett, the secretary of the Birmingham branch; Ecclesby and Forrester, the workmen already mentioned, and Stephen Wall, John Ponsford, and John Dear, the trustees of the defendant association in whom the funds and property of the association were vested, claiming damages for unlawfully and maliciously inducing and compelling Forrester and Ecclesby, and the other workmen of the plaintiff wrongfully to break their contracts with the plaintiff on or about Jan. 17, 1905, and to cease to work further for him or to in any way enter his service, and an injunction restraining the defendants from further committing or continuing the said wrongful acts, and from preventing the said men from working in the plaintiff's employment. The LORD CHIEF JUSTICE came to the conclusion that the defendant association authorised and adopted the action of the Birmingham branch, and that both the association and the branch when they sanctioned the calling out of the plaintiff's workmen, bona fide believed that they were acting within their rights B C D E F G H I

A after having given six clear working days' notice under cl. 5 of the National Agreement. He found as a fact that the executive of the defendant association when they sanctioned the strike did not know of the contracts which Forrester and Ecclesby had entered into, by reason of which they could not, like the other workmen, come out on strike on Jan. 17 without breaking their contracts. He held that the existence of the agreement of April 12, 1904, the express reservation
B therein of the right of the men to object to work with defaulters, and the neglect of the masters to allow the dispute which had arisen to be settled pursuant to the terms thereof, justified the defendant association in sanctioning the strike. He, accordingly, gave judgment for the defendant association, but he gave judgment for the plaintiff for £25 damages for breach of contract as against Ecclesby, and for £25 as against Forrester. The plaintiff now asked for judgment against the defendant
C association and their officials, or in the alternative for a new trial.

By the rules of the National Association of Operative Plasterers :

"Rule 1. Constitution.—(1) This association shall be known as the "National Association of Operative Plasterers," and shall consist of as many districts as will strictly conform to the following rules. Each district to consist of as many
D branches as the plasterers of any city, borough or town may consider necessary, and should one branch be all that is required, it shall be termed a district of this association . . . The registered office of this society shall be situated at 34 New Cross Road, London, S.E. . . . (2) Each district shall consist of branches in close proximity grouping themselves into councils, to be composed of and governed by delegates from each branch. The following is a list of branches
E grouped: . . . 2. Birmingham. . . . (3) The objects of this association shall be to raise by entrance fees, weekly contributions or levies, such funds as will provide for the protection of trade . . . benefits . . . and to regulate the relations between workmen and employers . . . and to exert the utmost endeavours to reduce the hours of labour. . . . Rule 16. Constitution of
F branches.—(1) Any branch numbering not more than twenty members shall have five officers—viz., president, secretary, and three others. Branches having more than twenty members shall appoint as many more as the branch may deem necessary to transact the business of the branch; all paid officers to be paid from their local fund. . . . (5) All branch committees shall be formed in the following manner: President, secretary, together with three elected members. . . . Rule 26. Circumstances under which support must be given.
G —(1) The privilege of every branch or district must be maintained, and if at any time an employer or employers shall attempt to infringe upon the rights and privileges of any district such infringement shall be immediately made known to the general secretary, who shall convene a meeting of the executive and submit the question to their investigation, and they shall take such measures as they may deem most expedient for the immediate resistance of such infringement,
H but no district shall cause their members to cease work without the sanction of the executive. Any district not conforming to this rule shall not be entitled to the protection of the association, and, if support is required, the full particulars of the case must be sent to the executive stating the amount required, which shall be paid from the general fund. (2) When any dispute takes place the same shall be immediately made known to the general secretary, who shall call
I the executive committee together, and send their opinion to the branch within four days. . . . (4) Should the executive committee deem it necessary to call a strike at any time in any district, the executive committee shall make all necessary inquiries, then submit the same to the association to be voted upon, giving the district in dispute the same opportunity of placing their views before the association. . . . (7) The support of the association shall be granted to members refusing to work with non-unionist plasterers, where the executive committee think the best interest of the association will be served by such

refusal, but before ceasing work application must be made to the executive committee. (8) Any district turning out against an infringement of privileges without the sanction of the association shall be entitled to forward an appeal to the association for support, accompanied with a statement from the executive committee. Rule 27. Application for support.—(2) In the event of any member or members being called upon to come out on strike . . . they shall be entitled to strike pay, every effort to be made to bring about an amicable settlement prior to ceasing work; but no branch or district shall cause its members to cease work without first obtaining the consent of the executive council as per r. 26, cl. 1. Rule 28. Reports of disputes.—(1) When a dispute has taken place between the employed and employers of any branch or district . . . the committee of the district shall use their utmost endeavours to settle those questions amicably between the two parties."

Before the appeal was opened the preliminary point was raised that the passing of the Trade Disputes Act, 1906, was a bar to the further maintenance of the action. The point had been taken at the trial before the Lord Chief Justice, when it was overruled. The Court of Appeal now held that the Trade Disputes Act, 1906, did not apply to actions commenced before the passing of the Act, and, therefore, that the preliminary objection failed and the action could proceed.

Lush, K.C., and *McCardie* for the plaintiff.

Simon, K.C., and *Clement Edwards* for the defendant association.

Shearman, K.C., and *E. E. Wild* for the defendant Duckett.

Cur. adv. vult.

Dec. 21, 1908. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—This is an appeal by the plaintiff, a master plasterer, against the decision of the Lord Chief Justice, sitting without a jury.

The action was brought by the plaintiff against the National Association of Operative Plasterers and also against Mr. Duckett, the secretary of the Birmingham local branch of the association, and against two workmen, John Forrester and William Henry Ecclesby, skilled scagliola makers, who had engaged to work for the plaintiff under agreements for terms of years which, at the time of the acts of the defendants complained of, were still running. Besides the association and Duckett and the two scagliola makers, Forrester and Ecclesby, who were members of the Birmingham branch of the association, there were other defendants, Michael Deller, the secretary (now dead), and Stephen Wall, John Ponsford, and John Deer, trustees of the property of the National Association, but no question arises in this appeal with reference to the last-mentioned defendants. The writ in the action was issued against the association before the passing of the Trade Disputes Act, 1906. The association is described in the statement of claim as a registered trade union association. The point was raised on behalf of the association that, it being a registered trade union, the court, after the passing of that Act, could not entertain the action. This preliminary point was overruled by the Lord Chief Justice at the trial, and, in the course of the hearing of this appeal, we have affirmed this decision, being of opinion that the Trade Disputes Act is not retrospective. The claim of the plaintiff against the defendant association and the defendants Deller and Duckett, acting on their own behalf as well as on behalf of the association, was that the defendants, well knowing that Forrester and Ecclesby had agreed to work for the plaintiff for the said terms of years, and that Duckett had threatened on behalf of the defendant association and Deller that if the plaintiff did not forthwith discharge one Gibbs the association would take up the matter against him, wrongfully and maliciously, and with the object of compelling the plaintiff to discharge Gibbs, procured Forrester and Ecclesby and certain other workmen to break their contracts. The defendants Forrester and Ecclesby were sued individually in respect of their breach of contract. They were not called. They broke their contract, acting, the Lord Chief Justice said in his judgment, in

A obedience to the orders of the union; and judgment has been given against each of them for the sum of £25 with costs to be taxed on the county court scale. Against all the other defendants the action was dismissed with costs. The plaintiff has appealed. There is no cross-appeal except that on behalf of the association an appeal was raised on one point by a letter from the defendants' solicitors to the plaintiff's solicitors dated June 25, 1908, which runs thus:

B "Dear Sirs,—*Smithies v. Plasterers' Association*. Having regard to the fact
 C that the decision of the Lord Chief Justice on the trial of this action was wholly
 D in favour of the defendants, it is of course not necessary for us to give any
 notice as to a cross-appeal, notwithstanding that our clients did not agree with
 the findings, &c., of the Lord Chief Justice upon the question of ratification,
 but in order that you may be under no misapprehension we beg to give you
 notice that upon the hearing of your appeal herein we shall if necessary contend :
 (a) that the finding of the Lord Chief Justice upon the question of ratification
 was unsupported by evidence; (b) alternatively that his decision on this matter
 was against the weight of evidence; (c) that there was not ratification in law
 by any of the defendants. We shall also contend that, having regard to the
 Trade Disputes Act, 1906, the court has no jurisdiction to entertain your
 appeal."

The substantial points argued before us have been on the question of (a) the responsibility of the union for the calling out of the men or the inducing Forrester and Ecclesby to remain out with knowledge that they were breaking their agreements; (b) of Duckett, as secretary of the Birmingham branch, which branch is not a defendant in this action.

E It was argued that, having regard to the constitution of the union as established by its rules, the union, the central body, stood to the branch in the relation of principal and agent, or that the branch was a constituent part of one central body—that is to say, the union that is the defendant association—so that the action and knowledge of the branch would be the action and knowledge of the central body.
 F I am of opinion that this contention cannot be justified. I think that there is nothing in the rules of the National Association of Operative Plasterers or their constitution to prevent the reasoning of LORD LOREBURN in *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (1) applying to the present case. The House of Lords in that case held that the branch officials were not, as such, officers or agents of the central body; but, in my judgment, the decision in the House of
 G Lords in no way exonerates the central body from responsibility, if a central body in fact orders or authorises the branch officials wrongfully to withdraw men from their employment.

I propose in the first instance to set forth the findings of fact of the Lord Chief Justice, and to discuss the question whether the defendants, the central body, did give to the officers of the branch such directions as to render the central body responsible, in case it is established either that the calling out of the men or the inducing the men who had come out to stay out was wrongful. The findings of fact of the Lord Chief Justice were the following: (i) That in the month of July, 1903, Gibbs was expelled from the union and from that date ceased to be a member; (ii) that the plaintiff prior to an interview with Duckett in October, 1904, had no knowledge of any trouble or difficulty between Gibbs and the defendant association; (iii) that at the said interview Duckett asked the plaintiff whether he knew that Gibbs was objectionable to the association and a non-union man, and what he (the plaintiff) intended doing about him, and that the plaintiff replied that the matter rested between the association and Gibbs and was no concern of his; (iv) the Lord Chief Justice was not satisfied that the action of the Birmingham branch during the months of November and December, 1904, was not bona fide in order to obtain a decision under cl. 5 of the National Agreement, or that the men were using the occasion for unfairly interfering with Gibbs and the other men working at the

plaintiff's, or that the defendants were endeavouring to force Gibbs to rejoin the National Association of Operative Plasterers; (v) that the defendant association and the Birmingham branch did sanction the men being called out, believing that for the purpose of bringing about a settlement they were acting within their rights after having given six clear days' notice under cl. 5 of the agreement of April 12, 1904; between the masters and operatives in the building and plasterers' trades; (vi) that the local rules did apply to the dispute in this case, so that the local conciliation committee could deal with it, and that the Lord Chief Justice was satisfied that there was an apprehension in the minds of the operative members, rightly or wrongly, that the masters might endeavour to get out of the agreement, and found as a fact that by Dec. 30 the operatives had formed the impression, not without some foundation, that the masters were not willing to deal with the case under cl. 5 of the agreement, and were thinking that the masters were trying to delay; (vii) that, even if the six days' notice provided under cl. 5 mentioned in the notice of Jan. 11 did not expire until the 17th or 18th, the strike was not unlawful under cl. 5, because the men came out on the 17th, the matter having been really pending since Nov. 28, 1904; (viii) that the determination by the masters that under the Birmingham and District Building Trades Rules the conciliation committee had no power to deal with the question that had arisen was ill-founded and wrong; (ix) that Duckett did not know of Forrester's agreement until the evening of Jan. 17 nor even then know of Ecclesby's agreement, and that there was no evidence that the late Mr. Deller, or anyone representing the defendant association, knew of these agreements until the receipt of the plaintiff's solicitor's letter to Duckett dated Jan. 19, which was forwarded to Mr. Deller on the 21st; (x) that the agreement of April, 1904, was made for good consideration, and bound masters and men; (xi) that the defendant association in sanctioning the strike were ignorant that any of the men (for example, Forrester and Ecclesby) were bound by contract, and that the existence of the agreement of 1904 and the express reservation therein of the right of the men to object to work with defaulters, and the neglect of the masters to allow the dispute which had arisen to be settled pursuant to the terms thereof, justified the defendants in sanctioning the strike; (xii) that the members of the association and the Birmingham branch bona fide believed that the masters were endeavouring to avoid having the dispute settled under cl. 5 of the agreement, and that they called the men out, not with a view of getting any contracts broken, but because they could not get the dispute settled in a manner contemplated by the agreement; (xiii) that the statement of Duckett and other witnesses that, had the decision of the conciliation board respecting Gibbs and the other defaulters been against them, they would have acted upon it without further objection is true; (xiv) that the central association—that is, the defendant association—authorised and sanctioned the men being called out on Jan. 17 (no doubt in ignorance of the existence of the agreements between the plaintiff and Forrester and Ecclesby), and, therefore, if the act of the Birmingham branch gave rise to a cause of action, "in my judgment the defendant association is responsible"; (xv) that the defendant association did ratify the action of the Birmingham branch after they knew that Forrester and Ecclesby had been under agreements, and continued to pay strike pay, and that the defendants and the Birmingham branch discussed the strike after Jan. 19; (xvi) that the defendant association allowed Forrester and Ecclesby to remain out with knowledge that they were breaking their agreements. But the Lord Chief Justice, having found these facts, including the facts as to ratification, held that, as the action of the association and the Birmingham branch up to Jan. 17 was bona fide, with a view to bringing about a settlement under cl. 5, and, as the men were called out under the power recognised by the agreement in the event of the men failing to obtain a settlement of their grievances as to working with defaulters, the ratification was not sufficient to enable the plaintiff to recover against the defendant association, on the ground that they wrongfully induced Forrester and Ecclesby to break the agreement.

A I want to say at this point that, agreeing as I do with the finding of the Lord Chief Justice as to the conduct of the defendant association, which he calls "ratification," I do not think this term quite accurate. I think that the defendant association assisted in supporting the Birmingham branch in encouraging the scagliola men to stay away, although they knew that the scagliola men were guilty of a breach of contract in staying away. I think that that is a wrongful act, but I do

B not think that the word "ratification" is an accurate term to use in respect of it but, apart from that, I wish to say, as to the justification which the Lord Chief Justice adopts in respect of this act, whether it is properly called ratification or not, that with all deference I cannot entirely agree with this conclusion of the Lord Chief Justice. I cannot agree that the agreement recognises a power in the defendant association, or in the branch, in the event of the men failing to obtain

C a settlement of their grievances as to working with defaulters, to call out the men at a date when the consequence would be that some of the men, by coming out at that date, would necessarily break the agreements under which they were employed, even if there had been a failure to obtain a settlement under cl. 5 through no fault of the men, of which I am by no means sure. Nor do I think that the judgment of LORD COLLINS in *Read v. Friendly Society of Operative Stonemasons of*

D *England, Ireland and Wales* (2) recognises that, under circumstances like those in the present case, there may be a justification even for inducing people to break their contracts. The Lord Chief Justice, after referring to the judgment of LORD COLLINS, says :

E "But so far as it is for me, in my opinion, a refusal by the masters to refer to arbitration a question which they and the workmen had specially agreed should be so dealt with, might justify them acting bona fide under cl. 5, even though the consequence might be that some agreements might be broken."

I suppose this means, so far as it is applicable to ratification, that, if the men were called out in the honest belief that the masters had refused to refer to arbitration a question which they and the workmen had specially agreed should be so dealt with, the defendant association might ratify the action of the Birmingham branch and continue strike pay after they knew that Forrester and Ecclesby had been under agreements such as those in this case. I cannot agree. The Lord Chief Justice does not find as a fact that there was any such refusal by the masters; on the contrary, he says :

G "I find as a fact that by Dec. 30 the operatives had formed the impression, not without some foundation, that the masters were not willing to deal with the case under cl. 5 of the agreement, and were thinking that the masters were trying to delay."

And I do not think that this honest belief would justify either the action of the Birmingham branch or the ratification by the union, if at the time respectively of the action of the branch or the ratification by the defendant association there was

H knowledge of the terms of the engagement of Forrester or Ecclesby. Although I have mentioned that the Lord Chief Justice does not find refusal by the masters, I should have arrived at the same conclusion even if the masters had in fact refused to arbitrate. As to the knowledge of the Birmingham branch, I think that the branch had this knowledge on Jan. 14, three days before the 17th, the day on which the men were called out, and that the defendant association also had this

I knowledge before the ratification, as indeed is found by the Lord Chief Justice in his judgment. My conclusion as to the knowledge of the branch is based on this—that the men's section of the masters' and men's conciliation committee was, in fact, a committee of the branch, and, in my opinion, the knowledge of this committee of the branch is the knowledge of the branch itself.

The conclusion which I have arrived at, if right, is sufficient to dispose of this case, and in no way conflicts with the judgment of the House of Lords in *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (1), because

in that case the masters, before the union approved and supported the action of the men, insisted on new terms of employment as a condition of taking the men back. It was urged before us that the judgment of LORD COLLINS is an authority for the proposition that you can excuse procuring a man to break his contract; and it was said that occasionally the court or a judge restrained a man from performing his contract. But these injunctions only go to restrain a contract which ought never to have been made.

I should like, however, before finishing my judgment, to say a few words as to the knowledge of the defendant association on Jan. 17, the day on which the men were called out, for I have had some doubt whether, for this purpose, the knowledge of the branch was the knowledge of the defendant association. No doubt the knowledge of an agent, when such knowledge is the knowledge of something material to the particular transaction and something which it is the agent's duty to communicate to his principal, is a matter by which the principal will be affected, and, if it is the agent's duty to make the communication, the principal is affected with notice whether the communication was in fact made or not. But I have to consider in the present case whether the fact that the branch was asking the union to sanction the strike either makes the union and the branch stand in the relation of principal and agent, or in such relation that the duty to communicate would justify the imputation of the knowledge of the branch as the knowledge of the defendant association. I have grave doubts as to this. It is quite clear that the relation is not that of principal and agent. The case seems to be that, two bodies having a common object, the one engages with the other that it will not take a course which will in all probability throw an obligation to make money payments for maintenance on the other body without the sanction of that other body. It is, of course, plain that the body asking for the sanction is bound to make full disclosure of all material facts, especially in a case in which the course for which sanction is asked is a course which, if taken without sufficient cause, may damage third persons, and possibly throw liabilities on both the body asking the sanction and the body giving its sanction. But the general proposition that, where a person asks for sanction and it is given, the person giving it must have imputed to him all the knowledge of the petitioner seems to me too wide. Hitherto I have only dealt with the case against the defendants other than Duckett. The case against Duckett depends on his knowledge of the scagliola contracts. He says that he did not know of these contracts, and the Lord Chief Justice has found that until Jan. 17 he did not know. I do not see my way to differ from the Lord Chief Justice, who saw and heard the witnesses as to this question of fact.

BUCKLEY, L.J.—The field in this case is so large that it is neither desirable nor useful to endeavour to cover the whole ground again in a second judgment. I shall endeavour to compress what I have to say under what seem to me to be the four principal heads in the case—namely, first, knowledge; secondly, ratification, if that be the right word; thirdly, liability; and fourthly, justification.

First as to knowledge. It is essential at the outset to form an opinion as to the position occupied by the conciliation committee of the operatives. It is a body which owes its existence to r. 11 of the local Birmingham Trade Rules of Operative Plasterers dated April 1, 1904. That rule provides for a board of conciliation, to consist of six employers and six workmen. It does not define how the members of this board of conciliation are to be elected. The rules of the National Association of Plasterers provide for committees, but not in so many words for this conciliation committee. There is nowhere any definition of the mode of its election. As a matter of fact, as appears by the book containing the minutes of the Birmingham branch, the resolutions for the election of the conciliation committee of workmen and the minutes of the proceedings of that committee are alike included in the book which records the proceedings of the Birmingham branch. The six workmen to serve on the conciliation committee were in point

A of fact appointed at a meeting of the branch. Further, I find that the conciliation committee at their meetings were dealing with business which was business of the branch, and I find that in the minutes of the executive council of the union in London the communications from and acts of the conciliation committee are treated as being communications from and acts of the branch. In my opinion, the workmen's conciliation committee was, for all purposes material to the present case, B a committee of the branch. Looking at the judgment of the Lord Chief Justice, it is obvious that he was of the same opinion, for many passages may be pointed to in his judgment in which he speaks of acts which were in fact done by the conciliation committee as having been done by the branch. Notably he says that he finds as a fact that the defendant association and the Birmingham branch did C sanction the men being called out. This sanction was in fact, so far as the branch was concerned, given by the conciliation committee. Holding, therefore, as I do, that the workmen's conciliation committee was a committee of the branch, that committee had on Jan. 14 knowledge of Forrester's agreement; and knowledge by the conciliation committee was, I think, knowledge by the branch.

D It is necessary next to determine what were the relative positions of the union and the branch. Rule 1 provides that the association shall consist of districts, and each district may consist of branches. The branch is not the association domiciled for local purposes in a locality, but is what I may call (borrowing an expression from another branch of the law) a subordinate integer, and exists as a member of the association. The branch under the rules is in certain respects unable to act without the sanction of the association, and is the body from whom the association is entitled to receive information to guide the association in determining whether E to give or refuse sanction. Then it is provided by the rules—r. 26 (1)—that no district shall cause its members to cease work without the sanction of the executive; and r. 26 (4) contains a power in the executive council to close a strike. Rule 27 (2) provides that no branch or district shall cause its members to cease work without first obtaining the sanction of the executive council as per r. 26 (1). The effect of the rules is, I think, that the branch stood towards the union in such a position as F that the branch was a member of the union which owed to the union a duty of communicating to them all material facts within their knowledge relevant to the question whether the union should or should not sanction a strike. If the branch, with the sanction of the union, declared a strike, such knowledge as the branch at that time had of facts material to the strike is, I think, for the purposes of liability, to be attributed to the union. The branch had during December (see the minutes G of the executive council of, for example, Dec. 1, 1904 and Dec. 15, 1904) been in communication with the union upon the question of the strike, and the union had resolved to support the branch. Under these circumstances it was, in my opinion, the duty of the branch to acquaint the union with the fact, which the branch by its committee knew on Jan. 14, 1905, that Forrester had an agreement with Mr. Smithies. The union had, moreover, after receipt of Duckett's letter of Jan. 11, H which stated an intention to strike on Jan. 17, resolved to "indorse the action reported," that action being to withdraw on the expiration of six days' notice from Jan. 11 if not amicably arranged in the meantime. This was communicated to the branch by the letter of Jan. 13. That letter contains this passage:

I "Concerning the matter of objectionables, I have to inform you that the whole of your committee's actions have been endorsed, including final resolutions to withdraw on the expiration of six days from the 11th."

The union had thus delegated to the branch, or given to the branch authority to strike in the event named. In this state of facts the knowledge of the branch on Jan. 14 was, I think, the knowledge of the union for all purposes of liability of the union in the matter of the strike.

The facts upon this part of the case differentiate the present case from *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (1). In that

case, in fact, the first head with which the Lord Chancellor dealt was not knowledge, but agency. These are not necessarily the same. But, secondly, whether I am right or not in attributing to the union knowledge on Jan. 14, the next point is that the branch, as distinguished from the conciliation committee, had by Duckett, its secretary, on the evening of Jan. 17, and the union by Deller, its secretary, had, upon receipt of the letter of Jan. 21 actual knowledge of Forrester's agreement, and also, as would appear by the letter of Jan. 21, of Ecclesby's agreement; and after that knowledge the union maintained the strike by paying strike pay "to keep the men in a fighting humour," and "to succeed in the job to keep some of them away." In so doing the union was procuring Forrester and Ecclesby to commit continuing breaches of the contracts which bound them to serve the plaintiff for the residue of unexpired terms. This, in my judgment, was an act which cannot be justified under the judgment of the House of Lords in *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (1). The facts there were that the union in the first instance declared the strike illegal and entirely disapproved of it; that, subsequently, the masters were willing to take the men back, but only under new contracts of service upon such terms, which the men were not willing to accept. In this state of facts the House of Lords held that the subsequent payment of strike pay did not create liability in the union. The union had disapproved the act which was wrongful, and were but supporting the men in acts which were rightful. The men were not bound to make new contracts on new terms. The headnote of the report of *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (1) at [1906] A.C. 384 does not, I think, accurately state the result of the decision. Words require to be added. The headnote, I think, should read thus: "Where workmen strike in breach of their contracts, those who help to maintain the strike by supporting the workmen, after their current contracts have expired, in a refusal to enter into new contracts of service on new terms, and for that purpose give them money and counsel, are not liable to pay damages," and so on.

In the present case I think there was a ratification, or rather I should prefer to say there were acts done with actual knowledge in support of the men in continuing a breach of contract, and that from such ratification or acts there resulted liability. At this point I find myself again in agreement with the Lord Chief Justice. He says, "I find as a fact that they [the union] authorised and sanctioned the men being called out on Jan. 17." I understand his next words to mean "and, although they did that in ignorance of the existence of the Forrester and Ecclesby agreements, yet, if the act of the Birmingham branch gave rise to a cause of action, the union is responsible." In my judgment, the act of the Birmingham branch did give rise to a cause of action. In this I differ from the Lord Chief Justice. He assented to the second contention of counsel for the association "that the existence of the agreement of April, 1904, and the express reservation therein of the right of the men to object to work with defaulters and the neglect of the masters to allow the dispute which had arisen to be settled pursuant to the terms thereof, justified the defendants in sanctioning the strike." To consider how this stands it is necessary to refer to the National Agreement. Clause 5 of the agreement in substance provided that in case of a dispute there should be, first, a reference to the conciliation committee; and, secondly, failing a local settlement, reference should immediately be made to a standing joint committee; and that, thirdly, until they had met to discuss the grievance there should be no strike. I accept the Lord Chief Justice's findings that the union and the branch bona fide believed that the masters were endeavouring to avoid conciliation under cl. 5. But I also think, and the Lord Chief Justice has expressed no opinion to the contrary, that it is not made out that the masters were in fact endeavouring so to do. During the period beginning with Dec. 1 it seems to me that the masters, while maintaining (perhaps wrongly) that the local conciliation committee had not jurisdiction, were taking the proper steps to obtain a local committee which could locally deal

A with the matter. Their endeavours in that direction broke down, because Mr. Hassal wrote the letter of Dec. 21. Deller's letter of Dec. 30 seems to me to have suggested a reasonable solution, which Bigwood entertained, but which came to nothing owing to Duckett's letter of Jan. 11. I find no fault with the last-mentioned letter, demanding, as it did, two things—namely, first, a local meeting, and, failing a local settlement, then, secondly, a reference to the joint committee.

B But the meeting of the workmen's conciliation committee of Jan. 10, which authorised that letter of the 11th, went on with a resolution which left no room for the meeting of the joint committee at the expiration of the six days. On Jan. 17 the strike was called without any opportunity of resort to the joint committee, with the result that Forrester and Ecclesby were called upon to break, and did break, contracts which bound them towards the plaintiff to serve for a term of years. For

C this act the defendant union, in my opinion, are liable. But, lastly, it is said that the act was justified.

No doubt there are circumstances in which A. is entitled to induce B. to break a contract entered into by B. with C. Thus, for instance, if the contract between B. and C. is one which B. could not make consistently with his preceding contractual obligations towards A., A. may not only induce him to break it, but may invoke the assistance of a court of justice to make him break it. If B., having agreed to sell a property to A., subsequently agrees to sell it to C., A. may, of course, restrain B. by injunction from carrying out B.'s contract with C., and the consequence may ensue that B. will be liable to C. in damages for breaking it. *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales* (2), was relied on upon this part of the case. That was an action by C. against B. in my supposed parties, and C. recovered damages. When the facts are those of the present case, wholly different considerations arise. I have no doubt that it might be a justification (to take the facts of the present case) if the union had done no more than induce Forrester to break a contract which the plaintiff, having regard to the provisions of the National Agreement, never ought to have made with Forrester. But this is not the contention which is raised. The contention of the defendants here is: "We were entitled to induce Forrester to break his contract with you, because you had broken your contract as contained in the National Agreement with us." This is setting up that, where there are two independent contracts, the breach of the one by the one party entitles a breach of the other by the other party. This contention, in my opinion, cannot be maintained.

G For these reasons I think that the union are liable in damages. As regards Duckett I need not say much. The Lord Chief Justice finds the facts as to the interviews between the plaintiff and Duckett to have been to the effect which the plaintiff stated. Duckett was the moving spirit in procuring the union to take the steps which they took. His means of knowledge and his knowledge in fact were as large as, if not larger than, that of the union, except that knowledge is not to be imputed to him, as I think it is to be imputed to the union, as stated at the beginning of this judgment. But, after knowledge in fact of the contracts for unexpired terms of years, he helped to maintain Forrester and Ecclesby in continuing breaches of those contracts. He, I think, also is liable. In this I have the misfortune to differ from VAUGHAN WILLIAMS, L.J. The result is that, while accepting all the Lord Chief Justice's findings of fact, and agreeing with him, as I do, upon the fact of ratification, I differ from him, first, upon the question of knowledge, for I think that the union must be taken to have known on Jan. 14; secondly, upon the consequence which follows upon the fact of ratification, or, as I prefer to call it, the fact that the union, after knowledge of the existing contracts supported the Birmingham branch in encouraging and supporting the men in acting in breach of contract; and, thirdly, upon the question of justification. There was, I think, no justification. I think, therefore, that the plaintiff is entitled to succeed, with the costs of the action and appeal against both the association and Duckett.

KENNEDY, L.J.—There can be no doubt in this case, upon the findings of fact stated in the judgment of the Lord Chief Justice, which I accept without reserve, that the Birmingham branch with knowledge that it was thereby inducing and procuring a breach of the contracts existing between Forrester and Ecclesby and the plaintiff, called upon Forrester and Ecclesby to leave the employment of the plaintiff. There is also no doubt that the defendant association, by their letter of Jan. 13 to Mr. Duckett, the secretary of the Birmingham branch, approved the intention of the branch, which had been communicated to the defendant association, to withdraw the men who were members of the association from the plaintiff's employment, and that this approval was communicated without knowledge on the part of the defendant association that Forrester and Ecclesby were under special contracts with the plaintiff which could not legally be terminated by the ordinary notice.

Having regard to the decision of the House of Lords in *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (1), and to the rules of this association, I cannot hold that the relations of the association to the branch were such as to make the acts of the branch, however illegal, the acts of the association, or such as to justify, as an inference of law, that what the branch knew the defendant association knew also. The authorisation of a strike—that is what the "withdrawal of workmen" means in the letter of Jan. 13—does not, in my view, necessarily imply the authorisation of an illegal cessation of work. If the matter had, so far as the action of the association was concerned, stopped there, the association could not, in my opinion, properly have been held liable for the act of the branch in persuading Forrester and Ecclesby to break their contracts with the plaintiff. But it did not stop there. As the Lord Chief Justice has found as a fact, when the defendant association subsequently learned that Forrester and Ecclesby were breaking their contracts with the plaintiff in leaving his service, as they had done, under the directions of the branch given on Jan. 14, the defendant association, by paying strike pay to these men, ratified the action of the branch in giving those directions, as part of the "withdrawal" of the men authorised by the defendant association in the letter of the 13th. In my opinion, by the same action of giving strike pay to these men, the defendant association further, and apart from ratification, made themselves liable, because they thereby induced and procured a continuing breach of contract on the part of the men. In so holding I am, of course, not venturing to depart from the law laid down in the judgment of the House of Lords in *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (1). The association in that case gave strike pay only when the men's contract of employment had been terminated by the masters, who had refused further to employ the men except under a new contract.

So far I entirely agree with the judgment of the Lord Chief Justice. But he has held further that, although this was so, the association is not liable in damages to the plaintiff, because the conduct of the local association of master builders and plasterers, to which the plaintiff was himself a party, had been such as to justify the action of the defendant association. In April, 1904, the Association of Master Builders and Master Plasterers had entered into an agreement with the defendant association for the reference of disputes to arbitration or conciliation, and the matter which led to the trouble in the present case was undoubtedly a dispute within the meaning of that agreement. The Lord Chief Justice has found as a fact that the action of the Birmingham branch and the association in regard to the strike resulted from a bonâ fide belief that the masters were endeavouring to avoid having the dispute settled under the agreement, and that Forrester and Ecclesby, as well as other men in the plaintiff's employment who were not, like Forrester and Ecclesby, under special contracts, were called out, not with a view of having contracts broken, but because, "not without some foundation," the operatives believed that they could not get the dispute settled in a manner contemplated by the agreement. I am myself by no mean sure, having regard to the language of the Lord Chief Justice, that he did not mean to go further and find that in fact the Master Builders' and

A Plasterers' Association did neglect or refuse to abide by the agreement of 1904 in regard to the reference of this dispute under cl. 5 of that agreement; and the language used by the president of the Masters' Association on Jan. 25, 1905, which is in evidence, appears to me rather to indicate that this was the true state of affairs. I do not think that it matters which interpretation of the Lord Chief Justice's judgment on this point is correct. For, even if the finding was not merely
B that the men bonâ fide and not without some foundation believed that the masters were endeavouring to evade compliance with the agreement of 1904, but that in fact the masters were so endeavouring, I am of opinion, with sincere deference to the Lord Chief Justice, that this fact is not sufficient justification or excuse in law for the defendant association ratifying the action of the branch in procuring the breach of contract on the part of Forrester and Ecclesby or for their procuring a continuation of that breach. The agreement of 1904 between the Masters' Association and the
C Operatives' Association and the agreements between the plaintiff and Forrester and Ecclesby were independent contracts. The breach by B. of his contract with A. cannot, I think, properly be held to justify or excuse A. in procuring C. to break an independent contract with B. Nor do I think that it would make a material difference if A. be an association of which C. is a member. I do not think that the decision in
D *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales* (2), or anything said by COLLINS, M.R., in that case, justifies a contrary view. In my opinion, the defendant association are liable in damages to the plaintiff.

There is a further appeal in the case of the defendant Duckett, in whose favour the Lord Chief Justice gave judgment. So far as regards authorising the calling out of Forrester and Ecclesby, the Lord Chief Justice has found as a fact that at the
E time these men were told to leave the plaintiff's work Duckett did not know of their special agreement of service. That was a question of fact depending upon oral evidence, and I see nothing to justify a reversal of that finding. It is urged, however, by the plaintiff in this Court of Appeal that, even if that view be accepted, inasmuch as Duckett, who was the branch secretary, after he came to know the facts, in correspondence with Deller, the secretary of the defendant association, supported
F the title of these men to strike pay, and inasmuch as the allowance of such pay, when authorised by the association, passed, as I understand the facts, through Duckett's hands, he must be treated as conspiring with the defendant association to procure Forrester and Ecclesby to continue their breaches of contract, and therefore, he ought to be held liable to the plaintiff in this action. Upon the whole, I do not feel myself able to accept this view. He was corresponding with the secretary of the
G association merely as the secretary of the local branch, and in paying strike pay to the men he was acting merely as a sort of conduit-pipe in the performance of his duty, carrying out a formal duty of his employment. Agreeing with VAUGHAN WILLIAMS, L.J., upon this point, I think that in Duckett's case the appeal should be dismissed.

Order accordingly.

Solicitors: *Ward, Bowic, & Co.*, for *Walthall & Pritchard*, Birmingham; *Pattinson & Brewer*.

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

ANGEL v. JAY

[KING'S BENCH DIVISION (Darling and Bucknill, JJ.), December 8, 9, 1910]

[Reported [1911] 1 K.B. 666; 80 L.J.K.B. 458; 103 L.T. 809;
55 Sol. Jo. 140]*Landlord and Tenant—Lease—Rescission—Innocent misrepresentation by lessor.*

The court will not rescind an executed lease under which the lessee has gone into possession on the ground of an innocent misrepresentation by the lessor, e.g., as to the condition of the drains.

County Court—Jurisdiction—Equity jurisdiction—Rescission—Lease—Value of property more than £500—Interest of lessor less than £500—County Courts Act, 1888 (51 & 52 Vict., c. 43), s. 67 (4).

By the County Courts Act, 1888, s. 67 (4), equity jurisdiction was given where the value of the property did not exceed £500. Where a tenant brought an action in the county court for rescission of a lease and the value of the premises exceeded £500, but the interest of the lessor was less than that figure,

Held: the value of the property exceeding £500, the action was not within the jurisdiction of the county court.

Notes. The County Courts Act, 1888, s. 67 (4) has been replaced by the County Courts Act, 1959, s. 52 (1) (d); 39 HALSBURY'S STATUTES (2nd Edn.), 141.

Considered: *Solle v. Butcher*, [1949] 2 All E.R. 1107. Followed: *Edler v. Auerbach*, [1949] 2 All E.R. 692. Referred to: *Armstrong v. Jackson*, [1916-17] All E.R. Rep. 1117; *Cruse v. Mount*, [1932] All E.R. Rep. 781; *Long v. Lloyd*, [1958] 2 All E.R. 402.

As to the jurisdiction in equity of the county court, see 9 HALSBURY'S LAWS (3rd Edn.) 156-158, and for cases see 13 DIGEST (Repl.) 395-398. As to warranty of fitness for habitation, see 23 HALSBURY'S LAWS (3rd Edn.) 574-578.

Cases referred to:

- (1) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 9, 24.
- (2) *Legge v. Croker* (1811), 1 Ball & B. 506; 30 Digest (Repl.) 504, *472.
- (3) *R. v. Judge Whitehorne*, [1904] 1 K.B. 827; 52 W.R. 524; 20 T.L.R. 311; 48 Sol. Jo. 314; sub nom. *R. v. Birmingham County Court Judge and Humphreys*, 73 L.J.K.B. 344; 90 L.T. 514, D.C.; 13 Digest (Repl.) 396, 247.
- (4) *Brett v. Clowser* (1880), 5 C.P.D. 376; 40 Digest (Repl.) 111, 852.
- (5) *Kennedy v. Panama, etc. Mail Co.* (1867), L.R. 2 Q.B. 580; 8 B. & S. 571; 36 L.J.Q.B. 260; 17 L.T. 62; 15 W.R. 1039; 35 Digest 118, 216.

Also referred to in argument:

- Soper v. Arnold* (1889), 14 App. Cas. 429; 59 L.J.Ch. 214; 61 L.T. 702; 38 W.R. 449; 5 T.L.R. 698, H.L.; 40 Digest (Repl.) 242, 2028.
- Wilde v. Gibson* (1843), 1 H.L. Cas. 605; 12 Jur. 527; 9 E.R. 897, H.L.; 35 Digest 68, 649.
- Seddon v. North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326; 91 L.T. 793; 53 W.R. 232; 49 Sol. Jo. 119; 35 Digest 20, 118.
- Hindle v. Brown* (1908), 98 L.T. 791, C.A.; 3 Digest (Repl.) 41, 297.
- Kennard v. Ashman* (1894), 10 T.L.R. 213; affirmed 10 T.L.R. 447, C.A.; 30 Digest (Repl.) 524, 1621.
- Whittington v. Seale-Hayne* (1900), 82 L.T. 49; 16 T.L.R. 181; 44 Sol. Jo. 229; 35 Digest 74, 719.
- May v. Platt*, [1900] 1 Ch. 616; 69 L.J.Ch. 357; 83 L.T. 123; 48 W.R. 617; 35 Digest 101, 85.
- Foster v. Reeves*, [1892] 2 Q.B. 255; 61 L.J.Q.B. 763; 67 L.T. 537; 57 J.P. 23; 40 W.R. 695, C.A.; 13 Digest (Repl.) 396, 245.

A **Appeal** from a decision of His Honour JUDGE SELFE, sitting at the Brompton County Court.

The defendant, the tenant of a house in Chelsea, demised the premises by way of sublease to the plaintiff by a deed, dated Aug. 14, 1909, for a period of three years from Aug. 28, 1909, at an annual rental of £45, payable monthly in advance. The value of the freehold of the premises in question exceeded £500, but the value of the interest of the defendant therein and of the interest demised to the plaintiff was of less amount. Before the lease was entered into, the plaintiff inquired of the defendant as to the condition of the drains of the house, and was informed that, so far as he (the defendant) knew, they were all right. The defendant further stated that he had lived in the house for a large number of years, and had never noticed anything wrong with the drains. Upon the faith of this statement the plaintiff executed the lease, and subsequently entered into possession of the premises. The drains in fact were in a defective condition, and the plaintiff and his family became ill as a consequence. The plaintiff brought an action against the defendant on the equity side of the county court in which he claimed (i) damages for breach of warranty as to the condition of the drains, and (ii) a rescission of the lease upon the ground that the plaintiff had been induced to enter into it on the faith of the misrepresentation made by the defendant as to the state of the drains. It was contended before the learned judge (i) that the statement made by the defendant as to the drains did not amount to a warranty the breach of which entitled the plaintiff to damages; (ii) that, the misrepresentation by the defendant being an innocent one, the plaintiff was not entitled to a rescission of the contract; and (iii) that under the provisions of the County Courts Act, 1888, s. 67 (4), the learned judge had no jurisdiction to hear the matter, since the value of the property leased, though not of the defendant's interest therein, exceeded £500.

The learned judge held that he had jurisdiction to hear the case, and decided that the statements made by the defendant (which he accepted as being made innocently) as to the condition of the drains did not amount to a warranty entitling the plaintiff to damages, but that the plaintiff was entitled to a rescission of the lease upon the ground that he had been induced to enter into it owing to a misrepresentation made by the defendant as to the state of the drains. The defendant appealed.

By the County Courts Act, 1888, s. 67 :

"The court shall have and exercise all the powers and authority of the High Court in the actions and matters hereinafter mentioned . . . (4) For specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase money, or in the case of a lease the value of the property, shall not exceed the sum of £500."

Foa for the defendant.

Haydon for the plaintiff.

H **DARLING, J.**—In this case an action was brought for damages for misrepresentation on the taking of a house, and the misrepresentation complained of was that the defendant, who let the house to the plaintiff, represented that the drains were in order whereas they were not. It was not alleged that that was any other than an innocent misrepresentation, but the learned county court judge found as a fact that it was a misrepresentation, and also that it was not made by the defendant knowing that it was false. On that finding he rescinded the lease which the plaintiff had taken on the basis of that representation being true. After the lease was signed the plaintiff had gone into possession of the premises and had held them for some time.

I It was argued by counsel for the defendant that the judge could not rescind the contract upon the ground that it had been induced by an innocent misrepresentation, because it was not an executory contract, but an executed contract. Counsel for the plaintiff admitted that that argument in itself was perfectly good, but he

tried to establish a distinction between the cases cited by counsel for the defendant and this case by saying that the principle stated by counsel was only applicable on the conveyance of the freehold interest in the property, and did not apply to a case where a lease only was taken. His argument was that the reason for the distinction was that where a contract has been executed and the property has passed from one person to another, you cannot put the parties back into the same position in which they were before, or, as it is expressed in *DART ON VENDORS AND PURCHASERS* (7th Edn.), p. 808,

"The principle [i.e., the principle of innocent misrepresentation being a ground for rescission] could not be extended to the taking away, after completion, the price of the property, which at law has become absolutely the vendor's, without advancing the interference of the court of equity further than has yet been authorised by judicial decision. In other words, misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a court of law, or, as LORD SELBORNE stated it [in *Brownlie v. Campbell* (1), 5 App. Cas. at p. 937] 'unless there is fraud or misrepresentation amounting to fraud'."

Such fraud, or misrepresentation amounting to fraud, was not suggested here. What reason is there for saying that this doctrine, which would be perfectly good if this were a sale out and out, is not to be applied because this is a case of a lease? Counsel for the plaintiff says it is because there are recurring acts to be done under a lease and there are none in the case of a sale outright. That is a distinction which has never yet been drawn. In none of the cases or text-books is any distinction drawn between the case of a sale and that of a lease. But one of the cases cited—*Legge v. Croker* (2)—was a case of a lease, and it was held that a lease deliberately executed cannot be set aside on account of an unfounded, though justifiable, assertion of the lessor pending the treaty, there being no wilful misrepresentation. I am inclined to think that this doctrine has not been confined to cases of conveyance of property. It has been applied in cases of deeds of partnership, but I need not go into that. I come to the conclusion that this was an executed contract. If it had not been executed, then I think, although there was here no suggestion of fraud, but only a misrepresentation of an innocent character as to facts which induced the plaintiff to take the lease, the county court judge might have been able to rescind the contract. But the plaintiff had gone into possession, and there is nothing to distinguish this case from the cases cited by counsel for the defendant therefore, the decision of the learned judge in granting a rescission of this lease was wrong.

Counsel for the defendant also submitted that the learned judge had no jurisdiction to entertain this matter at all. His jurisdiction, if any, was, of course, the equity jurisdiction of the county court, which is given by s. 67 of the County Courts Act, 1888. That section provides in sub-s. (4) that the court shall have and exercise all the powers and authority of the High Court in actions

"for specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase money, or in the case of a lease the value of the property, shall not exceed the sum of five hundred pounds."

Now, it is admitted that the value of the property, if by property is meant the thing leased—that is, the house and garden—was more than £500, but the value of the interest which the lessor had was less than £500, and therefore the value of the interest which he granted to the underlessee was also necessarily less than that amount. Counsel for the plaintiff contends that we ought to have regard to the value of the interest granted by the lease, and not to the value of the property, the occupation of which was granted by the lease. No doubt if you look at the case of a sale under the section it is provided that the purchase money is to be taken as the measure in determining whether the value of the property exceeds £500.

A Whether that was deliberately or accidentally done in that case, I come to the conclusion that this standard has not been applied to the case of a lease. In the case of a lease nothing is said about the rent to be paid or premiums, and nothing is said as to how you are to ascertain the value of the lease. We can only look at the plain words used in the statute, as WILLS, J., said in *R. v. Judge Whitehorne* (3). As the statute says in the case of a lease that regard must be had to the value of the property, we must hold that what we must look at is the value of the property demised, and not the consideration given for the interest demised. The county court judge had, therefore, no jurisdiction to give the equitable remedy which he gave in this case, and the result is that this appeal must be allowed with costs.

C **BUCKNILL, J.**—I agree, and upon the second point in the case I have nothing to add. The action brought by the plaintiff against the defendant was originally for breach of warranty or for misrepresentation. The learned judge decided in favour of the defendant upon the question of warranty, but he found that there had been an innocent misrepresentation on the part of the defendant, and upon that ground he entered judgment in the plaintiff's favour that the contract should be rescinded. D The case is an interesting one, because it does not appear that the question of whether a lease can be rescinded upon the ground that it was entered into on the faith of an innocent misrepresentation has ever been fully argued before. There are many cases which say that where there has been an executed contract for the sale of property in such a case the contract cannot be rescinded on the ground of an innocent misrepresentation. With regard to leases, there are two cases on the subject to which we have been referred—*Legge v. Croker* (2) and *Brett v. Clowser* (4)—and from these decisions there is ample authority for the court to decide in such a case as the present that where the contract for a lease is an executed contract it stands on the same footing in law as if the case were one of a sale or conveyance of land. There is one passage in BLACKBURN, J.'s, judgment in *Kennedy v. Panama, etc., Mail Co.* (5) to which I should like to refer. He says (L.R. 2 Q.B. at p. 587):

F "There is, however, a very important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind, but where there has been an innocent misrepresentation or misapprehension it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." G

H Applying that here, there was not a total failure of consideration, because the plaintiff actually went into occupation of the house, although it turned out to be insanitary. I agree upon both grounds that this appeal should be allowed.

Appeal allowed.

Solicitors: *Hamkins, Grammer & Hamkins; Sherwood, Baker & Hart.*

[*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.*]

SPEYER BROS. v. INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord Robertson and Lord Atkinson), January 20, 22, 1908]

[Reported [1908] A.C. 92; 77 L.J.K.B. 302; 98 L.T. 286; 24 T.L.R. 257; 52 Sol. Jo. 222]

Stamp Duty—"Marketable security"—*Treasury note of foreign state*—*Stamp Act*, 1891 (54 & 55 Vict., c. 39), ss. 82, and 122.

A "four-and-one-half per cent. gold coupon treasury note" of the United States of Mexico was negotiated in this country. By the note the Mexican government acknowledged themselves indebted to and promised to pay the bearer 1,000 dollars on June 1, 1905, and interest half-yearly from June 1, 1903, upon the surrender of coupons annexed, at the office of S. in London, the note to be redeemable at par at the option of the United States of Mexico on sixty days' notice. It gave no security to the holder except the promise to pay, and coupons for the payment of interest were attached to it. It was capable of being sold on the London Stock Exchange.

Held: it was a "marketable security" within ss. 82 and 122 of the Stamp Act, 1891, and chargeable with stamp duty accordingly.

Stamp Duty—*Rate of duty*—*Crown entitled to charge differing rates*—*Right to charge higher rate*.

Where, by virtue of a Stamp Act, an instrument may be charged with a higher rate of stamp duty under one part of the Act and with a lower rate under another part, the duty may be assessed at the higher rate, but both rates cannot be charged upon the same instrument.

Decision of the Court of Appeal, [1907] 1 K.B. 246, affirmed.

Notes. Referred to: *Hennell v. I.R. Comrs.*, [1933] 1 K.B. 415; *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1938] 2 All E.R. 444.

As to stamp duties on marketable securities, see 33 HALSBURY'S LAWS (3rd Edn.) 323-327, and as to regulation of stamp duties, generally, see *ibid.*, 271 et seq. For cases see 39 DIGEST 254 et seq. For Stamp Act, 1891, see 21 HALSBURY'S STATUTES (2nd Edn.) 610, and for Finance Act, 1899, s. 4, see *ibid.*, 720.

Case referred to:

- (1) *British India Steam Navigation Co. v. I.R. Comrs.* (1881), 7 Q.B.D. 165; 50 L.J.Q.B. 517; 44 L.T. 378; 29 W.R. 610, D.C.; 6 Digest (Repl.) 467 3272.

Also referred to in argument:

Re General Estates Co., *Ex parte City Bank* (1868), 3 Ch. App. 758; 18 L.T. 894; 16 W.R. 919, L.J.J.; 6 Digest (Repl.) 421, 2970.

Re Imperial Land Co. of Marseilles, *Ex parte Colborne and Strawbridge* (1870), L.R. 11 Eq. 478; 40 L.J.Ch. 93; 23 L.T. 515; 19 W.R. 223; 6 Digest (Repl.) 421, 2971.

Rothschild & Sons v. I.R. Comrs., [1894] 2 Q.B. 142; 70 L.T. 667; 58 J.P. 399; 42 W.R. 542; 10 T.L.R. 328; 38 Sol. Jo. 363; 10 R. 204, D.C.; 6 Digest (Repl.) 461, 3224.

Pruessing v. Ing (1821), 4 B. & Ald. 204; 106 E.R. 912; 6 Digest (Repl.) 470, 3296.

Wills v. Noott (1834), 4 Tyr. 726; 6 Digest (Repl.) 470, 3297.

Yates v. Evans (1892), 61 L.J.Q.B. 446, 66 L.T. 532; 56 J.P. 565; 36 Sol. Jo. 274, D.C.; 6 Digest (Repl.) 474, 3334.

Kirkwood v. Carroll, [1903] 1 K.B. 531; 72 L.J.K.B. 208; 88 L.T. 52; 51 W.R. 374; 19 T.L.R. 253; 47 Sol. Jo. 316, C.A.; 6 Digest (Repl.) 21, 134.

- A** *Mortgage Insurance Corpn. v. I.R. Comrs.* (1888), 21 Q.B.D. 352; 57 L.J.Q.B. 630; 36 W.R. 833; 4 T.L.R. 710, C.A.; 6 Digest (Repl.) 465, 3250.
- Brown, Shipley & Co. v. I.R. Comrs.*, [1895] 2 Q.B. 598; 64 L.J.M.C. 241; 73 L.T. 377; 11 T.L.R. 585; 39 Sol. Jo. 720; 14 R. 661, C.A.; 39 Digest 290, 711.
- B** *Texas Land and Cattle Co., Ltd. v. I.R. Comrs.* (1888), 16 R. (Ct. of Sess.) 69; 26 Sc.L.R. 49; 10 Digest (Repl.) 810, *2302.
- Matheson v. Ross* (1849), 2 H.L. Cas. 286; 14 L.T.O.S. 81; 13 Jur. 307; 9 E.R. 1101, H.L.; 22 Digest (Repl.) 258, 2574.
- Edmonds v. Blaina Furnaces Co., Beesley v. Blaina Furnaces Co.* (1887), 36 Ch.D. 215; 56 L.J.Ch. 815; 57 L.T. 139; 35 W.R. 798; 7 Digest (Repl.) 33, 169.
- C** *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 56 J.P. 709; 41 W.R. 270; 8 T.L.R. 618; 3 Tax Cas. 185, H.L.; 28 Digest (Repl.) 83, 315.
- National Telephone Co., Ltd. v. I.R. Comrs.*, [1900] A.C. 1; 69 L.J.Q.B. 43; 81 L.T. 546; 64 J.P. 420; 48 W.R. 210; 16 T.L.R. 58, H.L.; 17 Digest (Repl.) 253, 571.
- D** *Noakes v. I.R. Comrs.* (1900), 83 L.T. 714; 17 T.L.R. 99; D.C.; 39 Digest 290, 708.

Appeal from a judgment of the Court of Appeal (COLLINS, M.R., COZENS-HARDY and FARWELL, L.JJ.), reported [1907] 1 K.B. 246, reversing a judgment of WALTON, J., reported [1906] 1 K.B. 318, upon a Case Stated by the Commissioners of Inland Revenue. The question was whether a certain instrument, one of a series numbered consecutively, was a "promissory note" or a "marketable security." The commissioners held that it was the latter. WALTON, J., decided that it was only a "promissory note," but the Court of Appeal, restoring the order of the commissioners, held that it was a "marketable security," and liable, therefore, to a higher rate of duty.

F The instrument was described on its face as a "Four-and-a-half per cent. gold coupon treasury note," was dated June 1, 1903, and was issued by the Government of the United States of Mexico in pursuance of a Law of Congress of May 15, 1903. The following are the more material parts of the instrument:

G "United States of Mexico acknowledge themselves indebted and promise to pay to bearer on the 1st day of June, 1905, one thousand dollars in gold coin of the United States of America, and also to pay interest on said principal sum in like gold coin at the rate of four-and-one-half per cent. per annum from the 1st day of June, 1903, on the 1st days of December and June in each year, upon surrender of the annexed coupons as they respectively mature. Both as to principal and interest this Treasury note shall be for ever exempt from any taxes or assessments which may at present exist or be hereafter imposed by the United States of Mexico. The principal and interest of this Treasury note are payable in the city of New York at the office of Speyer & Co., or, at the option of the holder, in London, England, at the office of Speyer Bros., in sterling, at the fixed rate of 4·85 dollars to the pound sterling."

H The note was also stated to be redeemable at par and accrued interest at the option of the United States of Mexico at any time before maturity on sixty days' notice, to be given in certain newspapers in New York and London. The coupons attached to the note provided:

I "On the 1st day , 19 , unless the above-mentioned Treasury note shall be sooner redeemed, and on the surrender of this coupon, the United States of Mexico will pay to bearer in the city of New York, U.S.A., at the office of Speyer & Co., twenty-two dollars and fifty cents in gold coin of the United States of America, or in London, at the office of Speyer Bros. £4 12s. 9d. sterling, being six months' interest then due on said Treasury note."

By the Stamp Act, 1891 :

"Section 82. (1) Marketable securities for the purpose of the charge of duty thereon include (b) a marketable security by or on behalf of any foreign State or Government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security) bearing date or signed after the 3rd of June, 1862; (2) which though originally issued out of the United Kingdom has been since the 6th of Aug., 1885, or is offered for subscription and given or delivered to a subscriber in the United Kingdom; (3) which the interest thereon being payable in the United Kingdom is assigned, transferred, or in any manner negotiated in the United Kingdom. . . . Section 122. . . . The expression "marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom."

Danckwerts, K.C., and Vaughan Hawkins, for the appellants.

The Solicitor-General (Sir W. Robson, K.C.), Sir R. Finlay, K.C., and W. Finlay for the respondents.

LORD LOREBURN, L.C.—The appeal in this case fails. The question is under what description a particular document is to be stamped. Counsel for the appellants say that the document is a promissory note within the Stamp Act, 1891, and it does fall within the definition of a promissory note in that Act. They also say that it is so in a commercial sense within the meaning of the Bills of Exchange Act. I do not express either assent to or dissent from that proposition, because I do not think that it really signifies in the decision of this case. Then comes the question, is this document also a "marketable security" within the meaning of the Act? That was so found by the commissioners and by WALTON, J., after hearing evidence which has not been laid before your lordships. It seems to have been admitted in the Court of Appeal that it was a marketable security, and in one sense it has not been disputed here. It is a marketable security within the meaning of the Stamp Act, 1891. Accordingly, the document will fall within the description both of a promissory note and of a marketable security.

Counsel for the appellants, however, says further that according to authority a discrimination must be made between a marketable security and a promissory note, and that the test whether a document is within one class or the other is this: Is it something more than a promissory note? Now, this document is something more than a promissory note. There is a greater excess over a promissory note, so to speak, in this case than there was in *British India Steam Navigation Co. v. I.R. Comrs.* (1) which has been cited by your Lordships. But the document falls within both descriptions, and where a document is by its statutory description chargeable under the Stamp Act as a promissory note, and also as a marketable security, it is accurate to say that the Crown has a choice whether it will charge it under the one or the other description. Perhaps it would be sufficient to say that by virtue of the Act the Crown is entitled to charge the higher rate of stamp, but that it cannot charge both rates upon the same document; and if the Crown does claim a right to have the document stamped at the higher rate within one part of the Act, it is no answer to such claim to say that there is another part of the Act under which the same document might be stamped at a lower rate. For that reason this appeal fails and ought to be dismissed with costs.

LORD MACNAGHTEN.—I entirely agree.

LORD ROBERTSON.—If a plain man conversant with business were asked to describe this instrument, I think that he would call it a "foreign government security." It is found as a matter of fact that the thing is marketable, it is, therefore, a "marketable security." Now, from the point of view of legal analysis it contains a promise to pay, and is, therefore, in legal phraseology a promissory note. The result is that the instrument falls within both of the categories in this taxing

A Act. There is nothing legally impossible in this; it often occurs, and the result is that it may be assessed under either class at the option of the government.

LORD ATKINSON.—I concur.

Appeal dismissed.

Solicitors: *Bircham & Co.*; *Sir F. C. Gore*, Solicitor of Inland Revenue.

B [Reported by C. E. MALDEN, ESQ., *Barrister-at-Law.*]

C

STONE v. BURN

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Pickford and Lord Coleridge, JJ.), October 13, 1910]

[Reported [1911] 1 K.B. 927; 80 L.J.K.B. 560; 103 L.T. 540; 74 J.P. 456;
27 T.L.R. 6]

D

Merchandise Marks—False trade description—Bottle with name embossed—Adhesive label—*Merchandise Marks Act*, 1887 (50 & 51 Vict., c. 28), ss. 2, 3, 5.

E

The appellant, a bottler of beer, had, in the course of his business, come into possession of bottles embossed with the name of the F. Brewery Co., Ltd. Without their authority he filled the bottles with beer brewed by B. & Co., placed B. & Co.'s labels upon them, and sold the contents as being B. & Co.'s beer.

F

Held: the appellant had sold goods to which a false trade description had been applied and had thus committed an offence under the *Merchandise Marks Act*, 1887, s. 5 (1) (c) of which provides that a person shall be deemed to apply a trade description to goods who places the goods in any covering to which a trade description has been applied.

G

Notes. Considered: *Allard v. Selfridge & Co., Ltd.*, [1924] All E.R. Rep. 128; *Kat v. Diment*, [1950] 2 All E.R. 657. Applied: *Slatcher v. George Mence Smith, Ltd.*, [1951] 2 All E.R. 388. Referred to: *Mercer v. Pyramid Sand & Gravel Co. (Ltd.)*, 109 J.P. 54.

G

As to offences under the *Merchandise Marks Act*, 1887, see 10 HALSBURY'S LAWS (3rd Edn.) 685 et seq., and for cases see 43 DIGEST 239 et seq. For *Merchandise Marks Act*, 1887, ss. 2, 3, 5, see 25 HALSBURY'S STATUTES (2nd Edn.) 1114, 1116, 1118.

Case referred to:

H

(1) *Christie, Manson and Woods v. Cooper*, [1900] 2 Q.B. 522; 69 L.J.Q.B. 708; 83 L.T. 54; 64 J.P. 692; 49 W.R. 46; 16 T.L.R. 442, D.C.; 43 Digest 240, 849.

Also referred to in argument:

Wood v. Burgess (1889), 24 Q.B.D. 162; 59 L.J.M.C. 11; 61 L.T. 593; 54 J.P. 325; 38 W.R. 331; 16 Cox, C.C. 729, D.C.; 43 Digest 240, 846.

I

Thwaites & Co. v. McEvilly, [1904] 1 I.R. 310; 21 R.P.C. 397; 43 Digest 238, f.

Case Stated by Swansea justices.

An information was preferred by the respondent, W. H. Burn, against the appellant, Horatius Stone, a wine and beer merchant, under the *Merchandise Marks Act*, 1887, s. 2 (2), that the appellant on July 22, 1909, at the town of Swansea, did unlawfully sell certain goods, to wit, three bottles of beer and three bottles of stout to which a false name was applied, to wit, the name of Felinfoel Brewery Co., Ltd., of Llanelly.

On the hearing of the information the following facts were admitted or proved in evidence. The appellant was a bottler of Bass' ale and Guinness' stout, which came to him from the brewery in hogsheads, and the bottles purchased by him were not embossed with any name. When the ale or stout had been bottled by the appellant a Bass' or Guinness' label was attached to the bottle, bearing the words "Bottled by Horatius Stone." In the course of his business as a bottler the appellant had used bottles moulded with the names of other bottlers, and such bottles had been filled with ale or stout and a label with the above-named inscription attached thereto by him. On July 22, 1909, the appellant sold three bottles of beer and three bottles of stout embossed with the name of the Felinfoel Brewery Co., Ltd., without the latter's authority. The Felinfoel Brewery Co., Ltd., only bottled beer or stout of their own manufacture, whereas the beer sold by the appellant to the respondent was admitted to be Bass' beer.

The respondent contended that the effect of s. 2 of the Merchandise Marks Act, 1887, was to prevent one manufacturer using the bottles of another for the sale of his own goods and that such use constituted an offence. The appellant contended that the name on the bottle did not mislead and the purchaser obtained what he had asked for; that, if a false name had been applied, the appellant had acted innocently and in pursuance of a thirty years' old custom without any intention of infringing the Act of Parliament. The justices found as a fact (i) that the appellant had no authority or right to use bottles belonging to the Felinfoel Brewery Co., Ltd.; (ii) that the name of the Felinfoel Brewery Co., Ltd., on the bottles was calculated to deceive, and that such name was a false name and had been applied to the goods sold by the appellant within the meaning of ss. 2 and 3 of the Merchandise Marks Act, 1887; and (iii) that the appellant had not acted innocently. They therefore convicted the appellant.

Atkin, K.C., and *Marley Samson* for the appellant.

Bailhache, K.C., and *W. Llewellyn Williams* for the respondent.

LORD ALVERSTONE, C.J.—This case raises a difficult point, and one has to consider carefully the various sections of this Act of Parliament. The appellant had been charged under s. 2 (2) of the Merchandise Marks Act, 1887, with unlawfully selling certain goods to which a false name was applied. The fact is that he, without any intention of doing wrong, bottled Bass' beer and Guinness' stout into bottles which had the name of the Felinfoel Brewery Co. embossed on them, and he put proper Bass' and Guinness' labels on these bottles. These bottles were sold pursuant to an order for Bass' beer and Guinness' stout. If we were dealing with this case as an ordinary case of applying to beer a false trade description, I should have no difficulty in saying that if Bass' or Guinness' Labels were on the bottles when sent out, and the labels remained there, no reasonable person could suppose that he was purchasing any other than Bass' beer or Guinness' stout. If we could deal with the case on that footing, there is no evidence of any sort or kind that a purchaser would think that the beer or stout he was getting was not Bass' or Guinness'.

But we cannot decide the case on that ground. When we look at s. 5 (1) (c) of the Merchandise Marks Act, 1887, following s. 3 of the statute, the legislature has been careful to spread the net very wide indeed, and has said that a person who has put Bass' beer or Guinness' stout into bottles embossed with another name, and has put the right label—Bass or Guinness—on such bottles, has still committed an offence within the statute. Now, s. 5 (1) says

"A person shall be deemed to apply a trade mark or mark or trade description to goods who—(c) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied,"

and s. 5 (2) provides "the expression 'covering' includes any . . . bottle, . . ."

A That section means that, although a person has not in fact applied a trade description to goods he must be deemed to have done it if he puts the goods in a covering to which a trade description has been applied. There is no real evidence here that any person thought that this was the beer or stout of the Felinfoel Brewery Co. while the labels of Bass or Guinness were on the bottles. But having put the beer and stout in bottles with the name of this company embossed upon them, under B s. 5 the appellant must be deemed to have applied the name of this brewery company to the beer and stout in these bottles which was not their beer or stout. Therefore I cannot say that there was no evidence upon which the justices could come to the conclusion that an offence had been committed.

C I must now consider the question whether the appellant acted innocently. I should not have convicted him, for I cannot see that he had any intention other than an innocent one, and there seems to have been the practice for thirty years to bottle Bass' beer in other embossed bottles. But I cannot say that the matter is so clear that the justices were bound in law to find that innocence was made out. Ignorance of the provisions of the Act would not constitute innocence. "Innocently" in s. 2 (2) (c) means that the defendant did not know what was being done, or D that it was done by mistake and without any intention of committing an offence. But here the appellant did what he did knowingly and believing that he had a right to do it, and the present is a very different case from *Christie Manson and Woods v. Cooper* (1). I cannot say as a matter of law that it was proved that the appellant had acted innocently.

E **PICKFORD, J.**—This conviction must be affirmed. I regret that we must do so, because I think that the grounds upon which the justices convicted were absolutely wrong. On the facts, however, and on s. 5 (1) (c) of the Merchandise Marks Act, 1887, the conviction can be supported. Bass' beer and Guinness' stout were put by the appellant into bottles embossed with the name of the Felinfoel Brewery Co. On the other side of the bottles the appellant had placed a Bass' or Guinness' label, and I agree that nobody would think that he was F buying any beer or stout other than Bass' beer or Guinness' stout. The appellant was summoned under s. 2 (2) of the Act of 1887, which provides that

"every person who sells . . . any goods or things to which any . . . false trade description is applied"

is to be guilty of an offence against the Act; and by s. 3

G "the expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied. . . ."

Now, if the description "Felinfoel Brewery Co." was applied to beer and stout which was Bass' beer and Guinness' stout, that would be a false trade description, and the question here is whether that description was applied to this beer and stout. Apart from s. 5, that would depend upon whether persons would think that there H was an intention to supply this beer and stout as this brewery company's beer or stout, and the justices have found that the name of the Felinfoel Brewery Co. on the bottles was calculated to deceive, meaning by that that anyone buying these goods might be deceived that the beer and stout was that of this brewery company. In that they were wrong, for there was no evidence upon which they could come to that conclusion. But we were referred to s. 5 (1) (c), which provides that

I "a person shall be deemed to apply a . . . trade description to goods who—(c) places, encloses, or annexes any goods which are sold . . . in, with, or to any covering . . . to which a . . . trade description has been applied."

The appellant did place Bass' beer and Guinness' stout in bottles having the name of the Felinfoel Brewery Co. embossed on them, and therefore according to s. 5 (1) (c) he did apply the name of the Felinfoel Brewery Co. to goods, and so he sold goods to which a trade description and a false trade description was applied. Therefore on s. 5 (1) (c) alone an offence was committed by the appellant unless

he acted innocently. The justices have found that he did not act innocently, but how they arrived at that I cannot understand. But we cannot interfere with their finding on that ground unless the appellant (and the onus of proof is upon him) has given evidence upon which the justices must in law find that he acted innocently. In *Christie, Manson and Woods v. Cooper* (1) the court did quash a conviction on the ground that the appellants had acted innocently, and that the justices were bound so to find in law. But that case was different from this one. We cannot in this case say that the justices were bound in law to find that the appellant acted innocently, and therefore the appeal must be dismissed.

LORD COLERIDGE, J.—I agree. The appellant has offended against s. 5 (1) (c), and under s. 2 has applied a false trade description to the beer and stout he has sold. His only defence would be acting innocently. The innocence contemplated is what was pointed out by CHANNELL, J., in *Christie, Manson and Woods v. Cooper* (1), where he said ([1900] 2 Q.B. at pp. 528, 529):

“The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament.”

The innocence referred to means that the acts done were due to inadvertence or mistake.

Appeal dismissed.

Solicitors: *R. Woods*, for *Andrew & Thompson*, Swansea; *W. Webb & Sons*, for *G. F. Forsdike*, Cardiff.

[Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.]

SHARP v. RICKARDS AND OTHERS

[CHANCERY DIVISION (Neville, J.), November 11, 1908]

[Reported [1909] 1 Ch. 109; 78 L.J.Ch. 29; 99 L.T. 916]

Mortgage—Consolidation—Mortgagee of two mortgages—Equities of redemption in same hands.

A mortgagee of two or more mortgages, where it had been agreed that s. 17 of the Conveyancing Act, 1881, should not apply, **held**, not to be entitled to consolidate them when the equities of redemption, after having been assigned by different mortgagors, have come into the same hands. The doctrine of consolidation cannot be extended by applying the converse of what was held in *Vint v. Padget* (1) (1858), 2 De G. & J. 611.

Notes. The Conveyancing Act, 1881, s. 17 (1) (2) has been repealed: see now the Law of Property Act, 1925, s. 93 (1), 20 HALSBURY'S STATUTES (2nd Edn.) 631.

As to the consolidation of mortgages, see 27 HALSBURY'S LAWS (3rd Edn.) 320-326, and for cases see 35 DIGEST 419 et seq.

Cases referred to:

- (1) *Vint v. Padget* (1858), 2 De G. & J. 611; 32 L.T.O.S. 66; 4 Jur. N.S. 1122; 6 W.R. 641; 44 E.R. 1126, L.J.J.; 35 Digest 423; 1613.
- (2) *Re Raggett, Ex parte Williams* (1880), 16 Ch.D. 117; 50 L.J.Ch. 187; 44 L.T. 4; 29 W.R. 314, C.A.; 35 Digest 422, 1601.
- (3) *Pledge v. White*, [1896] A.C. 187; 65 L.J.Ch. 449; 74 L.T. 323; 44 W.R. 589, H.L.; 35 Digest 423, 1608.

A Also referred to in argument :

Jennings v. Jordan (1881), 6 App. Cas. 698; 51 L.J.Ch. 129; 45 L.T. 593; 30 W.R. 369, H.L.; 35 Digest 419, 1587.

Cummins v. Fletcher (1880), 14 Ch.D. 699; 49 L.J.Ch. 563; 42 L.T. 859; 28 W.R. 772, C.A.; 35 Digest 420, 1592.

Roe d. Kaye v. Soley (1770), 2 Wm. Bl. 726; 96 E.R. 426; 35 Digest 419, 1585.

B *Tassell v. Smith* (1858), 2 De G. & J. 713; 27 L.J.Ch. 694; 32 L.T.O.S. 4; 4 Jur. N.S. 1090; 6 W.R. 803; 44 E.R. 1166, L.J.J.; 35 Digest 424, 1618.

Adjourned Summons for an account as to consolidation of mortgages.

By four indentures of mortgage dated, as to two of them, Dec. 13, 1897, and the others Jan. 10, 1898, and Feb. 8, 1898, respectively, one J. Stead mortgaged to Major Edward Rickards by devise the whole of a term of years, less three days, which he had vested in him in the premises Nos. 1, 2, 3, and 4, Clayton Terrace, Upper Tooting, in order to secure the repayment of four separate sums of £465 with interest and costs; and each mortgage contained the provision that s. 17 of the Conveyancing Act, 1881, should not apply. On Aug. 10, 1898, Stead assigned, subject to the above mortgages, Nos. 1, 2, 3, and 4 to the plaintiff Sharp, who, on the same date, acquired the freeholds of Nos. 1, 2, 3, 4, and 7; in regard to No. 4, the assignment was made subject not only to the mortgage of Major Rickards, but subject also to a contract of sale of the lease of those premises, this contract having been previously made by Stead to another person whose name is immaterial, and on Aug. 26, 1898 the contract of sale was completed, Major Edward Rickards surrendering at the same time the mortgaged term on those premises. On Jan. 6, 1899, the plaintiff demised for a term of ninety-nine years No. 7 to his nominee, or trustee, Douglas Cooper, who on Jan. 7, 1899, mortgaged this term to Major Edward Rickards in order to secure a sum of £465 and interest and Cooper covenanted at the same time with Major Edward Rickards that s. 17 of the Conveyancing Act, 1881 should not apply, and that it should be lawful for Major Edward Rickards to consolidate the security with any other security on property other than that comprised in that indenture for any money for the time being due from him to Major Edward Rickards. The plaintiff afterwards sold and conveyed the fee simple of No. 7, but, on Mar. 1, obtained an assignment from his nominee, Cooper, of the remainder of the latter's term in the lease of No. 7. On Mar. 1, 1906, Major Rickards died, having appointed the defendants his executors, who, on Feb. 28, 1907, gave notice to the plaintiff to pay off the four sums of £465 secured on Nos. 1, 2, 3, and 7. The plaintiff wished to pay off the mortgage on No. 7 alone, but the defendants claimed a right to consolidate that mortgage with the other mortgages; whereupon the plaintiff took out the summons asking for an account to be taken of what was due to the defendants by virtue of the mortgage on No. 7, and that, on payment of what was found to be due to the defendants on that mortgage, he might be at liberty to redeem those premises.

H By the Conveyancing Act, 1881, s. 17 :

"(1) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. (2) This section applies only if and so far as a contrary intention is not expressed in the mortgage deeds or one of them."

I *C. Hartree* for the plaintiff.

G. Greenwood for the defendants.

NEVILLE, J.—In this case Rickards, the testator, was the mortgagee under separate mortgages of Nos. 1, 2, 3, and 4, Clayton Terrace, and the equities of redemption in these properties were assigned by the mortgagor to the plaintiff Sharp. Undoubtedly the right to consolidate these securities existed at the date

of the assignment to Sharp. Sharp had purchased the equity of redemption on No. 4 subject to a contract for the sale of the existing lease, and he subsequently paid, out of the proceeds of the sale, the money due on the mortgage, to Rickards' solicitor. I am asked to look into the negotiations between Sharp and Rickards with a view to accepting from extrinsic evidence the suggestion that it was the intention of the parties that the mortgage on No. 7 should be substituted for the mortgage on No. 4. But I cannot do so. I ought only to look at the documents for the purpose of ascertaining the intention of the parties, and these do not contain anything to support the suggestion that it was the intention of the parties to treat the mortgage on No. 7 as a substitute for the mortgage on No. 4. I, therefore, come to the conclusion that the mortgage on No. 7 was in respect of a fresh advance. No doubt Sharp was really the person who obtained this advance, for it appears that Sharp, who was the freeholder of No. 7, granted a long lease to Cooper, who was his nominee or trustee, and Cooper executed a mortgage of the term to Rickards.

What, then, was the position at that date with regard to the right of Rickards to consolidate the mortgage on No. 7 with the other three mortgages? He had no such right. The doctrine of consolidation is not one which ought to be extended at this time of day. The mortgage on No. 7 was granted by Cooper and not by Sharp, so that on the face of the documents the equity of redemption on No. 7 and those on Nos. 1, 2, and 3 were vested in different persons; for I have the authority of JAMES, L.J., for saying that the court will not go behind the mortgagor himself to ascertain the persons who have the equitable interest in the property. He distinctly laid it down in *Re Raggett* (2) when he said (16 Ch.D. at p. 119) that "a mortgagee has no right to look into any transactions between the mortgagor and third parties."

Therefore, as the matter then stood, no right to consolidate existed. But Sharp subsequently took an assignment of the equity of redemption in No. 7 from Cooper, and it is said that a right to consolidation then arose because the equities of the redemption in the four houses thereby became vested in the same person, and the mortgages were already in the hands of one mortgagee.

It is said that I ought to come to the conclusion that the right of consolidation then arose by an argument from analogy, as the converse of the rule laid down in *Vint v. Padget* (1). That case determined that where the equities of redemption of two estates mortgaged to different persons were vested in the same person, and the mortgages subsequently came into the hands of the same mortgagee, the mortgagee obtained the right to consolidate as against the owner of the two equities. I do not think that case ought to be extended for the purpose of establishing the converse rule. Moreover, this case was only upheld in *Pledge v. White* (3) because it had stood so long that the House of Lords thought that it might do harm to reverse it, and not because they approved of any principle established by it. I ought not to deduce from this case by analogy any rule which will apply to the converse case, so as to hold that a right of consolidation arises where the equities of redemption, after being originally in different persons, have come into the same hands. The court has never recognised a right to consolidate in such a case, and, as I have said, the application of the doctrine ought not to be extended. The claim to consolidate, therefore, fails, and the plaintiff must have an order for redemption of the mortgage on No. 7. I wish to add that the question of consolidation is not one which ought to be raised on an originating summons.

Solicitors: *J. Moverley Sharp; Maude & Tunnicliffe.*

[Reported by A. J. B. TAPLING, Esq., Barrister-at-Law.]

Re VIOLA'S LEASE. HUMPHREY v. STENBURY

[CHANCERY DIVISION (Warrington, J.), December 1, 1908]

[Reported [1909] 1 Ch. 244; 78 L.J.Ch. 128; 100 L.T. 33]

Landlord and Tenant—Lease—Determination—Joint tenancy—Notice to determine given by one tenant.

By a lease, dated Feb. 2, 1906, premises were demised to two lessees, a husband and his wife, to hold jointly for a term of years, the lessees having power to terminate the lease by notice at a date earlier than its full period. Notice to terminate was given by one only of the lessees and there was no evidence of any authority from the other lessee to give it.

Held: as the power to determine the term was given by the lease to both the lessees, one of them, in the absence of authority conferred upon him by the other, could not exercise the power.

Notes. Considered: *Leek and Moorlands Building Society v. Clark*, [1952] 2 All E.R. 492.

As to determination of lease, see 23 HALSBURY'S LAWS (3rd Edn.) 516 et seq., and for cases see 31 DIGEST (Repl.) 594–600.

Case referred to :

(1) *Doe d. Aslin v. Summersett* (1830), 1 B. & Ad. 135; 8 L.J.O.S.K.B. 369; 109 E.R. 738; 31 Digest (Repl.) 502, 6268.

Also referred to in argument :

Jones v. Phipps (1868), L.R. 3 Q.B. 567; 9 B. & S. 761; 37 L.J.Q.B. 198; 18 L.T. 813; 33 J.P. 229; 16 W.R. 1044; 31 Digest (Repl.) 493, 6191.

Doe d. Whayman v. Chaplin (1810), 3 Taunt. 120; 128 E.R. 49; 31 Digest (Repl.) 502, 6266.

Right d. Fisher v. Cuthell (1804), 5 East, 491; 2 Smith, K.B. 83; 102 E.R. 1158; 31 Digest (Repl.) 599, 7163.

Originating Summons to determine whether a notice to terminate a lease given by one of two joint lessors was valid.

By a lease dated Feb. 2, 1906, made between O. F. Viola, thereafter called the lessor, and Ernest George Humphrey, and Helen Ann Humphrey his wife, thereafter called the lessees, a shop and room forming part of premises in New Bond Street, St. George's, Hanover Square, were demised to the lessees for a term of fifteen and three-quarter years (except the last twelve days of the term) computed from Dec. 25, 1905, paying therefor the yearly rent of £475 by four quarterly payments to be made on the usual quarter days. The lease contained a proviso that the term might be determined at the end of the first three years by the giving of six calendar months' previous notice in writing. The lessees entered into possession of the premises in pursuance of the lease, and carried on business as "E. Humphrey." From a receipt signed by the lessor, set forth in the statement of facts, it appeared that the lessor had received the quarter's rent due Midsummer, 1907 from "E. Humphrey, Esq." Subsequently to this the reversion to the lease became vested in the defendant J. Stenbury, and on Oct. 3, 1907, the plaintiff, the husband, sent to the agents of the lessor a cheque for the quarter's rent due Michaelmas, 1907, accompanied by a letter signed by the plaintiff E. G. Humphrey, addressed to the lessor's agents, which, so far as material, was as follows :

"Dear Sir,—Herewith cheque for quarter's rent due, and kindly address all communications to 14, New Burlington Street, W. I propose, as I have said before, of terminating my tenancy at the end of my first break of my lease, which falls Feb. 8, 1909."

The defendant did not admit the validity of the notice, and the plaintiffs, the lessees, took out this summons asking whether an effective notice to determine the term of years created by the lease pursuant to the proviso had been given.

Richards for the plaintiffs.

Sheldon for the defendant.

WARRINGTON, J. (after stating the lease, the sending of the last quarter's rent, and the accompanying letter).—I know that "E. Humphrey" is the defendant E. G. Humphrey. I have no other facts before me, except that by the receipt for the previous quarter's rent the rent is stated to have been received from E. Humphrey, Esq., and that the cheque was actually sent by the husband. The lessor has done nothing to admit the validity of the notice to determine the lease, and he now objects that it is a bad notice. In the first place, attention is drawn to the fact that it is given for a wrong day, and next that it is not sufficiently definite to be valid. He says: "I propose" to terminate the tenancy. I need not deal with those objections because there is a much stronger one which is fatal to it—namely, that the notice is given by one only of the two lessees. The argument for the defendants is put in two ways. First, it is said that a notice given by one of two joint tenants is in itself a good notice for both of them. In support of this proposition reference is made to *Doe d. Aslin v. Summersett* (1). In my judgment that decision has no bearing upon the case before me. There a man held premises as tenant from year to year from three lessors who were joint tenants, and a notice to quit was given to him by one of the lessors on behalf of them all. The question there was, not whether the notice was a good one, but whether at common law, regard being had to the nature of the estates of joint tenants, a notice to quit by one of them was a sufficient notice to determine the tenancy as to all. LORD TENTERDEN, C.J., after remarking that joint tenants are seised not only of their respective shares per my, but also of the entirety per tout, goes on to say (1 B. & Ad. at p. 140):

"Upon a joint demise by joint tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please."

If anyone no longer pleased there was an end of the tenancy. That case turns upon the nature of the estates of joint tenants, and decided that at common law, in the absence of express terms, a notice to quit by one joint lessor is valid. It is not the same as the present case, which turns upon the question whether the notice comes within the terms of the proviso in the lease. Here these terms expressly state that both lessees must be desirous and must express their desire to determine the lease. Notice by one lessee cannot be notice by the other of a desire to determine the lease. There remains the question whether the notice was the notice of both the lessees. But for this purpose there must be facts proving the agency of the one giving the notice, or facts from which the court can infer such agency. No attempt has been made to prove any such agency. The only facts from which I am asked to infer such agency are the two payments of rent by the husband and the fact that he sent the notice. But those facts are as consistent with the absence of such authority as with the existence of it. I must declare that no effective notice to determine the term created by the lease has been given.

Solicitors: *Arthur H. Dabbs & Son; Bartlett & Gluckstein.*

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.]

A

BOEHM v. GOODALL

[CHANCERY DIVISION (Warrington, J.), November 24, 1910]

[Reported [1911] 1 Ch. 155; 80 L.J.Ch. 86; 103 L.T. 717;
27 T.L.R. 106; 55 Sol. Jo. 108]

B

Partnership—Dissolution—Action for dissolution—Receiver and manager—Appointment by consent—Assets insufficient for payments—Right of receiver to be indemnified by partners in respect of payments made by him for the business.

C

In an action for dissolution of partnership, a receiver and manager was appointed by the court upon a consent order. Payments were made by him without the special leave of the court, partly in carrying on the partnership business and partly for rent due by the firm. As the assets were insufficient to satisfy the payments in full he claimed to be indemnified by the partners personally in respect of the balance due to him.

D

Held: the receiver and manager, being an officer of the court, and not an agent of or in a fiduciary capacity towards the partners, could only look to be indemnified out of the assets of the business in the control of the court, and not by the partners personally, and the fact that the order appointing him was made by consent of the partners did not put him in any better position.

Notes. As to powers, liability and remuneration of receiver and manager, see 28 HALSBURY'S LAWS (3rd Edn.) 557, and for cases see 36 DIGEST (Repl.) 596–598.

E

Cases referred to:

- (1) *Gardner v. London, Chatham and Dover Rail Co.* (No. 1), *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Association v. Same* (1867), 2 Ch. App. 201; 36 L.J.Ch. 323; 15 L.T. 552; 31 J.P. 87; 15 W.R. 325, L.J.J.; 39 Digest 93, 1103.
- (2) *Burt, Boulton and Hayward v. Bull.* [1895] 1 Q.B. 276; 64 L.J.Q.B. 232; 71 L.T. 810; 43 W.R. 180; 11 T.L.R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65, C.A.; 10 Digest (Repl.) 834, 5463.

F

Also referred to in argument:

- Re German Mining Co.* (1853), 22 L.J.Ch. 926; 21 L.T.O.S. 221; 17 Jur. 745, L.J.J.; 36 Digest (Repl.) 550, 110.
- Hardoon v. Belilios*, [1901] A.C. 118; 70 L.J.P.C. 9; 83 L.T. 573; 49 W.R. 209; 17 T.L.R. 126, P.C.; 9 Digest (Repl.) 210, 1328.
- Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch.D. 61; 52 L.J.Ch. 92; 48 L.T. 33; 31 W.R. 98, C.A.; affirmed sub nom. *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 App. Cas. 857; 54 L.J.Ch. 376; 52 L.T. 225; 33 W.R. 309, H.L.; 12 Digest (Repl.) 555, 4205.
- Bannatyne v. MacIver*, [1906] 1 K.B. 103; 75 L.J.K.B. 120; 94 L.T. 150; 54 W.R. 293, C.A.; 1 Digest (Repl.) 369, 410.
- Re Flowers & Co.*, [1897] 1 Q.B. 14; 65 L.J.Q.B. 679; 75 L.T. 306; 45 W.R. 118; 13 T.L.R. 9; 41 Sol. Jo. 30; 3 Mans. 204, C.A.; 4 Digest (Repl.) 104, 933.

H

Adjoined Summons in a partnership action as to indemnification of receiver and manager.

I

All the material facts are stated in the judgment of WARRINGTON, J.

Cave, K.C., and *T. E. Mansfield* for the applicant.

J. W. M. Holmes for the plaintiff.

W. R. Sheldon for one defendant.

R. H. Roope Reeve for another defendant.

WARRINGTON, J.—This was an application made in a partnership action, not by one of the parties, but by a gentleman who has been appointed receiver and

manager of the partnership business by the court, and his application is for an order directing the plaintiff and defendants to pay him, in effect, the balance found due to him upon taking his account; and that, if necessary for this purpose, the plaintiff and the defendants may be directed to proceed forthwith with the judgment in the action.

The action is an ordinary action brought by the plaintiff against his partners for dissolution of partnership and the winding-up of the partnership affairs. The plaintiff moved for the appointment of a receiver and manager, and upon that motion a consent judgment was pronounced, which was in the usual form, directing *inter alia* a sale of the partnership business, and appointing James Todd receiver and manager for a limited period, with the usual directions as to giving security, and that the receiver and manager should pay the debts due and to become due from the partnership out of the first moneys which he received, and should pass his accounts. Subsequently to the making of that order, the receiver and manager obtained an order authorising him to borrow a sum of £500 on the security of the assets for the purpose of payment of the rent and certain other urgent payments, and the money so borrowed was directed to be a first charge on the assets, subject to the costs of realisation and the remuneration of the receiver and manager. In 1910, the assets were sold, and the proceeds were paid into court. The receiver and manager's account was taken, and a balance of £1,020 was found due to him, which included the £500 borrowed with the leave of the court. Later, the money in court was paid out to the receiver and manager, and applied by him towards repayment of the moneys borrowed, and after all these transactions there remained due to him a balance of £481, and it is this balance that the receiver and manager now asks that the partners should be directed to pay to him.

The applicant puts his claim upon two grounds: First, he says that the receiver and manager undertook, at the request of the parties, who all consented to the order, to undertake certain duties on their behalf, and the sums expended and all liabilities which he properly incurred in the performance of these duties were so incurred on an implied promise arising out of the relation of the parties, or, if not, then out of the fact that the expenditure was made and the liabilities incurred at the request of the partners. Secondly, he says that so far as the balance is made up of sums expended by him in payment of rent or other debts for which the partners were liable, he is entitled under the doctrine of subrogation to stand in the place of the creditors whom he had paid, and so to recover from those who were the ultimate debtors. Cases have been referred to on the first point which established this proposition with regard to persons who are trustees, or are in a fiduciary capacity towards those for whom they act. Such persons, making payments or incurring expenditure in the proper performance of their duties are entitled to be indemnified not only out of the property of which they are trustees, but also by the beneficiaries personally.

The whole question to be determined is whether the principle of those cases applies to the case of a receiver and manager appointed by the court. The position of such a receiver and manager is described by LORD CAIRNS (then SIR HUGH CAIRNS, L.J.), in *Gardner v. London, Chatham, and Dover Rail. Co.* (No. 1) (1) in this way (2 Ch. App. at p. 211):

"When the court appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant or officer of the court, and upon any question arising as to the character or details of the management, it is the court that must direct and decide."

The same point is dealt with by LORD ESHER, M.R., in *Burt, Boulton and Hayward v. Bull* (2), where the receiver and manager had been appointed in a debenture-holders' action. He says ([1895] 1 Q.B. at p. 279):

"What is the position of such a receiver and manager? He is not the agent of the company. They do not appoint him; he is not bound to obey their

A directions; and they cannot dismiss him, however much they may disapprove of the mode in which he is carrying on the business. Only the court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business properly."

And later, in the same judgment, LORD ESHER says (*ibid.* at p. 280):

B "Therefore there might be cases in which such a manager would not be personally liable; but, if there is not special stipulation of that kind, and if the terms of the order merely amount to a statement that the giver of it, being a manager appointed by the court, gives such an order, then I think that the only business inference is that the tradesman is to look at the personal credit of the manager, and that the manager trusts to the funds in hand or the other assets of the concern for indemnity."

C
The two lords justices who took part in that decision took the same view of the position of the receiver and manager, that he is not an agent for the company, but that is an officer of the court and personally liable for any obligations which he may incur. It is true that RIGBY, L.J. (*ibid.* at p. 284), speaks of a receiver and manager as "looking for indemnity to the assets or persons for whose benefit ultimately the business was carried on." But this cannot be considered as departing from the general proposition laid down in the case; and no authority has been cited which goes near the point for which the receiver and manager has been contending in the present case. Do these cases of trustees and persons in a fiduciary capacity apply to the case of a receiver and manager? I cannot come to that conclusion without going contrary to all the decisions with reference to receivers and managers appointed by the court. Such a receiver and manager is not an agent of the partners; he is not a trustee of theirs; he is not under their control. As far as they are concerned, he may incur liabilities and spend money without their being able to say a word. I think it is a matter of extreme importance that receivers and managers who act in this manner should know that they must look for their indemnity to the assets which are under the control of the court, and that the court cannot indemnify them otherwise than out of these assets as far as they will extend. There are many cases in which it would be an extreme hardship to the parties if they were to be held liable for expenditure incurred by the receiver and manager in matters over which they have no control. Receivers and managers should know that they incur these liabilities at their own risk.

G But then the receiver and manager in this case says it is not quite the ordinary case, the order appointing him having been made by consent; and by consenting the partners have requested him to undertake these liabilities. That makes no difference at all. If I were to accede to that argument, I should have to hold that in every case the person who put the court in motion would have to indemnify the receiver and manager. The fact that the order was made by consent does not distinguish the case from the ordinary numerous cases in which such orders are made. Then the receiver and manager puts his case on another ground, that he has paid certain debts and is entitled to be subrogated to the rights of the creditors who have been paid by him. In good truth that is the same ground over again. He can only be entitled to be subrogated if he has paid the debts at the express or implied request of the persons whose debts they are. The cases referred to in support of the claim are all cases where the debts had been paid by a person who stood in the position of an agent of the debtor—an agent, who, it is true, was exceeding his authority in paying the debts, but who was entitled to be indemnified so far, as the assets of his principal were not diminished by what he had done. These cases depend on the fact that the expenditure is made by someone as an agent; and they do not apply to the present case. Then the receiver and manager says that if the action is carried on by the partners, there will be a fund out of which he can be paid; but, upon the facts, that is not so. The assets have all been realised; the court can merely determine the

rights and claims of the various parties, and that will bring in no further assets out of which the court could indemnify the receiver and manager. The application fails, and I must refuse it, making no order except that the receiver and manager pay the costs of all the parties who have been heard on this application.

Solicitors: *H. A. Taylor; Ingle, Holmes, Sons & Pott; Dennison, Horne & Co.*; for *Ernest S. Taylor*, Birmingham; *W. E. Aldis*, for *James Hall-Wright*, Birmingham.

[Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.]

R. v. ELLIS

[COURT OF CRIMINAL APPEAL (Lord Alverstone, C.J., Jelf, Bray, A. T. Lawrence and Lord Coleridge, JJ.), June 13, 1910]

[Reported [1910] 2 K.B. 746; 79 L.J.K.B. 841; 102 L.T. 922; 74 J.P. 388; 26 T.L.R. 535; 22 Cox, C.C. 330; 5 Cr. App. Rep. 41]

Criminal Law—Evidence—Evidence of similar offences—False pretences—Evidence of other pretences not charged.

The appellant was convicted of obtaining cheques for large sums of money from one D. to whom from time to time he sold pieces of china under an agreement by which he charged D. the cost price of the articles plus ten per cent. commission. The false pretences alleged were that the appellant represented the cost prices of various pieces of china at a much higher figure than was actually the case, thereby obtaining from D. larger sums than those to which he was entitled. During the hearing of the case the appellant was cross-examined as to alleged fraudulent practices in cases other than those included in the indictment, and this evidence was admitted.

Held: the evidence only amounted to a suggestion that the appellant was of a generally fraudulent disposition, and, therefore, it was not relevant to prove the false pretences charged against the appellant and was inadmissible.

R. v. Fisher (1), [1910] 1 K.B. 149, applied.

Notes. Considered: *R. v. Starkie*, [1922] 2 K.B. 275; *Jenkins v. Feit*, [1923] All E.R. Rep. 295; *R. v. Cohen*, [1938] 3 All E.R. 380. Applied: *R. v. Jones*, [1961] 3 All E.R. 668. Referred to: *Barker v. Arnold*, [1911] 2 K.B. 120; *R. v. Boyle and Merchant*, [1914-15] All E.R. Rep. 553; *R. v. Mason* (1914), 111 L.T. 336; *R. v. Baird* (1915), 84 L.J.K.B. 1785; *R. v. Ratcliffe* (1919), 89 L.J.K.B. 135; *R. v. Porter* (1935), 25 Cr. App. Rep. 59; *R. v. Cutter*, [1944] 2 All E.R. 337; *Stirland v. D.P.P.*, [1944] 2 All E.R. 13.

As to evidence of character and credibility of witnesses, see 10 HALSBURY'S LAWS (3rd Edn.) 445 et seq., and for cases see 14 DIGEST (Repl.) 408 et seq.; as to appeals against conviction, see 10 HALSBURY'S LAWS (3rd Edn.) 535-541, and for cases see 14 DIGEST (Repl.) 629 et seq. For Criminal Evidence Act, 1898, s. 1 (f), see 9 HALSBURY'S STATUTES (2nd Edn.) 614.

Cases referred to:

- (1) *R. v. Fisher*, [1910] 1 K.B. 149; 79 L.J.K.B. 187; 102 L.T. 111; 74 J.P. 104; 26 T.L.R. 122; 22 Cox, C.C. 270; 3 Cr. App. Rep. 176, C.C.A.; 14 Digest (Repl.) 420, 4095.

- A** (2) *R. v. Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, 4091.

Appeal against a conviction at the Central Criminal Court of obtaining cheques by false pretences.

Reginald White for the appellant.

- B** *Bodkin* (*Leycester* and *Roome* with him) for the Crown.

BRAY, J.—The appellant was indicted under six counts for obtaining moneys by false pretences from the late Mr. C. T. Dickins in respect of china sold by him to Mr. Dickins. It was alleged that all the articles referred to in the indictment had been sold by him to Mr. Dickins under an agreement that he was to charge **C** Mr. Dickins the cost price plus ten per cent. profit or commission. The fraud alleged was that he had represented to Mr. Dickins that the cost was much in excess of the real cost, and that by this means he had obtained from Mr. Dickins much larger sums than he was entitled to. The jury acquitted him on counts two and three, but convicted him on counts one, four, five, and six. The case was first argued before the Lord Chief Justice and **BRAY** and **PICKFORD, JJ.** The notice of appeal recited a number of grounds, but many were not argued at all. As to some of these the court, as then constituted, felt no difficulty, but as to one of them the court considered it a point of so much importance and difficulty, that it was advisable to have it argued before a court of five judges, and accordingly it came on for hearing before a court consisting of the Lord Chief Justice and **JELF, BRAY, A. T. LAWRENCE, and LORD COLERIDGE, JJ.** This court has already **E** announced its decision that the appeal must be allowed, but stated that the reasons would be given later. We have now to give our reasons for our decision on all the points argued.

We will deal first with those that we did not think it necessary to have argued before the larger court. The first point raised by counsel for the appellant related to the entries in the appellant's books. In all the six cases entries had been **F** made in the books which apparently showed the cost to him of the articles as well as the prices he charged Mr. Dickins. These entries were the evidence on which the prosecution relied as showing the real costs, and if they were the real costs it was clear that the appellant had obtained more from Mr. Dickins than he was entitled to. His case was that they showed only part of the costs, and that he had paid more for the articles than the figures shown in the book, and **G** that he had only charged Mr. Dickins the actual sums he had paid plus ten per cent. Counsel for the appellant urged that by their finding on counts two and three the jury had destroyed the presumption on which the prosecution had rested their case, that they had found in those two cases that the entries in the books did not show the whole cost, and that if they did not show the whole cost with regard to the articles mentioned in counts two and three, there was no presumption that **H** they showed the whole cost of the articles mentioned in the remaining counts. We are of opinion that this argument is not sound. When the evidence is looked at it appears that there were good reasons why the jury should have accepted the appellant's explanation in the two cases and have rejected it in the others. The fact that there was a good explanation in the two cases, would tend to weaken the presumption in the others, but would not destroy it. It was for the jury to decide **I** the strength of the presumption, and the next point was that evidence as to certain civil proceedings which had been taken by the executors of the late Mr. Dickins against the appellant was wrongly admitted. It appeared that, before any criminal proceedings had been taken, the executors of Mr. Dickins had brought an action against the appellant for damages for fraud. The original statement of claim alleged fraud in the sale of a considerable number of articles not including any of those mentioned in the six counts, but this statement of claim was afterwards amended by including all the articles in the six counts. Evidence was given on the

part of the prosecution that the case came on for trial, that the appellant was present on the first day, but not subsequently, that he was not called as a witness to deny the fraud, nor were any witnesses called on his behalf, and the verdict passed for the plaintiffs with large damages. It was further shown that after the first day the appellant had gone abroad and had remained there till after the criminal proceedings were started. It appears to us that this evidence was admissible as showing the conduct of the appellant when the charges were made against him. It is, as a rule, admissible to show what is the conduct of a prisoner when he is charged with the offence alleged in the indictment. If he denies the charge it is evidence in his favour, if he is silent it may be evidence against him, if he admits it, it will be strong evidence against him. In this case it was suggested by the prosecution that his conduct in leaving the country instead of going into the witness box to deny the charges was strong evidence against him. We are clearly of opinion that this conduct of his was evidence against him and properly admissible. It was none the less admissible because the charges of fraud were first made in said proceedings. The value of this evidence was of course for the jury. It does not clearly appear that the prosecution put in all the proceedings. They would not be entitled to have the part of the statement of claim which contained the other charges read to the jury, but that part was not heard. It did appear what the verdict of the jury was, but that was sure to come out and no objection was made. It did also appear that GRANTHAM, J., who tried the action had ordered the documents to be impounded. This should have been stated, but no objection was taken, and the matter is not one of sufficient importance in our opinion to justify an appeal. The real importance of the evidence given was the conduct of the appellant, and that we hold to have been clearly admissible.

We now come to the points argued before the larger court. It was contended on the part of the appellant,

“That questions had been put to him in cross-examination tending to show that he had committed an offence other than that wherewith he was then charged”

in violation of the provision in s. 1 (f) of the Criminal Evidence Act, 1898, and that the appellant had been wrongly required to answer such questions, and further that the Recorder had wrongly directed the jury in his summing-up that the evidence so given was relevant evidence which should be considered by them in forming their opinion as to whether the appellant was guilty of the offences charged. It appears that there was a second indictment under which the appellant was charged with further frauds which included the following: (a) That he had obtained money from Mr. Dickens by falsely pretending that a certain china figure described in an invoice sent to Mr. Dickens on July 17, 1900, as a figure of Countess Cozier was a genuine piece of fine old Dresden china, and that he had acquired it on July 16, 1898, as a genuine piece of fine old Dresden china. (b) That he had committed a similar fraud in falsely representing that a certain china group described in an invoice dated Dec. 30, 1902, as a fine old Dresden group of two noblemen in masonic costume dividing the globe, was a piece of genuine fine old Dresden china. This piece of china was referred to at the trial as a group of Peter the Great and Augustus the Strong pushing the world. The indictment was not, of course, before the jury except indirectly in the argument as herein-after stated, and it is only now referred to as explaining the cross-examination. For the purpose of our judgment it is quite immaterial whether these frauds had been made the subject of another indictment or not. It was argued by counsel for the appellant that questions were put to the defendant in cross-examination tending to show that the defendant had committed these two frauds.

It will be convenient to consider, first, what is the meaning of the words of the statute, “Any question tending to show that he had committed an offence,” etc. It is plain that it must include many more questions than the simple question whether the prisoner has committed a particular offence. It is also plain that

A whether the question "tends to show" cannot be decided by looking merely at a single question. Each question must be judged by the light of others asked before and after. The object of the enactment is that it should not be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that

B he had committed another offence would, in our opinion, tend to show that the prisoner had committed that other offence. It does not in the least depend on the object of the counsel putting the question. The words of the Act are not "with a view to show," they are "tend to show." Moreover, if they do so tend, it is quite immaterial whether the evidence would be admissible or the questions admissible on other grounds. As we read the statute, when a prisoner is charged

C with offence A questions tending to prove offence B are not to be asked unless proof of offence B is evidence of offence A. If it were otherwise, the protection of the prisoner would be liable to be destroyed by a side wind. This disposes also of the proposition that the questions were admissible as going to the general credit of the witness. Nothing goes more to the credit of a witness than a previous conviction; but no question tending to prove this can be asked.

D We will now refer to the questions that were put in the Countess Cozier case in order to see whether they come within our definition of the words "tending to show." They are questions 2056 to 2207. On examination of these questions it will be found that they are directed to prove the allegations necessary to show that the appellant had committed this fraud. Questions 2056 to 2074 are directed to proving by means of entries in his own books that he bought this Countess Cozier

E from Hoffman on July 16 under the description "Figure of a Lady in crinoline green cloak" for £30 and sold it the same day to Mr. Dickins for £430 under a much more elaborate description. This suggested a fraud. Then comes Question 2076.

"Q. In your day-book is this what the lady in crinoline has developed into. A figure of Countess Cozier of fine old Dresden porcelain of exceptional quality in large crinoline beautifully painted with detached bunch of flowers in gold trellis medallion with long flowing train of green colour on Louis XV plain ormolu mount, £430? Q. 2077. The figure of Countess Cozier is well known in Dresden china circles, is it not?—It is a well-known and valuable piece. Q. 2081. Do you suggest that by that day-book entry and the invoice which tallies exactly with it you were not representing to Mr. Dickins that that was the Countess Cozier, the well-known Dresden china piece?"

F

G

Now, what is the meaning of these questions? What would they convey to a jury? Surely that he had bought a piece of china of little value from Hoffman for £30 and had sold it to Mr. Dickins on a representation that it was the well-known Dresden china figure of Countess Cozier—the very false pretence charged in the

H second indictment. This line of cross-examination is followed up:

"Q. 2088. Do you tell the jury that you before that date (July, 1900) did not know of the Countess Cozier as a very important piece of Dresden china?"

And when the appellant denied this, there come a number of questions directed to show that the appellant was an expert, and must therefore have known of the existence of this well-known valuable piece of china, and that the article he sold was not that piece. Questions 2103 to 2113 are directed to show that Hoffman, from whom he bought this piece, is also an expert, and would never have sold such a valuable piece of china if it were genuine for £30. We come now to Question 2170.

I

"Q. This is a photograph, is it not, of the piece that you sold for £430?"

It was at this point that Mr. Elliott interposed with an objection that the cross-examination was irrelevant, and that it related to a fraud not in the indictment.

It is most important to observe the answers of the Recorder to this objection. A

"Mr. Elliott: What possible bearing it has on any of the transactions named in the indictment I do not know.—The Recorder: It is cross-examination for the purpose of suggesting to the jury that there had been fraud in cases other than those set out in the indictment."

This makes it quite clear how these questions were interpreted at the time—viz., as tending to show that the appellant had committed another fraud in the sale of this Countess Cozier to Mr. Dickens for £430. B

Applying the test we have indicated—viz., Would these questions reasonably lead a jury to believe that it was being imputed to the appellant that he had committed this other fraud?—our answer must be that a jury would quite reasonably and properly take this same view. The objection was overruled by the Recorder, and the cross-examination was allowed to proceed, and the appellant was asked to admit statements which Mr. Alfred Dickens had made in the witness-box at Bow Street when he was giving evidence in support of the charge in the second indictment, and the photograph and a pencil sketch, both of which have been put in evidence at Bow Street, were handed to the jury to show that the appellant's explanation must be untrue. C

So much for the Countess Cozier fraud. Questions 2208 to 2255 relate to the Peter the Great and Augustus the Strong piece of china. They are directed to show, by means of entries in his books, that the appellant had bought the article for £30, or perhaps £60, for Woolman, and had re-sold it to Mr. Dickens for £440. Reading these questions and bearing in mind the questions put with reference to the Countess Cozier fraud, we come to the conclusion that these also "tended to show" that the appellant had committed another offence. Now, if it be established, as we think it has been, that these questions or some of them tended to show that the appellant had committed another offence, the statute provides that they shall not be asked or answered D

"unless (i) the proof that he has committed . . . such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character . . . " E F

We need not refer to the other cases in which the statute provides that such questions may be asked, as it was not suggested they were applicable here. Dealing first with (i), was the proof that he had committed the Countess Cozier or Peter the Great frauds admissible evidence to prove the frauds with which he was then charged? In other words, could evidence of the frauds have been given by the prosecution? It was argued by counsel for the Crown that the judgments in *R. v. Bond* (2) supported his proposition. We think they show the contrary. LORD ALVERSTONE, C.J., says ([1906] 2 K.B. at p. 394): G

"The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved." H

RIDLEY, J., agreed with this judgment, and KENNEDY, L.J. (*ibid.* at p. 397), and BRAY, J. (*ibid.* at p. 415), agree with the principle so enunciated by LORD ALVERSTONE, C.J., so that four of the seven judges (a majority) laid down this principle; but when the other judgments are referred to it will be seen that they differ not so much as to the principle but as to the application of the principle to the facts of that case. I

The law on this subject is laid down with perfect accuracy by CHANNELL, J., in

A *R. v. Fisher* (1). He says, giving the judgment of the Court of Criminal Appeal (LORD ALVERSTONE, C.J., CHANNELL and LORD COLERIDGE, JJ.) ([1910] 1 K.B. at p. 152):

B "In other words, whenever it can be shown that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences in order to negative the suggestion of mistake or in order to show the existence of a systematic course of fraud."

C Then applying these principles to the case he was dealing with, where the prisoner was charged with obtaining a pony and cart by making certain statements, he proceeded (*ibid.* at p. 153):

D "The falsity of those statements is not proved by giving evidence that in other cases the prisoner made other false statements, though it does tend to show that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by showing that he has also swindled in some other manner. We are of opinion that the evidence as to the other cases was inadmissible in this case, because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if all the cases had been frauds of a similar character, showing a systematic course of swindling by the same methods, then the evidence would be admissible."

E Applying these principles to the present case, we are of opinion that proof that the appellant had committed the Countess Cozier or the Peter the Great Frauds is not admissible evidence that he was guilty of the frauds with which he was charged. As we have already pointed out, the frauds with which the appellant is charged were making false representations as to the cost price of the article, and so obtaining from Mr. Dickens more than the cost plus ten per cent. In the Countess Cozier and Peter the Great cases there had been no agreement by the defendant to charge only cost plus ten per cent. The frauds were in representing the articles to be genuine old Dresden china when they were not so. The transactions were entirely distinct. The frauds were not of a similar character. There was no systematic course of swindling by the same methods. It was argued by counsel for the Crown that there was some connection between one of the six cases—viz., the Worcester cups case mentioned in count four, and the Countess Cozier frauds—because in each case the article had been originally bought from Hoffman, and because in each case the entries in the books showed payments to Hoffman. When the evidence is carefully looked at it will be seen that it is a fallacy to say that there was any connection between the two transactions. The prosecution were affirming not denying the entries in the books of payment to Hoffman, and the appellant was not suggesting any further payments to Hoffman, but to a different person altogether named Dopson. But, however that may be, the statute says "that the test is to be whether the proof that he has committed such other offence is admissible evidence to show that he is guilty of the offence charged."

I We come now to the second ground on which these questions might be properly put. Counsel for the Crown suggested that Mr. Elliott had in his opening speech to the jury endeavoured to establish the appellant's general good character. We do not think that this was so; but if it were so, that is not within the statute; he must have asked questions of the witnesses for the prosecution, or he must have given evidence with a view to establish the appellant's good character. It was said that in the examination in chief of the appellant Mr. Elliott had asked questions relating to his purchase of this business, to his general relations with Mr. Dickens,

and to other transactions under the cost plus ten per cent. agreement. It would not be correct to say that the appellant had given evidence of his own good character. It may or may not have been relevant to go into other sales on the cost price plus ten per cent. basis. Counsel for the Crown thought it was not and objected, and Mr. Elliott did not further pursue that line of examination; but its object was not to set up his good character, it was to negative fraud. In our opinion, if we were to give the slightest colour to the idea that a general examination as to the surrounding circumstances was such evidence of good character as to entitle the prosecution to prove or to cross-examine as to other offences or convictions, we should deprive the prisoner of the protection which the statute has given him. Section 1 (f) (ii) was not intended to apply to a case like this. It was intended to apply to cases where witnesses to character were called or where evidence of the good character of the prisoner was sought to be elicited from the witnesses for the prosecution. In civil actions evidence of good character is not, as a rule, admissible. It is admissible in criminal cases, and it is to this class of evidence that the statute refers. Not to mere assertions of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertion or repudiation. The evidence given by the appellant here in examination-in-chief could not possibly have been objected to in a civil action as being "evidence of good character." It is to be observed that it never was suggested for a moment at the trial that the appellant had given evidence of good character, nor was it suggested by counsel for the Crown on the first argument of this case. He said the point had occurred to him from reading Mr. Elliott's opening, but this, as we have pointed out, is not within sub-clause (ii) of s. 1 (f). Now, these are the only two grounds on which the statute, so far as it is applicable to the cases now under consideration, permits cross-examination of the prisoner as to the commission of other offences. They both fail, in our opinion, and it follows that the questions put in cross-examination were not admissible.

But it was said that Mr. Elliott's objection came too late. Now, it is true that he might have objected earlier, and no doubt this court must be careful in allowing appeals on the ground of the reception of evidence that ought not to have been admitted when no objection has been made at the trial by the prisoner's counsel. Here, however, the objection was taken, though not at the earliest opportunity. It was argued on its merits and overruled, and the jury were informed not only when the objection was overruled, but afterwards in the summing-up that this evidence was relevant. No one was misled in the slightest degree by any delay in making the objection, and it would work a grave injustice if we were to refuse to allow the appeal here on the ground of some possible mistake on the part of the appellant's counsel. But there is another reason. The statute provides that the prisoner shall not be asked, and if asked shall not be required to answer, these questions. In our opinion, these words were intended to afford a double protection to the prisoner. The statute provides that the question shall not be asked. The reason of this is plain, because in most cases the mischief is done by the asking of the question. The jury naturally assume that no such question would be put unless there was foundation for it, and the more objection is made to it by the prisoner's counsel the stronger, to their minds, becomes that assumption. It is most damaging to the prisoner's case for his counsel to get up and argue that a question is inadmissible because it tends to show that the prisoner has committed another crime. In this case, in order to make his objection clear, Mr. Elliott was obliged to tell the Recorder in the hearing of the jury that there was another charge pending against the appellant which was contained in another indictment. This, of itself, unless removed by some clear statement from the Recorder that they must dismiss the question from their minds, must prejudice the jury. That is the reason, in our opinion, why the statute forbade the question even being asked. It is the duty of the judge not to wait for any objection from the prisoner's counsel, but to stop such questions himself, and if by mischance the question be put, it is

A equally the clear duty of the judge to direct the jury to disregard it and not let it influence their minds.

There being, therefore, a clear misreception of evidence, it would have been necessary to consider whether there was also a misdirection in the summing-up, but for the fact that it was argued lastly that there had been no miscarriage of justice. This court has laid down quite clearly the rule to be applied in cases of misreception of evidence or misdirection in law. It is stated by CHANNELL, J., in *R. v. Fisher* (1) in these words ([1910] 1 K.B. at p. 153):

B “In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this court, the conviction cannot stand.”

C Ought we to say here that the jury may have been influenced by these questions and answers? A large part of the summing-up was devoted to the stories of the Countess Cozier and Peter the Great frauds, whereas the jury should have been told to dismiss these two matters from their consideration. However, in the summing-up occur the following passages:

D “His evidence, of course, was directed to show that he had not committed any fraud, and therefore Mr. Bodkin cross-examined him at length; and I think he was quite right, on the ground that it was for the purpose of throwing doubt upon that portion of his testimony. He says: ‘I have committed no fraud.’ . . . However, Mr. Bodkin cross-examined him about this very interesting case—this Countess Koessel, whoever she is.”

E The Recorder then commented at length about the appellant’s dealings in this transaction, and then said:

F “There is just one other matter of a similar character before I come to read to you the defendant’s [the present appellant’s] own evidence, which is not unworthy of your attention and consideration on the same matter”

G —that is to say, the same question as to whether the defendant in going into the witness-box for the purpose of endeavouring to disprove the intent to defraud is a person to be relied upon. The issue with regard to the charges in the indictment was a perfectly clear one. It was this: Were the entries in the defendant’s books to be taken to show the whole cost, or did the defendant pay other sums? In other words, what credit was to be given to the defendant’s evidence? Now the evidence as to these two other frauds was put before the jury as matter which they ought to take into consideration when they were deciding as to what credit should be given to the defendant’s evidence. It is quite clear from the summing-up that the jury were invited to consider whether these two cases were not very damaging to the defendant’s credit, and the jury could hardly have failed to draw the inference hostile to the defendant on the point. We feel bound, therefore, to say not only that the jury may have been influenced, but that they must have been influenced. On these grounds the court is of opinion that the appeal must be allowed, and the conviction quashed.

Conviction quashed.

Solicitors: *Julius A. White; Director of Public Prosecutions.*

[*Reported by G. DODSON, Esq., Barrister-at-Law.*]

WING v. LONDON GENERAL OMNIBUS CO.

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Buckley, L.J.J.),
June 17, 18, July 16, 1909]

[Reported [1909] 2 K.B. 652; 78 L.J.K.B. 1063; 101 L.T. 411; 73 J.P. 429;
25 T.L.R. 729; 53 Sol. Jo. 713; 7 L.G.R. 1093]

Negligence—Res ipsa loquitur—Application of principle—Cause of accident and circumstances essential to occurrence within sole control of defendant—Road accident—Accident to or through particular vehicle—Evidence of negligence of driver.

Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies where the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control and management of the defendants or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened. An accident in the case of traffic on the highway is in marked contrast to such a condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road, and over their actions those in charge of the vehicle have no control, hence the fact that an accident has happened either to or through a particular vehicle is by itself no evidence that the fault, if any, which led to it was committed by those in charge of that vehicle: per FLETCHER MOULTON, L.J.

Highway—Nuisance—Unmanageable vehicle—Danger to other vehicles—Tendency to skid.

The doctrine of *Rylands v. Fletcher* (1) (1868), L.R. 3 H.L. 330, is applicable to a case where a member of the public makes undue and improper use of the right which he enjoys in common with all others of using the public highways for traffic. If a man places on the highway a vehicle which is so wholly unmanageable as necessarily to be a continuing danger to other vehicles either at all times or under special conditions of weather he does so at his peril and is responsible for injuries arising therefrom, even though there has been no negligence in the management of his vehicle: per FLETCHER MOULTON, L.J.

Road Traffic—Negligent driving—Nuisance—Accident caused by skidding.

Without any negligence of the driver a motor omnibus belonging to the defendants skidded on a road made greasy by rain, collided with an electric standard, and caused injury to the plaintiff who was a passenger in the omnibus. In an action by the plaintiff for damages for personal injuries,

Held by VAUGHAN WILLIAMS, L.J., and FLETCHER MOULTON, L.J., BUCKLEY, L.J., dissenting: the fact that an accident was caused by the skidding of a motor vehicle was not in itself any evidence of negligence on the part of those in charge of the vehicle or that the vehicle was so unmanageable as to constitute a nuisance on the highway, and, therefore, the action failed.

Notes. Applied: *Parker v. London General Omnibus Co.* (1909), 101 L.T. 623. Distinguished: *McGowan v. Stott* (1923), 99 L.J.K.B. 357n. Considered: *Ryan v. Youngs*, [1938] 1 All E.R. 522; *Liffen v. Watson* (1939), 161 L.T. 351; *Laurie v. Raglan Building Co.*, [1941] 3 All E.R. 332. Referred to: *Newberry v. Bristol Tramways and Carriage Co.* (1912), 11 L.G.R. 69; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; *Stennett v. Hancock and Peters*, [1939] 2 All E.R. 578; *Spicer v. Smee*, [1946] 1 All E.R. 489; *Read v. Lyons & Co.*, [1946] 2 All E.R. 471.

As to negligence and nuisance on highways and *res ipsa loquitur*, see 28 HALSBURY'S LAWS (3rd Edn.) 62-73, 77-80, and *ibid.*, vol. 19, p. 270 et seq. For cases see 26 DIGEST (Repl.) 466 et seq., and 36 DIGEST (Repl.) 89 et seq., 143-149.

A Cases referred to :

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (2) *Simson v. London General Omnibus Co.*, (1873), L.R. 8 C.P. 390; 21 W.R. 595; sub nom. *Simpson v. London General Omnibus Co.*, 42 L.J.C.P. 112; sub nom. *Smith v. London General Omnibus Co.*, 28 L.T. 560; 8 Digest (Repl.) 100, 665.

B

- (3) *Readhead v. Midland Rail. Co.* (1867), L.R. 2 Q.B. 412; 36 L.J.Q.B. 181; sub nom. *Redhead v. Midland Rail. Co.*, 8 B. & S. 371; 16 L.T. 485; affirmed (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 9 B. & S. 519; 20 L.T. 628; 17 W.R. 737; 8 Digest (Repl.) 75, 496.
- (4) *Christie v. Griggs* (1809), 2 Camp. 79, N.P.; 8 Digest (Repl.) 79, 531.

C

- (5) *Sharp v. Grey* (1833), 9 Bing. 457; 2 Moo. & S. 620; 2 L.J.C.P. 45; 131 E.R. 684; 8 Digest (Repl.) 80, 535.
- (6) *Isaac Walton & Co., Ltd. v. Vanguard Motor Bus Co., Ltd.*, *Gibbons v. Vanguard Motor Bus Co., Ltd.* (1908), 72 J.P. 505; 25 T.L.R. 13; 53 Sol. Jo. 82; 7 L.G.R. 349, D.C.; 36 Digest (Repl.) 91, 487.

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- (7) *Hyman v. Nye* (1881), 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554; 3 Digest (Repl.) 96, 239.

Also referred to in argument :

The Lancashire (1874), L.R. 4 A. & E. 198; 29 L.T. 927; 2 Asp. M.L.C. 202; 24 Digest (Repl.) 1149, 109.

E

Appeal by the defendants from a decision of the Divisional Court (BIGHAM and WALTON, JJ.), on an appeal by the plaintiff from a decision of the learned judge at Clerkenwell County Court in an action brought by the plaintiff against the defendants for personal injuries sustained by her owing to the negligence of the defendants' servants while she was a passenger in a motor omnibus belonging to the defendants which skidded on a greasy road and came into contact with an electric light standard.

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Simon, K.C., and *Ernest Charles* for the defendants.
Moses and Dunbar for the plaintiff.

Cur. adv. vult.

July 16, 1909. The following judgments were read.

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VAUGHAN WILLIAMS, L.J.—This is a case of some importance. The plaintiff (an artificial flower maker) claims £40 damages for personal injuries sustained by her while travelling as a passenger in a motor omnibus of the defendants, from Hornsey Rise to Hammersmith, and alleges that the personal injuries sustained by her were caused (i) by the negligence of the defendants' servant, when in charge of a motor omnibus, in so improperly managing it as to cause or allow it to come into collision with an electric light standard, and to occasion such fright and alarm to the plaintiff that in escaping from the said omnibus she was seriously injured; (ii) alternatively, the plaintiff claims a like amount by reason of the negligence of the defendants in placing upon the highway a dangerous machine which was liable to become uncontrollable in certain slippery or other conditions of the roadway (which condition existed at the time the aforesaid injuries were sustained) and thereby creating a nuisance. At the close of the evidence for the plaintiff counsel for the defendant company submitted there was no evidence of negligence. A police officer spoke to the road being in a greasy state at the time, and to the driver and conductor having stated that the omnibus was going about five miles an hour; and the plaintiff proved that as the omnibus was going into Caledonian Road it came into collision with an electric light standard, and that she, in escaping or alighting from the omnibus, was seriously injured. It was, the county court judge said in his judgment, part of the plaintiff's case that the collision was due to skidding, and the defendant company admitted (while denying negligence) that such was the

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case. The county court judge declined to leave to the jury the first of the plaintiff's alternative claims—viz., the claim based on negligent management by the defendants' servant in driving the omnibus—and the plaintiff's counsel assented to that course, so that there was nothing left for the jury to consider except the question arising on the second alternative claim, and the question whether the plaintiff was guilty of contributory negligence causing the accident in getting out as and when she did. The learned judge asked the jury whether the defendant company were guilty of negligence towards the plaintiff in allowing their motor omnibus to run, having regard to the fact that the roadway was in a slippery, greasy state at the time, and of the known tendency of such vehicles as motor omnibuses to skid on greasy surfaces, and also asked the question as to contributory negligence by the plaintiff. The jury found that the defendant company was negligent in allowing their omnibus to run when the road was in a slippery state, and that the plaintiff was not guilty of "contributory negligence" in getting out as she did, and assessed the damages at £34 11s. The county court judge reserved entering judgment for the purpose of considering whether he was right in leaving any question of negligence to the jury, and came to the conclusion that there was no evidence of negligence on the part of the defendant company in allowing their motor omnibus to run when the road was in a slippery condition, and entered judgment for the defendant company. In the course of his judgment the county court judge stated that it was not suggested at the trial that the defendant company used an imperfectly constructed or wrongly designed vehicle, or that the company had omitted to use any known contrivance or take any proper precaution to prevent "skidding."

From this judgment of the county court judge entering judgment for the defendant company there was an appeal to the King's Bench Division, which reversed the judgment of the county court judge, and ordered judgment to be entered for the plaintiff for the sum assessed by the jury, with costs. BIGHAM, J., in delivering his judgment in the King's Bench Division, begins by stating that it is not an abnormal thing for a road to be greasy, and then says that if it appears that a motor omnibus, using a road when the road is in a normal condition, behaves in an eccentric way, there must be something wrong about the vehicle itself, and that people ought not to send out vehicles which (the highway being in an ordinary condition in which you may expect to find it) are not controllable. Here the highway was in a normal condition, and the motor omnibus being driven along it, and being driven (for this purpose I will assume) quite carefully, the driver is not able to control its movements. I think, says BIGHAM, J., that those circumstances are quite sufficient to justify a jury in saying that it is a negligent thing to send that motor omnibus out. WALTON, J., deals with the case in much the same way, stating that the learned county court judge, taking the view that he could not say that there was general evidence of negligence because the omnibus might have skidded in that way, a fault not in any way due to the driver, left the question to the jury whether the defendants were negligent. Even in that view, even assuming that the accident was caused by skidding, and that the driver could not control the omnibus, and so prevent it, WALTON, J., concludes this part of the case by saying:

"Upon that the jury have found for the plaintiff, and upon the decisions which have been given I do not see how that verdict can be impeached unless [the argument of counsel for the defendants] must prevail—namely, that the plaintiff, when she went into this omnibus, took the risk of the omnibus skidding."

The learned judge then goes on to say:

"No doubt if she knew that omnibuses will skid, notwithstanding everything that can be done to prevent them, if she had known that in the sense that the omnibus was not a safe omnibus for her to travel in, and had taken that risk, of course she could not sue; but whether she knew that or whether she

A did not take that risk is a question of fact upon which the burden is rather on the defendants, who set up that she did take that risk; but it seems to me that there was nothing to show that the plaintiff knew anything at all about the tendency of the omnibus to skid, and that the verdict cannot be disturbed."

I think WALTON, J., must have meant here "such an omnibus," to wit, a motor omnibus, to skid.

B I will first inquire into the question how far the decided cases justify the conclusion that the mere happening of the accident to a passenger in a public vehicle makes a prima facie case against the owners of an omnibus plying for passengers in the public streets. Generally in a case charging negligence, as in every other case, it is for the plaintiff to prove his case—that is, to prove negligence of a duty owing to him—and the mere fact of an accident is not generally prima facie evidence of negligence; but if the cause of the accident be shown, this may or may not be prima facie evidence, according to its nature: see *Simson v. London General Omnibus Co.* (2). The cause of the accident in the present case was the skidding of the motor omnibus; there was no actual evidence that motor omnibuses (however well constructed) will occasionally skid when roads are slippery, which, as BIGHAM, J., says, is a normal condition of roads; but, on the other hand, the whole case was conducted on the assumption that when a road is in a slippery condition a motor omnibus has a tendency to skid, whatever its construction may be, and there was no suggestion by the plaintiff that this omnibus was ill-constructed or omitted any known means of preventing skidding. Nevertheless, the defendants knew of the tendency of motor omnibuses to skid, and, knowing this, put a motor omnibus on the streets to ply for passengers. Their counsel admitted that motor omnibuses, however well constructed, have a tendency to skid, and that this was well known, and that it must be assumed that the plaintiff knew, but there was in fact no evidence that she knew. His admission did not go beyond this.

E Before I read the rest of my judgment I want to say that I have written this final part of my judgment for this reason. The materials we had for knowing what took place exactly at the trial are very scanty, and under those circumstances I have thought it worth while, at the expense, it may be, of some repetition of the facts that I stated at the beginning of the judgment, to see exactly what the course of the trial was, and what the actual facts were as to the defendants' liability. I will begin with the facts of the case and the course of the trial as appearing from the judge's notes and the statements in his judgment. It appears from the evidence of a police constable, who did not see the accident, that the driver said: "Hind part of omnibus skidded when avoiding other vehicles, which caused damage." The conductor said the same. All the rest of the evidence went only to the injuries sustained by the plaintiff and the pecuniary and other damage. Counsel for the defendant company submitted that there was no evidence of negligence, or that the accident happened to the plaintiff as a direct consequence of accident to the lamp post. The defendant company called no evidence except medical evidence by Dr. Abbott. Looking at the judgment of the county court judge, I find that he begins his judgment by referring to the submission by counsel for the defendant company that there was no evidence of negligence which ought to be left to the jury. He then recapitulates the evidence of the police officer, not quite in the words of his notes, for he adds that this witness spoke to the road being in a greasy state at the time, and adds to his statement that the driver said that the hind part of the omnibus skidded when avoiding other vehicles, and that the conductor said the same, a statement that the driver and conductor admitted that the omnibus skidded while going about five miles an hour, and while the driver was trying to avoid two other vehicles. The county court judge goes on to say that it was in fact part of the plaintiff's case that the collision with the lamp post was due to skidding, and that the defendant company admitted (while denying negligence) that such was the case, and that it was due to the state of the road. The learned judge declined

to leave any question of negligent driving to the jury, and it is admitted that counsel for the plaintiff assented to this course and cannot complain that this issue was not left to the jury, but the learned judge did leave to the jury the question

"whether the defendant company were guilty of negligence towards the plaintiff in allowing their motor omnibus to run, having regard to the fact that the road was in a slippery state at the time and of the known tendency of such vehicles as motor omnibuses to skid on greasy surfaces."

The jury, the learned judge says, found

"that the defendant company was negligent in allowing their motor omnibus to run on the road when it was in a slippery state."

I observe that neither the question left to the jury nor their finding coincide exactly with the words of the second head of particulars, which are :

"Alternatively, the plaintiff claims a like amount by reason of the negligence of the defendants in placing on the highway a dangerous machine which was liable to become uncontrollable in certain slippery or other conditions of the roadway (which condition existed at the time the aforesaid injuries were sustained) and thereby creating a nuisance."

The county court judge reserved his judgment, and after consideration delivered a written judgment to the effect following :

"I think I ought to enter judgment for the defendant company. The duty of a carrier of passengers is laid down in *Readhead v. Midland Rail. Co.* (3) as being the duty of taking every precaution to procure a vehicle reasonably sufficient for the journey which it is to assist in performing, and I do not think there was any evidence in the present case that the company had not performed that duty."

The learned judge adds a statement of fact as to the course of the trial. He says :

"It was not suggested that the defendant company used an imperfectly constructed or wrongly designed vehicle, or that the company had omitted to use any known contrivance or take any proper precaution to prevent skidding, and, apart from the fact that in common with all motor-drawn vehicles there is a great tendency for motor omnibuses to skid or slip on greasy roads, rather than for other classes of vehicles, I do not think there was any evidence of negligence on the part of the defendant company in allowing their motor omnibus to run when the road was in a slippery condition."

There is some slip in the use of the word "drawn." I think "propelled" is the right word, and not "drawn," strictly speaking.

I have read this part of the judgment in the county court at length so as to ascertain what really was the question with which the jury were dealing when they found that the company was negligent in allowing their omnibus to run when the road was in a slippery state. I have not got the summing-up before me, and can only infer its substance from the words of the judgment of the county court judge which I have quoted; but I do not think that the jury considered any question as to defects in construction or design of this particular omnibus, but assumed the fact that motor omnibuses and other vehicles propelled by motor power had a tendency to skid on slippery roads, and asked themselves whether it was negligence on the part of the defendant company, who had knowledge of this tendency to skid, to place a machine liable to become uncontrollable in slippery conditions of the road and thus a nuisance. If this was the question which the jury presented to themselves and answered, I think that the fact that the defendant company placed such a carriage on the road to ply for passengers was no evidence of negligence or nuisance, having regard to the fact that motor omnibuses have been running in the streets of the metropolis for many years. No doubt the mere fact of the accident may be *prima facie* evidence of negligence when the accident itself

A is evidence of a defect in the particular carriage, as was the case in *Christie v. Griggs* (4) and *Sharp v. Grey* (5); but I do not think that an accident resulting from the tendency of motor omnibuses, however well constructed and designed, to skid is any evidence of negligence or of nuisance. So, with all deference to the Divisional Court, especially as constituted, I think this appeal must be allowed. I do not think that the knowledge or want of knowledge of the plaintiff of the tendency of motor omnibuses to skid affects the event of this action.

FLETCHER MOULTON, L.J.—This is an appeal from the judgment delivered by the judge of Clerkenwell County Court in an action in which the plaintiff sued for damages resulting from an accident which occurred while she was a passenger in a motor bus belonging to the defendants.

C The plaintiff's claim was based on two alternative grounds: (i) that the defendants' servants whilst in charge of the motor were guilty of negligence causing the accident, and (ii) that the motor bus was itself a dangerous machine and that the defendants were liable for having placed it upon the roadway, thereby creating a nuisance whereby the plaintiff suffered damage. The evidence given at the trial as to the nature and circumstances of the accident was meagre in the extreme.

D The plaintiff deposed to nothing more than that she was a passenger in the bus, that she heard breaking of glass and knew that the bus had hit something, and that she heard something fall. She tried to get out and in doing so hurt her foot. No other witness was called who was present at the time of the accident, but evidence was given on her behalf by a police constable who came up afterwards and proved that an electric standard had been broken in the accident, and that the hind step of the motor bus had been slightly bent. No other damage had been caused to the bus. He also proved that the road was in a greasy state at the time by reason of rain that had fallen during the day. He was asked by plaintiff's

E counsel as to certain admissions made to him at the time by the driver and the conductor of the bus, and proved that they stated to him that the hind part of the bus skidded when the bus was going at about five miles an hour while the driver was trying to avoid two other vehicles. The defendants called no evidence except as to the quantum of damage. At the end of the plaintiff's case, counsel for the defendants submitted that there was no evidence either of negligence or of nuisance to go to the jury, and the learned judge gave partial effect to that contention by withdrawing from the jury the question of negligence in the driving or management of the bus. The plaintiff did not take exception to this by giving a cross notice of appeal, nor was the point raised before the Divisional Court, and it is not, in my

G opinion, open to her counsel to raise it now.

But apart from this, I am of opinion that the learned judge was right in so doing. There was no evidence whatever that the accident was due to the negligence on the part of the servants of the defendants who were in charge of the bus, unless the mere occurrence of the accident amounts to such evidence. In my opinion,

H the mere occurrence of such an accident is not in itself evidence of negligence. Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies where the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control and management of the defendants or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened. An accident in the case of traffic on the highway is in marked contrast to such a condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road, and over their actions those in charge of the vehicle have no control, hence the fact that an accident has happened either to or through a particular vehicle is by itself no evidence that the fault, if any, which led to it was committed by those in charge of that vehicle. Exceptional cases may occur in which the peculiar nature of the accident may throw light upon the question on whom the

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responsibility lies, but there is nothing of the kind here. The collision with the electric standard was due to the omnibus skidding, and if we are to give any weight to the admissions made by the defendants' servants which were proved in evidence in chief as part of the plaintiff's case, that skidding was due to difficulties in avoiding other vehicles. There is certainly no evidence to negative such a probable explanation of what actually happened, and it is impossible to say that this points to negligence or that it establishes that any negligent act of the defendants' servants was the cause of the accident. I am, therefore, of opinion that the learned judge acted rightly in withdrawing from the jury the issue as to the accident being due to negligence of the defendants' servants in the driving and management of the vehicle.

The learned judge, however, left to the jury the other question—viz., whether the defendants were guilty of negligence towards the plaintiff in allowing their motor omnibus to run, having regard to the fact that the roadway was in a slippery or greasy state at the time and of the known tendency of such a vehicle to skid on greasy surfaces. The jury found for the plaintiff on this issue. Subsequently, however, the judge entered judgment for the defendants, on the ground that there was no evidence to support that finding. The question for our decision is whether he was right in so doing. It is somewhat difficult to ascertain the exact nature of the issue left to the jury, but a careful examination of the language of the learned judge has satisfied me that it referred, and would be understood by the jury to refer, to acts of the defendant company other than acts of their servants in charge of the vehicle. The conduct of the driver or conductor in continuing to run was covered by the first issue which the learned judge rightly refused to leave to the jury. The second issue referred, therefore, to the conduct of the defendants as a company in allowing their motor omnibuses to run when the roads were in a greasy state; in other words, it related to the alternative claim based on nuisance. It is true that in the question to the jury the word "negligence" appears. But it is also used in the count in the pleadings based on nuisance. In neither case is it rightly used, because nuisance and negligence are different in their nature and consequences. But the so-called negligence of the defendants in allowing their omnibus to run when the roads were in a greasy state must mean that they ought not to have done so, because when so run the omnibus constituted a nuisance. All else to which it can refer must be covered by the first issue, which has already been disposed of.

This cause of action is of the type usually described by reference to the well-known case of *Rylands v. Fletcher* (1). For the purposes of today it is sufficient to describe this class of actions as arising out of cases where by excessive use of some private right a person has exposed his neighbour's property or person to danger. In such a case, should accident happen therefrom, even through the intervention of an event for which he is not responsible and without any negligence on his part, he is liable for the damage. The best known cases of this type are associated with the use by a person of land belonging to him, as when a man collects a large volume of water on his land or carries on some dangerous manufacture there. But I have no doubt that analogous causes of action exist when a member of the public makes undue and improper use of the right which he enjoys in common with all others of using the public highways for traffic. If a man places on the streets vehicles so wholly unmanageable as necessarily to be a continuing danger to other vehicles either at all times or under special conditions of weather, I have no doubt that he does it at his peril and that he is responsible for injuries arising therefrom, even though there has been no negligence in the management of his vehicle. It is not necessary to decide whether a state of things which would entail such consequences might not also be stopped by legal process on the ground that putting or keeping the vehicles on the road was a nuisance. I incline to the opinion that such is generally, though not universally, the case. But the whole of the facts with regard to the vehicles and the danger to which they give rise may not be known

A to the public, or it may be that no member of the public feels sufficiently personally interested to proceed against the owner. The doctrine of *Rylands v. Fletcher* (1), as applied to such cases, amounts in my opinion to this—that, if there be such a nuisance, the fact that no one has chosen to seek by legal process the complete remedy of stopping it does not interfere with the liability of the author of the nuisance to pay for all damage occasioned thereby to any member of the public.

B But it is for the plaintiff to prove that the defendant has committed a nuisance, and this must be shown by proper evidence.

In the present case there was none. No witness was called to prove either that this particular motor bus or that motor buses generally were unmanageable or dangerous to such an extent as to constitute a nuisance in the eye of the law or to call into play the doctrine of *Rylands v. Fletcher* (1). For the reason I have already given, the mere occurrence of the accident is not evidence of negligence, much less of the more difficult issue of nuisance, and beyond this there was no relevant evidence of any kind. It was suggested before us that the plaintiff's case was assisted by some admission made by the defendant's counsel. Neither the note of the learned judge nor his judgment contains any record of any such admission.

C No doubt it was present to the minds of all concerned in the case in the county court, as it was at the hearing of this appeal, that self-propelled vehicles at times slip on roads when they are greasy. But this fact is not evidence that they are so unmanageable as to constitute a nuisance. All vehicles have their defects. Those that are drawn by horses are liable to cause or suffer accidents through the horses becoming frightened or slipping and falling. If they are four-wheeled vehicles, such as horse-drawn buses, they are liable to swerve and skid on greasy pavements.

D Self-propelled vehicles have the advantage that there are no horses that can be frightened or can fall. Such vehicles are also under more complete mechanical control and can ordinarily be pulled up in a much shorter distance. On the other hand, they are probably more liable than horse-drawn vehicles to slip if the road be greasy, and especially if they are required to turn suddenly. But there is nothing

E in the case which makes it incumbent on the court to balance the advantages and disadvantages of the several types of vehicle or to say which on the whole is the safest. There is nothing which points to any of them being so unsuitable for use in street traffic as to constitute a nuisance, and no jury is entitled *mero motu* to pronounce that a vehicle, such as a motor bus, is a nuisance, without proper evidence. Thousands of motor buses travel in the streets of London in all weathers, and they carry a considerable portion of the passenger traffic of London. They are recognised by the authorities and duly licensed to carry passengers. The number of car miles annually run by them must amount to many hundreds of thousands, if not to many millions. The number of accidents which occur must be small compared with the extent of their use. In the absence of evidence the jury could not properly pronounce motor buses generally to be unfit for street traffic and a nuisance, and there was no attempt to show that this motor bus was not a properly constructed motor bus. The judge acted rightly, therefore, in declining to accept the verdict of the jury on this issue.

H Thus far I have dealt with the question of nuisance as though the plaintiff had been a member of the public using the public highway and injured by a vehicle travelling thereon. But in fact the plaintiff was a passenger by the motor bus.

I This fact no doubt alters the rights of the plaintiff, but not in any way to the advantage of her case. She cannot complain of matters naturally incidental to traffic in motor buses, for she voluntarily elected to become a passenger by one of such vehicles. Inasmuch, therefore, as there was no negligence in the management of the vehicle, she must, in order to establish her case, prove that the vehicle was defective. As I have already said, there was no evidence in support of such an allegation. I am of opinion, therefore, that the decision of the Divisional Court in allowing the appeal from the judgment of the county court judge was wrong, and

that this appeal must be allowed, and that judgment must be entered as directed by him, with costs here and in the court below.

BUCKLEY, L.J.—My judgment is that the Divisional Court are right and that this appeal should be dismissed. There is no difference of opinion, I think, among the members of the court as to the law. The difference arises upon the facts. The principal difficulty I feel lies in ascertaining exactly what were the facts upon which the decision proceeded. Even the finding of the jury is nowhere recorded in so many words. Some material facts were admitted at the trial, but there is no note of what the facts admitted were. I have to ascertain both the one and the other as best I can from the judgment of the learned county court judge and from the admission of counsel for the defendants before us at the Bar. Counsel stated that it was admitted at the trial that this motor omnibus was one of a class which will skid and fall out of control when running upon a paving slippery with recent rain. From the learned judge's judgment I find that the defendant company admitted (while denying negligence) that the collision was due to skidding, and that it was due to the state of the road. The jury had before them, therefore, these facts by way of admission, and the further fact that there was here a vehicle which in ordinary circumstances confined itself to the roadway, but under these circumstances knocked down a permanent structure on the pavement without (upon the facts of this case) negligence in the driver. **LORD ALVERSTONE, C.J.**, in *Isaac Walton & Co. v. Vanguard Motorbus Co.* (6) commented upon a similar state of facts. I agree with him in saying that that last matter is evidence upon which a jury might come to the conclusion that there was negligence. In the present case it would be negligence in employing the vehicle under the circumstances. These being the facts upon the question of negligence, the learned judge discriminated between two things, negligence in the driving or management of the omnibus and negligence in allowing the omnibus to run at all having regard to the fact that the roadway was in a slippery, greasy state at the time and the fact of the known tendency of such a vehicle as this to skid on greasy surfaces. Upon the former he thought there was no evidence of negligence which he ought to leave to the jury. On the latter he left it to the jury to say whether the defendant company were guilty of negligence in allowing their motor omnibuses to run under those circumstances. The jury found that the company were negligent in allowing their motor omnibuses to run under those circumstances. The motion to the Divisional Court was to have judgment entered for the plaintiff on the ground that the county court judge was wrong in law in holding that there was no evidence to support the finding of the jury.

In my opinion, he was wrong. There was evidence to support it, and the finding of the jury upon the fact ought to stand. There is no point made here of faulty construction of the vehicle nor, having regard to the course which the case took, any assertion that in the driving of the omnibus there was negligence. The negligence found I understand to have been that the defendant company offered to the plaintiff for her conveyance a vehicle which was safe in certain conditions of the road, but became dangerous in other conditions of the road, and that they continued to run it after the latter conditions had arisen. In *Hyman v. Nye* (7), **LINDLEY, J.**, was discussing, I agree, negligence by the employment of a vehicle defective in construction, but I think his language is in point of law equally applicable to negligence in user under circumstances when user has become dangerous. A person who lets out carriages, he says (6 Q.B.D. at p. 687), "is an insurer against all defects which care and skill can guard against": see also *Christie v. Griggs* (4). This is true, I think, of defective or improper user which care and skill can guard against. His duty is, I think, to use the carriage in such proper manner and under such proper circumstances as care and skill can ensure, and if he can prove that the accident was not preventible by any care or skill in user he is not liable; "but no proof," says **LINDLEY, J.**, "short of this will exonerate him." It was,

A in my opinion, for the jury here to say whether this vehicle, being one which in certain conditions of the road would skid and become dangerous, ought to have been used after the road had got into that condition. They have found that it ought not, and for this negligence, in my opinion, the defendants are liable.

Appeal allowed.

Solicitors: *Alfred Slater & Co.; Hicks, Davis & Hunt.*

B [Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

C Re THURSBY'S SETTLEMENT. GRANT v. LITLEDALE

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), May 28, June 2, 1910]

[Reported [1910] 2 Ch. 181; 79 L.J.Ch. 538; 102 L.T. 838; 54 Sol. Jo. 581]

D *Power of Appointment—Revocation—Appointment in exercise of power given in marriage settlement—Later inconsistent appointment in exercise of same power “and of every or any other power”—Effect on previous appointment.*

In a marriage settlement the trust property was described as “the trust moneys and premises hereinbefore assigned . . . and the stocks, funds, and securities in or upon which the same shall from time to time be invested.”

E The property was to be held on trust for the spouses during their lives and after the death of the survivor on such trusts for the issue of the marriage as they (or the wife if she survived) should appoint. The powers of investment contained in the settlement included a power to invest in the purchase of freehold land and under this power the trustees of the settlement purchased the P. estate. By a deed poll executed in 1895 the spouses appointed the P. estate to their eldest son, reserving to themselves power to revoke the appointment and to limit and appoint any new trusts or provisions. By a further deed poll dated in 1898 made “in exercise of the power . . . given to them by . . . the settlement . . . and of every or any other power enabling them in that behalf” they appointed “the trust moneys, stocks, funds and securities . . . comprised in, or which are now, or hereafter may be subject to the trusts of the settlement to the five children of the marriage in equal shares.” There was no mention of the previous appointment of 1895.

G **Held:** a power of revocation is not a power of appointment, but a power the exercise of which is a condition precedent to the exercise of the power of appointment in question, and, therefore, the appointment in exercise of a power of appointment “and of every or any other power” did not refer to powers of revocation but to powers of appointment; there was no intention to execute a power of revocation; and the appointment of 1898 did not operate as a revocation of the appointment of 1895.

H Per **Curiam:** If the appointment of 1898 had revoked that of 1895 the five children of the marriage would have taken life estates only as there were no circumstances sufficient to show that the fee should pass.

I *Re Oliver's Settlement* (1), [1905] 1 Ch. 191, and *Re Tringham's Trusts* (2), [1904] 2 Ch. 487, explained.

Notes. Considered: *Re Chatterton's Settlement*, *For v. Powell*, [1946] 2 All E.R. 211. Referred to: *Re Bostock's Settlement*, *Norrish v. Bostock*, [1921] All E.R. Rep. 125; *Re Lee's Trusts*, *Lees v. Lees*, [1926] W.N. 220; *Re Butler's Settlement Trust*, *Lloyds Bank, Ltd. v. Ford*, [1942] 2 All E.R. 191.

As to power of revocation of appointments, see 30 HALSBURY'S LAWS (3rd Edn.) 266 et seq., and for cases see 37 DIGEST 482 et seq.

Cases referred to :

- (1) *Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191; 74 L.J.Ch. 62; 53 W.R. 215; 21 T.L.R. 61; 37 Digest 68, 102. A
- (2) *Re Tringham's Trusts, Tringham v. Greenhill*, [1904] 2 Ch. 487; 73 L.J.Ch. 693; 91 L.T. 370; 20 T.L.R. 657; 40 Digest (Repl.) 687, 1832.
- (3) *Pomfret v. Perring* (1854), 5 De G.M. & G. 775; 3 Eq. Rep. 145; 24 L.J.Ch. 187; 24 L.T.O.S. 123; 1 Jur. N.S. 173; 3 W.R. 81; 43 E.R. 1071, L.J.J.; 37 Digest 482, 787. B
- (4) *Maddison v. Chapman* (1861), 1 John. & H. 470; 70 E.R. 831; 44 Digest 1199, 10385.
- (5) *Allin v. Crawshaw* (1851), 9 Hare, 382; 21 L.J.Ch. 873; 68 E.R. 555; 40 Digest (Repl.) 609, 1073.
- (6) *Tunstall v. Trappes* (1830), 3 Sim. 286; 57 E.R. 1005; 40 Digest (Repl.) 609, 1072. C

Also referred to in argument :

- Re Goulding's Settlement, Dobell v. Dutton* (1899), 48 W.R. 183; 37 Digest 483, 794.
- Re Wells' Trusts, Hardisty v. Wells* (1889), 42 Ch.D. 646; 58 L.J.Ch. 835; 61 L.T. 588; 38 W.R. 229; 37 Digest 438, 432. D
- Re Whiston's Settlement, Lovatt v. Williamson*, [1894] 1 Ch. 661; 63 L.J.Ch. 273; 70 L.T. 681; 42 W.R. 327; 38 Sol. Jo. 253; 8 R. 175; 40 Digest (Repl.) 686, 1828.
- Re Brace, Welch v. Colt*, [1891] 2 Ch. 671; 60 L.J.Ch. 505; 64 L.T. 525; 39 W.R. 508; 37 Digest 483, 793. E

Appeal from a decision of WARRINGTON, J.

By a settlement made in 1859, on the marriage of Mr. and Mrs. Thursby, a share in a certain fund to which Mrs. Thursby was then contingently entitled and to which she became absolutely entitled was assigned to the trustees of the settlement. The fund which the trustees were to stand possessed of and interested in upon the trusts of the settlement was described therein as F

"the trust moneys and premises hereinbefore assigned . . . and the stocks, funds, and securities in or upon which the same shall from time to time be invested."

The power of investment included a power to invest the fund in the purchase of freehold and copyhold hereditaments in England or Wales. The trusts of the settlement, so far as material, were that the trustees should set apart a sum of £6,000 on the trusts mentioned, and that subject thereto they should stand possessed of the trust moneys and premises and the stocks, funds, and securities in or upon which the same should be invested upon trusts in favour of the wife and husband during their lives, and after the death of the survivor upon such trusts in favour of the issue of the marriage as the husband and wife should jointly or the wife, if she survived, should by any deed or deeds, with or without power of revocation, from time to time appoint. In 1860, part of the trust moneys were invested in the purchase of a farm in Northamptonshire, and in 1869 a further part were invested in the purchase of a freehold estate at Priors Hardwick, in Warwickshire, called the Priors Hardwick Estate. By a deed-poll dated May 25, 1895, the husband and wife in exercise of their joint power, after reciting that a portion of the trust fund had been invested in the purchase of freehold lands at Priors Hardwick, appointed that after the decease of the survivor of them the Priors Hardwick Estate should be held in trust for Arthur E. Thursby, the eldest son of the marriage; and by the same deed they reserved to themselves power by any deed or deeds to revoke the appointment thereby made, and to limit and appoint any new trusts or provisions of the property thereby appointed. G
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By a deed-poll dated Mar. 4, 1898, upon which the question to be determined arose, the husband and wife made a further appointment. By that deed they recited

A the settlement so far as material for their purpose. They recited that Mrs. Thursby had by the settlement assigned to the trustees the share to which she was entitled in the fund, and that it was by the settlement agreed and declared that the trustees should stand possessed of and interested in the trust moneys and premises thereby assigned, and the stocks, funds, and securities whereon the same should from time to time be invested upon the trusts above described. The appointment of 1895 was not mentioned. They further recited that there had been five children of the marriage, all of whom had attained twenty years, and who were mentioned by name; and they recited that they were desirous of appointing the trust moneys (other than the £6,000) subject to the trusts of the settlement in favour of the children of the marriage. The deed then witnessed that

C "in exercise of the power for that purpose given to them by the hereinbefore recited indenture of settlement as aforesaid, and of every or any other power enabling them in that behalf"

the husband and wife appointed that after the death of the survivor of them the trustees should stand possessed of

D "the trust moneys, stocks, funds, and securities (other than the said hereinbefore mentioned sum of £6,000 and the stocks, funds, and securities, representing the same) comprised in, or which are now, or hereafter may be subject to the trusts of the hereinbefore recited indenture of settlement"

in trust for the said five children of the marriage in equal shares.

E The present trustees of the settlement took out a summons asking for a determination of the question (inter alia) whether the deed of 1898 had revoked the appointment in 1895 of the Priors Hardwick Estate. WARRINGTON, J., held that the deed of 1898 revoked the appointment made by the deed of 1895. From this decision the executors of A. E. Thursby appealed.

Cave, K.C., and *W. F. Webster* for the executors.

Carson, K.C., and *J. Tanner* for another son.

F *H. Terrell, K.C.*, and *N. C. Armitage* for other parties in the same interest.

G. R. Northcote for the trustees.

Cur. adv. vult.

G June 2, 1910. **FARWELL, L.J.**, read the following judgment.—This case raises the question of the construction of a deed of appointment dated Mar. 4, 1898, whereby in exercise of a limited power given to them by their marriage settlement "and of every or any other power enabling them in that behalf" the spouses appointed that the trustees of the settlement should stand possessed of the

"trust moneys, stocks, funds, and securities (other than the £6,000) comprised in or which are now or hereafter may be subject to the hereinbefore recited indenture of settlement"

H in trust for all the children of the marriage equally. WARRINGTON, J., has held that these words have exercised a power of revocation and new appointment contained in a deed of May 25, 1895, whereby certain real estate which then formed part of the settled property was appointed to the eldest son in fee, and that the words "trust moneys, stocks, funds, and securities, &c.," are sufficient to carry such real estate and to carry it in fee. I am unable to agree with him.

I The law as to powers of revocation and new appointment has been settled for more than fifty years by *Pomfret v. Perring* (3). A power of revocation is not a power of appointment, but is a power the exercise of which is a condition precedent to the exercise of the power of appointment in question. An appointment, therefore, in exercise of a power of appointment "and of every or any other power," or similar words, does not, *prima facie*, refer to powers of revocation, but to powers of appointment. If so far, therefore, as the intention to appoint in such a case depends on the reference to the power, it cannot be found. Such words might show an intention

to execute not only the power in the particular instrument stated, but also any other power of appointment which the appointee might possess, but it does not show any intention to execute a power of revocation. It is, of course, open to the claimants to show that there are other indicia, besides the reference to the power, showing an intention to execute; for example, a reference to property which can only pass by means of an execution of both power of revocation and of appointment. Thus, if in the present case the appointment had been of "the Priors Hardwick Estate," the power both of revocation and of appointment in the deed of 1895 would have been exercised, because in no other way could the intention to pass the Priors Hardwick Estate be effected.

The question, therefore, next arises, can words so inappropriate as "trust moneys, stocks, funds, and securities" be held to include this real estate? The general rule is that if there is property to which the words of appointment apply in their primary sense so that effect can be given to the deed in its ordinary signification, the appointment is confined to its primary meaning, and this is especially the case when the court is asked to divest an estate already vested. Take the analogous cases of election. If a testator devises Blackacre, which belongs to A., to B. and gives A. a legacy, A. is put to his election, but it is otherwise if the testator has any interest in Blackacre—for example, a charge thereon, as in *Maddison v. Chapman* (4). The presumption in each case is that the appointor, or the testator, means to deal with that which he can properly dispose of without displacing other persons' rights. It is said, however, that the circumstances in the present case are peculiar, and in one respect they certainly are. The marriage settlement of 1859 creating the power was a money settlement, but it contained in the investment clause powers "to invest on real securities or in the purchase of freehold or copyhold lands," and there is no provision for the conveyance of such lands if and when purchased to the trustees on trust for sale so as to preserve the character of the investment in personality. Under this power a farm was purchased in fee in 1860 and in 1869 the Priors Hardwick Estate was purchased in fee, and this latter estate was appointed in fee to the eldest son on May 23, 1895. An ingenious argument has been addressed to us to this effect. The settlement speaks of the trust property as the "trust moneys and premises hereinbefore assigned . . . and the stocks, funds, and securities in or upon which the same shall from time to time be invested." WARRINGTON, J., says that these words must include the lands when purchased. The words used in the appointment of 1898 are

"the trust moneys, stocks, funds, and securities (other than the £6,000) comprised in or which are now or hereafter may be subject to the trusts"

of the settlement; therefore, these latter words must also include the lands. With great respect, this appears to me a fallacy. The lands became subject to the trusts of the settlement when purchased, not because the words "stocks, funds, and securities" comprise real estate, for they clearly do not, but because the trusts created by the settlement apply by necessary implication to the lands bought by the trustees out of the trust moneys in pursuance of the powers in the deed, and which the trustees must necessarily admit that they held on the trusts of the deed. Thus in *Allin v. Crawshay* (5) and *Tunstall v. Trappes* (6), where the marriage settlement gave the wife the income of her settled funds during coverture and was silent as to the rest of her life, it was held that the trust to pay her after coverture arose by implication, not that a trust to pay during coverture would be construed as meaning during coverture and afterwards during the rest of her life.

There are three contentions open to claimants in cases like the present. They may show that the words used are on construction wide enough to include all that is claimed by them; or they may show that the nature of the case is such that, although the words are not wide enough to express the trust that is claimed to exist, yet the court can imply such a trust, for implication *ex vi termini* negatives actual expression; or they may be able to adduce evidence of common error in

A a suit to rectify, but this assumes a proper case and the absence of both express and implied trust. But when the appointment of 1898 is considered, no such considerations arise. The reason for implying the trust in the settlement does not apply to the appointment. If it were not implied in the settlement, there would be a total failure of trusts respecting the land; but if it is not implied in the appointment there is no such failure, and the existing appointment is left undisturbed. The fallacy in the learned judge's judgment is to assume that the purchase of the land has created a definition clause applicable to the settlement and to every appointment under it. As I have already said, there is no case of alteration of meaning of words or of a new definition at all, but the creation of trusts by necessary implication.

C Under these circumstances it is not necessary to determine the extent of the estate which the appointees would have taken under the appointment. The Prior Hardwick Estate has been appointed to the eldest son in fee, and this remains untouched. The farm bought in 1860 has not been appointed at all, and goes as in default of appointment. But as the case has been argued and a judgment of my own in *Re Oliver's Settlement* (1) relied on, I desire to say that I have never decided, and do not think, that an appointment of equitable estates in land D to A. or to a class without words of limitation or under the Conveyancing Act can carry more than a life interest to the appointee. It is not absolutely necessary to have the technical words as in the case of legal estates in land, but there must be circumstances such as *Joyce, J.*, found in *Re Tringham's Trusts* (2) and I found in *Re Oliver's Settlement* (1) sufficient to show an intention that the fee should pass. I can find nothing of the sort here, so that if the five children had taken under E the appointment, they would have taken life estates only. In my opinion this appeal must be allowed.

SIR HERBERT COZENS-HARDY, M.R.—I agree.

F **KENNEDY, L.J.**—I agree in the conclusion at which FARWELL, L.J., has arrived, and generally in the reasoning by which that conclusion has been reached. I only desire in regard to the decisions in *Re Tringham's Trusts* (2) and *Re Oliver's Settlement* (1), upon which he has commented in the latter part of his judgment, to reserve my own decision.

Solicitors: *Robins, Hay, Waters & Hay; Evans, Wadham & Co.*

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.]

A

ASCHERSON v. TREDEGAR DRY DOCK AND WHARF CO., LTD.

[CHANCERY DIVISION (Swinfen Eady, J.), July 8, 1909]

[Reported [1909] 2 Ch. 401; 78 L.J.Ch. 697; 101 L.T. 519; 16 Mans. 318]

Guarantee—Surety—Right against debtor—Right to declaration that surety entitled to be discharged from liability by payment of debt by debtor—Right of deceased surety's executors.

Where there is an actual accrued debt and a surety for that debt is liable, and admits liability, for the amount of the debt guaranteed, he is entitled in equity to compel the principal debtor to relieve him from his liability by paying off the debt. The cases in which equity has granted relief to sureties have not been limited to those where the creditor has refused to sue the principal debtor.

By an agreement, dated Aug. 27, 1902, A. and four other directors of a company gave a bank a joint and several guarantee to secure the overdraft from time to time on the company's current account up to £20,000. A. died on June 24, 1908. The bank heard of his death on June 30, 1908, and closed the account, on which £17,219 2s. 5d. was owing. A.'s executors requested the company to discharge this liability, and on the refusal of the company to do so, brought an action asking for a declaration that they were entitled to be discharged by payment by the company of £17,219 2s. 5d., or so much thereof as was then owing.

Held: they were entitled to the declaration asked.

Earl of Ranelagh v. Hayes (1) (1683), 1 Vern. 189; *Nisbet v. Smith* (2) (1789), 2 Bro. C.C. 579; *Wooldridge v. Norris* (3) (1868), L.R. 6 Eq. 410, applied.

Notes. Considered: *Re Mitchell, Freelove v. Mitchell*, [1911-13] All E.R. Rep. 187. Distinguished: *Morrison v. Barking Chemicals Co.*, [1919] 2 Ch. 325; *Bradford v. Gammon*, [1924] All E.R. Rep. 766. Considered: *Re Anderson-Berry, Harris v. Griffith*, [1927] All E.R. Rep. 143. Followed: *Tate v. Crewdson*, [1938] 3 All E.R. 43. Referred to: *Mills v. United Counties Bank*, [1911] 1 Ch. 669; *Re Fenton* (No. 1), *ex parte Fenton Textile Association*, [1930] All E.R. Rep. 15.

As to rights before satisfaction by surety of a guaranteed debt, see 18 HALSBURY'S LAWS (3rd Edn.) 476 et seq., and for cases see 26 DIGEST (Repl.) 128 et seq.

Cases referred to :

- (1) *Earl of Ranelagh v. Hayes* (1683), 1 Vern. 189; 2 Cas. in Ch. 146; 23 E.R. 405; 26 Digest (Repl.) 130, 911.
- (2) *Nisbet v. Smith* (1789), 2 Bro. C.C. 579; 29 E.R. 317; 26 Digest (Repl.) 186, 1393.
- (3) *Wooldridge v. Norris* (1868), L.R. 6 Eq. 410; 37 L.J.Ch. 640; 19 L.T. 144; 16 W.R. 965; 26 Digest (Repl.) 131, 921.
- (4) *Coulthart v. Clementson* (1879), 5 Q.B.D. 42; 49 L.J.Q.B. 204; 41 L.T. 798; 28 W.R. 355; 26 Digest (Repl.) 216, 1659.
- (5) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest (Repl.) 192, 370.
- (6) *Re Sherry, London and County Banking Co. v. Terry* (1884), 25 Ch.D. 692; 53 L.J.Ch. 404; 50 L.T. 227; 32 W.R. 394, C.A.; 26 Digest (Repl.) 93, 640.
- (7) *Parr's Banking Co. v. Yates*, [1898] 2 Q.B. 460; 67 L.J.Q.B. 851; 79 L.T. 321; 47 W.R. 42, C.A.; 26 Digest (Repl.) 88, 614.
- (8) *Padwick v. Stanley* (1852), 9 Hare, 627; 22 L.J.Ch. 184; 19 L.T.O.S. 293; 16 Jur. 586; 68 E.R. 664; 26 Digest (Repl.) 131, 924.
- (9) *Mathews v. Saurin* (1893), 31 L.R. Ir. 181; 26 Digest (Repl.) 131, *385.
- (10) *Dale and Perry v. Lolley* (1808), 2 Bro. C.C. 582 n.
- (11) *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch.D. 561; 52 L.J.Ch. 418; 48 L.T. 107; 31 W.R. 285; 26 Digest (Repl.) 131, 927.

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A Also referred to in argument :

Rouse v. Bradford Banking Co., [1894] 2 Ch. 32; 63 L.J.Ch. 337; 70 L.T. 427; 10 T.L.R. 291; 38 Sol. Jo. 270; 7 R. 127, C.A.; on appeal [1894] A.C. 586; 63 L.J.Ch. 890; 71 L.T. 522; 43 W.R. 78; 6 R. 349, H.L.; 26 Digest (Repl.) 110, 761.

Re Brown's Estate, Brown v. Brown, [1893] 2 Ch. 300; 62 L.J.Ch. 695; 69 L.T. 12; 41 W.R. 440; 37 Sol. Jo. 354; 3 R. 463; 26 Digest (Repl.) 69, 485.

Lloyd v. Dimmack (1877), 7 Ch.D. 398; 47 L.J.Ch. 398; 38 L.T. 173; 26 W.R. 458; 26 Digest (Repl.) 251, 1915.

Clarke v. Stamford (1801), 2 Bro. C.C. 582 n.

Bechervaise v. Lewis (1872), L.R. 7 C.P. 372; 41 L.J.C.P. 161; 26 L.T. 848; 20 W.R. 726; 26 Digest (Repl.) 130, 914.

C **Action** by the executors of a deceased for a declaration that they were entitled to be discharged and exonerated from all liability under the guarantee by the payment of the debt to the creditors by the principal debtor.

Macnaghten, K.C., and *Sargant* for the plaintiffs.

Mickleth, K.C., and *Luxmoore* for the defendants.

D **SWINFEN EADY, J.**—In this case the plaintiffs are the executors of Edward Ascherson. The deceased with four other persons, being directors of the defendant company, the Tredegar Dry Dock and Wharf Co., Ltd., jointly and severally guaranteed to the London, City and Midland Bank the moneys from time to time owing from the company to the bank with a limit of £20,000. The guarantee is dated Aug. 27, 1902. It is signed by the five sureties. I understand that Mr. Ascherson, the deceased, was the chairman of the company, and that the other four were all directors. It is a joint and several guarantee, as I have said, with a limit of £20,000, and it is on the printed form of the bank. That guarantee having been given on Aug. 27, 1902, Mr. Ascherson died on June 24, 1908, and the plaintiffs are his executors. The bank had notice of the death on June 30, and on that date the amount owing by the dock company to the bank was £17,219 2s. 5d. It appears from the accounts before me that there were various accounts open between the company and the bank—the general account in debit, and the other accounts in credit; but, drawing the line and ascertaining the total amount owing on the day when the bank received notice of the death, it was the amount I have mentioned. On Dec. 5, 1908, the bank wrote to the solicitors for the executors :

G “Our Newport branch have forwarded us your letter to them, and in reply we have to say that the balance due to the bank on June 30 last—the date on which we received notice of the death of Mr. Edward Ascherson—was £17,219 2s. 5d. On that day the account was stopped, and all transactions have gone through a new account since that date, so that our claim against the estate of the late Mr. Edward Ascherson is £17,219 2s. 5d., with interest thereon from June 30 last.”

H The object of the present action is to compel the defendants, the principal debtors, to pay off the amount owing by them to the bank, and relieve and release the executors of the deceased. The defendant company conceded that the form of the guarantee in the present case was indistinguishable from that in *Coulthart v. Clementson* (4), where it was held that a guarantee in that form was revoked as to subsequent advances by notice of the guarantor's death, and the bank have acted upon that footing. They have drawn the line on June 30, 1908, when they received notice of the death, and closed the account and opened a fresh account with the defendant company as from that date. Then it was said that the bank were entitled to do that, and that they were not bound to credit the closed account with the subsequent payments in, so as by the application of the rule in *Clayton's Case* (5), to relieve the deceased's estate, but were entitled to treat the £17,219 2s. 5d. as still owing, for the purpose of the guarantee, with interest from June 30, 1908.

in accordance with *Re Sherry, London and County Banking Co. v. Terry* (6). It was contended that, until the guarantee had been determined and the overdraft called in, no right of action accrued to the bank against the sureties, although, if the present accounts continued for more than six years, all claim against the deceased's estate would be barred by the Statutes of Limitation under the decision in *Parr's Banking Co. v. Yates* (7).

In my opinion the true position is this. The bank have a present right of action against the executors of Edward Ascherson for the £17,219 2s. 5d. owing on June 30, 1908, with subsequent interest, and have claimed that amount by their letter of Dec. 5, 1908. It has been the law of the court for very many years that a surety is entitled to come into equity to compel the principal debtor to pay what is due from him to the intent that the surety may be relieved. In *Earl of Ranelagh v. Hayes* (1) the Lord Keeper (1 Vern. at p. 190):

"compared it to the case of a counter-bond; where although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this court will decree the principal [that is, the principal debtor] to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him."

Then in *Nisbet v. Smith* (2) the Lord Chancellor says (2 Bro. C.C. at p. 582):

"It is clear, and never has been disputed, that a surety, generally speaking, may come into this court, and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money, and deliver him from the obligation."

A recent instance of that was *Wooldridge v. Norris* (3). [His LORDSHIP referred to the facts of that case.] There the Vice-Chancellor said (L.R. 6 Eq. at pp. 413, 414):

"Now, as regards the right of a plaintiff to file a bill quia timet, the principle is clearly laid down by LORD REDESDALE in these terms [MITFORD ON PLEADING (5th Edn.) at pp. 171, 172]: 'A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered; by a bill which has been sometimes called a bill quia timet, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless a bill may be filed to relieve the covenantee under similar circumstances'."

Then it was argued, although perhaps I may say but faintly, that in *Padwick v. Stanley* (8) TURNER, V.-C. (9 Hare, at p. 628), limited the cases in which the court of equity exercised that jurisdiction to

"cases where the creditor has a right to sue the debtor and refuses to exercise that right."

In my opinion the cases in which equity has granted relief to sureties have not been limited to cases where the creditor has refused to sue. In *Wooldridge v. Norris* (3) that element did not exist. In *Mathews v. Saurin* (9) it was determined that

"when there is an actual accrued debt [as there was in the present case] and the surety is liable and admits liability for the amount guaranteed [which again is the present case] he has a right to compel the principal debtor to relieve him from his liability by paying off the debt. In order to support such an action it is not necessary to prove that the creditor has refused to exercise his right to sue the principal debtor."

A The suggested limitation in *Padwick v. Stanley* (8) was disapproved. It is true that the disapproval was only obiter dictum because the creditor had in fact brought an action against the principal debtor. The present action is not like *Dale and Perry v. Lolley* (10) where a surety brought an action to compel the debtor to pay a bill not due for twenty months, or *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (11) where he asked for indemnity against a future contingent liability. The obligation of the executors is a present liability, and they are entitled in my judgment to the relief they ask. There must be a declaration that the plaintiffs as executors of the deceased are entitled to be discharged and exonerated from all liability under the guarantee by payment by the defendant company to the bank of the £17,219 2s. 5d., with interest from June 30, 1908, or so much thereof as is now owing by the defendant company to the bank. There must be an order for the defendant company to pay the amount to the bank, so as to satisfy the plaintiffs' liability, with liberty to apply in the event of non-payment.

Solicitors: *Lawrence, Messer & Nickolls; Neish, Howell & Haldane.*

[Reported by G. B. HAMILTON, Esq., Barrister-at-Law.]

D

E

HUNT v. STAR NEWSPAPER CO., LTD.

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), March 3, 4, 20, 1908]

[Reported [1908] 2 K.B. 309; 77 L.J.K.B. 732; 98 L.T. 629; 24 T.L.R. 452; 52 Sol. Jo. 376]

F

Libel—Fair comment—Matters that must be proved—Truth of facts commented on—Separation of comment from facts—Fairness of comment—Question for jury.

G

To support the defence of fair comment in an action for libel the facts on which the comment purports to be based must be truly stated. If those facts do not exist, the foundation of the plea fails. The comment must not convey imputations of an evil sort except so far as the facts truly stated warrant such imputation. Further, the comment, to be justifiable as fair comment, must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment, for, if the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that the comment might do will be to some extent negatived by the reader seeing the grounds on which the unfavourable inference is based, while, if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference, while in the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. It is a question for the jury whether or not the comment is that which a fair man, however extreme his views relating to the matter in question, might make honestly, without malice, and not without foundation.

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Notes. Considered: *Walker v. Hodgson*, [1909] 1 K.B. 239; *Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.* (1913), 29 T.L.R. 389. Explained: *Kemsley v. Foot*, [1952] 1 All E.R. 501.

As to fair comment, see 24 HALSBURY'S LAWS (3rd Edn.) 70-78, and for cases see 32 DIGEST 141 et seq. A

Cases referred to :

- (1) *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K.B. 292; 73 L.J.K.B. 752; 91 L.T. 155; 32 Digest 149, 1805.
- (2) *Dakhyl v. Labouchère* (1907), [1908] 2 K.B. 325, n.; 77 L.J.K.B. 728; 96 L.T. 399; 23 T.L.R. 364, H.L.; 32 Digest 150, 1823. B
- (3) *Merivale v. Carson* (1887), 20 Q.B.D. 275; 58 L.T. 331; 52 J.P. 261; 36 W.R. 231; 4 T.L.R. 125, C.A.; 32 Digest 152, 1837.
- (4) *Andrews v. Chapman* (1853), 3 Car. & Kir. 286; 21 L.T.O.S. 108, N.P.; 32 Digest 140, 1707.
- (5) *Lefroy v. Burnside* (1879), 4 L.R. Ir. 340; 18 Digest (Repl.) 188, *932.
- (6) *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur. N.S. 1069; 11 W.R. 569; 122 E.R. 288; 32 Digest 149, 1802. C
- (7) *Wason v. Walter* (1868), L.R. 4 Q.B. 73; 8 B. & S. 671; 38 L.J.Q.B. 34; 19 L.T. 409; 33 J.P. 149; 17 W.R. 169; 32 Digest 144, 1754.

Appeal by the defendants from a verdict and judgment in an action tried by LAWRENCE, J., with a jury, and application for a new trial. D

The action was brought by the plaintiff, John Hunt, town clerk of the city of Westminster, for libel in respect of statements contained in articles which appeared in the "Star" of Mar. 2, 1907, and the "Morning Leader" of Mar. 4, 1907, newspapers of which the defendants were the proprietors. The articles complained of related to acts of the plaintiff when acting as deputy returning officer at the Caxton Hall polling station at the election for the London County Council in March, 1907. The article in the "Star" was as follows: E

"In Westminster.—Serious Allegations Made by Progressive Candidates.—The 'Star' was informed this afternoon that formal protests had been handed in by the Progressive candidates in Westminster, Messrs. Campbell and Herrin, against the action of Mr. John Hunt (clerk to the Moderate city council), who was the deputy returning officer at the Caxton Hall polling station. Mr. Hunt ordered the exclusion from the hall of the Progressive personation agents, one of whom was Major Hobart, lately Liberal candidate for the division, and it is further alleged that Mr. Campbell, although one of the candidates, was refused admission. It is further stated that one of the Westminster City Council officials doing duty at the polling station used the words: 'I am not going to take the opinion of my political opponents' to Mr. Herrin, the other Progressive candidate. This assertion of political bias on the part of an officer at a polling station is to be the subject of grave inquiry, and we are assured that the attention of Parliament will be called to the matter next week. The chairman of the Westminster Liberal Association told a 'Star' reporter this evening that an appeal was being made to Mr. Gomme (clerk of the London County Council and returning officer) to overrule the decision of his deputy at Westminster. 'It is absolutely necessary that personation agents should be at Caxton Hall,' he added. 'Already we have detected plural voters recording second votes, and in cases where the evidence is conclusive we are determined to prosecute'."

The article in the "Morning Leader" was as follows: F

"Obstructing Progressives.—Extraordinary Action by Westminster Polling Official.—At the Caxton Hall (Westminster) polling station extraordinary obstacles were placed in the way of the Progressive polling agents in the performance of their duties—duties of particular importance in a constituency where plural voting exists on an abnormal scale. Mr. John Hunt, the town clerk, who is a Moderate, relegated the Progressive agents to a part of the hall G
H
I

A where they could neither see the voters' faces nor hear their numbers, and were thus completely frustrated in their legitimate duty of seeing whether an elector was voting for the second time. The remonstrances of Major Hobart (late Liberal candidate for Westminster) and Mr. Montefiore Brice (chairman of the Westminster Liberal Association), who were acting as unpaid polling agents, resulted in their being turned out of the hall by the police, together with Captain B Hemphill. On the failure of an attempt to obtain fair treatment, the Progressive candidates, Mr. W. B. Campbell and Mr. Edwin Herrin, handed in a formal protest, and withdrew their polling agents from the hall. Mr. Hunt told Mr. Herrin that he did not intend to take advice from the opposition. The incident is to be made the subject of a question in Parliament."

C These statements, the plaintiff asserted, reflected on his fairness, and suggested that he was politically biased in his action in favour of the Moderate party. The defendants pleaded justification, said that the statements were not capable of a defamatory meaning, and contended that they were fair comment on a matter of public interest. The action came on for trial before LAWRENCE, J., and a jury, who returned a verdict for the plaintiff, awarding him £800 damages. His Lordship entered judgment for the plaintiff, and the defendants now applied for judgment or for a new trial.

Eldon Bankes, K.C., and Norman Craig for the defendants.

Montague Shearman, K.C., and R. F. Colam (with them Courthope-Munroe) for the plaintiff.

Cur. adv. vult.

E Mar. 20, 1908. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—This is an application for a new trial on the ground of misdirection. The action was for libel based upon two articles in the "Star" newspaper and the "Morning Leader." The articles related to the plaintiff, who was deputy returning officer at the Caxton Hall polling station at the election for the London County Council in March, 1907. The article in the "Star" is headed "In Westminster. Serious Allegations Made by Progressive Candidates," and the article in the "Morning Leader" is headed "Obstructing Progressives. Extraordinary Action by Westminster Polling Official." Each article stated certain alleged facts with reference to what took place in the Caxton Hall, and, as the plaintiff asserts, charged the plaintiff with not having acted honestly in the discharge of his statutory duties as deputy returning officer, and as having been influenced by political bias with intent to prejudice the Progressive candidates. The defendants pleaded that the words complained of were in their natural and ordinary signification true in substance and in fact, and also, as a separate defence, that, in so far as the words consisted of comment, the same were fair and bona fide comment upon a matter of public interest and importance. G The issue of justification was strenuously fought at the trial. The learned judge, in summing-up, after holding that it was a matter of public interest that a gentleman occupying the position of the plaintiff should properly discharge his duties, told the jury that the question for them would be, if they found that the words were libellous and were intended to convey the meaning alleged by the plaintiff, whether the words which purported to be statements of what took place were, in fact, true in substance and in fact. He pointed out that if these questions were answered in the affirmative, or, in other words, if the justification were proved, the plaintiff would not be entitled to damages, and he then dealt with the plea of fair comment thus :

"If a newspaper publishes exactly what took place with no comment whatever they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment was bona fide and fair comment or whether it was comment which tended, as

alleged here, to charge the plaintiff with improper conduct . . . If you come to the conclusion that they are libels and are such as would have a tendency to prejudice the plaintiff in his position of town clerk of Westminster and of presiding officer and deputy returning officer of the county council elections, then you must give him your verdict. The next question is whether the defence is made out that the accounts given in these two articles of what happened at the Caxton Hall on this occasion were true in substance and in fact as far as they related to the details of what took place at the Caxton Hall. Then as far as comment is concerned you will consider whether that comment is fair and bona fide comment, or whether it is for the purpose of suggesting, as is alleged by the plaintiff, that he was acting in any improper way."

I regret that no separate questions were left to the jury. A general verdict was found in favour of the plaintiff with £800 damages.

It seems to me that the learned judge did not properly direct the jury as to the meaning and effect of the plea of fair comment. The words which I have read seem to indicate that that cannot be fair comment which tends to prejudice or to impute blame to the plaintiff. In my opinion, that is not the law. The defence of fair comment only arises in the event of the plea of justification failing, but the plea of justification may fail by reason of the facts stated not being substantially true. But there still remains whether if, and only if, the facts are substantially true the comment made by the defendants based upon those true facts was fair and such as might, in the opinion of the jury, be reasonably made. I cannot do better than adopt the language of KENNEDY, J., in *Joynt v. Cycle Trade Publishing Co.* (1) ([1904] 2 K.B. at p. 294):

"The comment must . . . not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and, further, it must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation."

In *Dakhyl v. Labouchère* (2) LORD ATKINSON said ([1908] 2 K.B. at p. 329):

"A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn."

In substance it seems to me that the issue of fair comment was not left to the jury. It is highly probable that the jury thought that the facts were not truly stated, in which case the verdict for the plaintiff would be plainly justified, but it is also possible that they thought that, although the facts were truly stated, they must, as the learned judge told them, find for the plaintiff if in the view of the jury the articles imputed improper conduct to the plaintiff. In my opinion, the defendants are entitled to have a new trial in which both the issues raised by them may be presented to a jury with a proper and adequate direction. There must be an order for a new trial, but under the circumstances I think the costs of this appeal, as well as those of the first trial, should abide the result of the second trial.

FLETCHER MOULTON, L.J.—With the greater part of the argument that was addressed to us by counsel for the defendants in this case I thoroughly disagree. That argument was based mainly upon an application of the language of the judgment in *Merivale v. Carson* (3) to the case of the imputation of corrupt or disgraceful motives to an individual, and the contention was that, if in his comment upon

A facts a writer attributed such motives to an individual, such language was covered by the plea of fair comment unless the views it expressed could not be held by any fair man, however prejudiced he might be and however exaggerated and obstinate his views.

B In my opinion, this is a complete misapprehension of the law as laid down by that case and is absolutely opposed to what is now settled law with regard to fair comment. *Merivale v. Carson* (3) related to a criticism upon a play, and not to a question of libel on personal character, and the language of the judgments in that case shows that both the eminent judges who decided it intended to deal with literary criticism. The law laid down by the decision in that case has, therefore, nothing to do with personal libels such as the imputation of disgraceful motives to an individual. In order to demonstrate this it is only necessary to quote what
C may be said to be the leading passage in the judgment of LORD ESHER. He says (20 Q.B.D. at p. 280):

D "What is the meaning of a 'fair comment'? I think the meaning is this: Is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what clearly would be beyond that limit. If, for instance, the writer attacked the private character of the author."

E With this language as applied to literary criticism I fully agree, but it gives no support to the contention of counsel for the defendants in the present case, seeing that we have here to deal with imputations of motives which unquestionably amount to attacks on the character of the plaintiff.

F The law as to fair comment, so far as is material to the present case, stands as follows. In the first place, comment in order to be justifiable as fair comment must appear as comment, and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v. Chapman* (4). The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports
G to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. In this relation I must express my disagreement with the view apparently

H taken by the Court of Queen's Bench in Ireland in *Lefroy v. Burnside* (5), where the imputation was that the plaintiffs dishonestly and corruptly supplied to a newspaper certain information. The court treated the qualifications "dishonestly" or "corruptly" as clearly comment. In my opinion, they are not comments, but constitute allegations of fact. It would have startled a pleader of the old school if he had been told that in alleging that the defendant "fraudulently represented" he was indulging in comment. By the use of the word "fraudulently" he was
I probably making the most important allegation of fact in the whole case. Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment and not statement of fact cannot be protected by the plea of fair comment.

In the next place, in order to give room for the plea of fair comment, the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down

authoritatively that I do not need to dwell further upon it: see, for instance, the direction given by KENNEDY, J., to the jury in *Joynt v. Cycle Trade Publishing Co.* (1) ([1904] 2 K.B. at p. 294), which has been frequently approved of by the courts. Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation. This is the language of KENNEDY, J., in the case to which I have just referred. It is based on the judgments in *Campbell v. Spottiswoode* (6), a case of the highest authority, and is, in my opinion, unquestionably a true statement of the law. The only portion of the statement which requires examination is the phrase "except so far as the facts truly stated warrant the imputation." Speaking for myself, the words "warrant the imputation" can bear but one meaning, and that meaning is stated so plainly by LORD ATKINSON in the opinion delivered by him in *Dakhyl v. Labouchère* (2) in the House of Lords that I cannot do better than quote his language ([1908] 2 K.B. at p. 329):

"Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn."

In other words, a libellous imputation is not warranted by the facts unless the jury hold that it is a conclusion which ought to be drawn from those facts. Any other interpretation would amount to saying that where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law. To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact, and it must be supported, as every other allegation of fact, by adequate evidence. I agree that an allegation of fact may be justified by its being an inference from other facts truly stated, but, as LORD ATKINSON says in the passage just quoted, in order to warrant it the jury must be satisfied that such inference ought to be drawn from those facts.

Applying this law to the facts of the present case, I would say first that I have a great doubt whether there is anything in the publication complained of which can fairly be called comment at all, unless it be the head-lines of the second article. All the rest appears to me to purport to be statement of fact and, therefore, in my opinion, the defendants could only succeed by establishing their plea of justification with respect to it. I have great doubt, therefore, whether the learned judge ought to have allowed the issue of fair comment to go to the jury at all (except, perhaps, as to those head-lines). But the judge permitted it to go to the jury, and, therefore, he was bound to give them a proper direction as to it. In my opinion, the direction he gave was so expressed as to bear a meaning which might have misled the jury and affected their verdict, and, as it was a general verdict, not distinguishing the issues, but giving a sum by way of damages in respect of both, we have no alternative but to send the case back for a new trial, because it is impossible to say to what extent the verdict may have been influenced by this misdirection. The first misdirection to which I refer is in the passage of the summing-up which reads as follows:

"If a newspaper publishes exactly what took place with no comment whatever they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment is bona fide and fair comment or whether it was comment which tended, as alleged here, to charge the plaintiff with improper conduct."

Taken by itself, this would seem to be a direction that if the comment charged the plaintiff with improper conduct it was outside the plea of fair comment whether or not that charge was warranted by the facts, and although I think it clear from the sentence that immediately follows that the learned judge did not intend to give any such erroneous direction, and although I am of opinion that the defendants

A by their conduct of the case (as admitted before us by their counsel) did not seriously suggest that the matter was justified, I am unable to say that this direction may not have been misunderstood by the jury and have influenced their decision at least as to the amount of damages given. Two other passages towards the end of the summing-up are also open to exception. The first reads as follows:

B "If you come to the conclusion that they are libels and are such as would have a tendency to prejudice the plaintiff in his position of town clerk of Westminster and presiding officer and deputy returning officer of the county council elections, then you must give him your verdict."

This appears to ignore the question of fair comment altogether. The second reads:

C "Then as far as comment is concerned you will consider whether that comment is fair and bona fide comment, or whether it is for the purpose of suggesting, as is alleged by the plaintiff, that he was acting in an improper way."

This is open to the misinterpretation to which I have already referred. I am, therefore, of opinion that the case must go back for trial, but under the circumstances I think that the costs of the appeal as well as of the first trial should abide the event.

D **BUCKLEY, L.J.**—In my judgment, there was such misdirection in this case that the defendants are entitled to a new trial. The action was one for libel to which the defendants pleaded justification and fair comment. The alleged libels consisted of certain statements of fact as to what took place at the Caxton Hall polling station and further matter which conveyed the imputation that the plaintiff, who was the deputy returning officer at that station, was actuated by an improper motive—viz., by political bias. The defendants' case was that the statements of fact contained in the alleged libels were true, and, as to the imputation of motive, that it was protected by the defence of "fair comment." The substantial point of the alleged libel lay in the imputation that the plaintiff, being a Moderate, had in his conduct as returning officer obstructed the Progressives and acted unfairly towards their personation agents.

F Where justification and fair comment are pleaded as defences, the latter is a weapon which comes into action if and when the former has failed. The defence of fair comment assumes that the matter to which it relates would be defamatory if it were not protected by the defence of fair comment. A fair and bona fide comment on a matter of public interest suffices to protect that which would otherwise be defamatory. Comment which tends to prejudice may still be fair; it may convey imputation of bad motive so far as the facts truly stated justify such an imputation. It is for the jury to say whether the facts justify the imputation or not. The fault here is that that question has never properly been left to them. The question for the jury is whether the comment is in their opinion beyond that which a fair man, however extreme might be his views in the matter, might make honestly and without malice and which was not without foundation. The defence of fair comment extends to the imputation of motives. **COCKBURN, C.J.**, in *Wason v. Walter* (7), speaking of the development of the law of libel, says (L.R. 4 Q.B. at p. 93):

I "The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised."

Whether the imputation is within the defence of fair comment or not is for the jury. It is for them to say whether the imputation was warranted by the facts and honestly represented the opinion of the person who gave expression to it, and that his belief was not without foundation. **COCKBURN, C.J.**, in *Campbell v. Spottiswoode* (6) says (3 B. & S. at p. 777),

"that where the public conduct of a public man is open to anim-adversion and the writer who is commenting upon it makes imputations on his motives which

arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty he is therefore justified in assailing his conduct as dishonest."

Whether the criticism be upon a literary production or the conduct of a public man, it is for the jury, I think, to find whether the imputation based upon facts truly stated does or does not honestly represent the opinion of the person who gives expression to it, and was not without foundation. In the present case the learned judge, in my judgment, failed to direct the jury that the comment which charged the plaintiff with improper conduct would not be libellous if it was the honest expression of the well-founded opinion of the writer based upon the true facts. The jury were in substance directed upon the question of fair comment that an imputation which charged the plaintiff with improper conduct was libellous whether it was or was not an honest expression of opinion upon a true state of facts, or, at any rate, were not directed that it was for them to say whether the imputation was or was not an honest expression of opinion and had foundation. This misdirection may have caused a miscarriage in either or both of two ways. It may be, and it seems to me impossible to say that it was not, the case that but for this direction the jury would not have found the matter libellous at all. They may have thought that the statements of fact, although not absolutely, were yet substantially true, but that the imputation of political bias, which was really the substance of the matter, was libellous whether it was an honest expression of opinion warranted by the facts or not. And, secondly, it may well be that the imputation of misconduct originating from political bias weighed largely with the jury in assessing the damages, and that they understood that they were bound to find that to be libellous. These circumstances are not, to my mind, answered by saying that to some extent the statements of fact as to what took place in the polling booth are not wholly accurate. It was for the jury to say whether they were substantially true or not, and it may well be that, while finding them to be substantially true, they held the matter to be libellous, and assessed the damages upon the wrong ground as regards the defence of fair comment. I think, therefore, that the order must go for a new trial, upon the ground that the defence of fair comment was not properly put to the jury. I agree as regards the costs.

Appeal allowed.

Solicitors: *Lewis & Lewis; Allen & Son.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

Re LAMBERT. CORNS v. HARRISON

[CHANCERY DIVISION (Eve, J.), April 2, 1908]

[Reported [1908] 2 Ch. 117; 77 L.J.Ch. 553; 98 L.T. 851]

Will—Construction—Gift to children of nephews “who shall die in my lifetime”—Nephew dead at date of will leaving child.

A testatrix by her will left her residuary estate in trust “for all my nephews and nieces who shall be living at my death, to be equally divided between them. Provided always that if any nephew or niece of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age, then and in every such case the last-mentioned child or children shall take (and if more than one equally between them) the share which his, her, or their parent would have taken of and in the residuary trust funds if such persons had survived me.” A nephew of the testatrix had died before the date of her will leaving a son who attained twenty-one.

Held: the son was entitled to share in the residuary estate of the testatrix under the substitutionary gift.

Loring v. Thomas (1) (1861), 1 Drew. & Sm. 497, applied.

Notes. Followed: *Re Metcalfe, Metcalfe v. Earl*, [1909] 1 Ch. 424; *Re Williams, Metcalfe v. Williams*, [1914] 1 Ch. 219. Considered: *Re Walker, Walker v. Walker*, [1930] All E.R. 392. Followed: *Re Birchall, Re Valentine, Kennedy v. Birchall*, [1940] 1 All E.R. 545. Referred to: *Re Rayner, Conch v. Warner*, [1925] All E.R. Rep. 484; *Mackintosh or Miller v. Gerrard*, [1947] A.C. 461; *Re Brooke’s Will Trusts, Jubber v. Brooke*, [1953] 1 All E.R. 668.

As to the description of donees in a will, see 34 HALSBURY’S LAWS (2nd Edn.) 265 et seq.; and for cases see 44 DIGEST 758 et seq.

Cases referred to:

- (1) *Loring v. Thomas* (1861), 1 Drew. & Sm. 497; 30 L.J.Ch. 789; 5 L.T. 269; 7 Jur. N.S. 1116; 9 W.R. 919; 62 E.R. 469; 44 Digest 796, 6528.
- (2) *Barracrough v. Cooper* (1905), [1908] 2 Ch. 121, n.; 77 L.J.Ch. 555, n.; 98 L.T. 852, n., H.L.; 44 Digest 532, 3483.
- (3) *Gorringe v. Mahlstedt*, [1907] A.C. 225; 76 L.J.Ch. 527; 97 L.T. 111; sub nom. *Re Gorringe, Gorringe v. Mahlstedt*, 51 Sol. Jo. 497, H.L.; 44 Digest 796, 6525.

Also referred to in argument:

Christopherson v. Naylor (1816), 1 Mer. 320; 35 E.R. 693; 44 Digest 793, 6502.

Adjourned Summons taken out by Thomas Corns, executor and trustee of the will of Mrs. E. Bock Harrison, widow, who died in 1908.

By her will dated Jan. 8, 1906, after bequeathing certain specific and pecuniary legacies, the testatrix gave, demised, and bequeathed her real and residuary personal estate to her trustee upon trust for sale and conversion and, after payment of funeral and testamentary expenses and legacies out of the proceeds of such conversion, to stand possessed of the residue thereof called the residuary trust funds on the terms set out in the headnote.

This summons was taken out to have it determined whether Stewart Colpitts Harrison, who had attained the age of twenty-one years, the son of Colpitts Harrison, a nephew of the testatrix, who was dead at the date of her will, was entitled to share in the residuary estate of the testatrix, a question which depended upon the construction of the words “shall die in my lifetime.”

Vernon for the trustee.

P. O. Lawrence, K.C., and *Crossman* for Stewart Colpitts Harrison.

J. E. C. Adams for other persons entitled to the testator’s residue.

EYE, J.—The testatrix, after devising and bequeathing all her real and her residuary personal estate to her trustee upon trust for conversion, directed him to stand possessed thereof

"in trust for all my nephews and nieces who shall be living at my death, to be equally divided between them, provided always that if any nephew or niece of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age, then and in every such case the last-mentioned child or children shall take (and if more than one equally between them) the share which his, her, or their parent would have taken of and in the residuary trust funds, if such persons had survived me."

Now the question which I have to determine, as was pointed out by KINDERSLEY, V.-C., in *Loring v. Thomas* (1) (1 Drew. & Sm. at p. 523), is really one of intention, whether the testatrix intended to make the gift by way of substitution of the issue only of those who were living at the date of the will or to include the issue of any predeceased child; and, of course, this intention can be taken from the language of the will. The original gift here is to those of the testatrix's nephews and nieces who shall be living at her death, and it is obvious that she could not have included in that gift a nephew who was already dead when she made her will, and that the proviso which concludes with the words which give to the issue the share which their parents would have taken contemplates a hypothetical position. If the issue of a deceased nephew or niece in fact survive the testatrix, then the share of the deceased nephew or niece is to be the subject-matter of a substitutionary gift. But then arises the question whether the phrase "if any nephew or niece of mine shall die in my lifetime" includes a nephew or niece who may have died before the date of the will or is confined to a nephew or niece dying between the date of the will and the date of the testatrix's death; and it is said that if the words are read strictly it must be confined to the latter, because the testatrix, clearly looking at matters as they were then at the date of her will, contemplates possible changes between then and the date of her death, for the words "shall die in my lifetime" point obviously to futurity starting from the date of the will. But it has been settled by authority that the court is not bound to read those words as importing futurity only if upon the true construction of the will it appears that they have not been used in the strict grammatical sense, and if in effect they are equivalent to "shall have died in my lifetime." Now in *Loring v. Thomas* (1) that meaning was attributed to the words "shall die"; they were held to import not merely futurity, but to mean "shall have died," and in this will I find circumstances exactly similar to those in *Loring v. Thomas* (1), for, after referring to the death of a nephew or niece in her lifetime, the testatrix says, "leaving a child or children who shall survive me"—that is a matter of futurity—"and being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry." Now, as KINDERSLEY, V.-C., pointed out in *Loring v. Thomas* (1), it would be doing violence to what must be assumed to be the meaning of the testatrix if I were to hold that those only of the issue who attained twenty-one after the date of the will participated, and if I were to exclude those who had already attained twenty-one at the date of the will. In my opinion, then, I have in this case all the elements which were present in *Loring v. Thomas* (1), and as was said by ROMER, L.J., in *Barraclough v. Cooper* (2) this case cannot substantially be distinguished from and is governed by *Loring v. Thomas* (1). Now, it is said, and said correctly, that *Gorringe v. Mahlstedt* (3) must be treated as an exception to *Loring v. Thomas* (1), and the exception was made because it appeared on the face of the will that the testator there knew that one of his sons was already dead at the date of his will, for he left specific legacies to "the children of my deceased son," so that knowing that the children of his deceased son would not come in

A under the substitutionary gift he, therefore, provided specially for them, and besides in that case there was no provision in the substitutionary gift as to attaining twenty-one years or marriage. I think, therefore, *Gorringe v. Mahlstedt* (3) does not exclude the authority of *Loring v. Thomas* (1), which has been followed in the recent case of *Barracrough v. Cooper* (2). I, therefore, construe this will in accordance with the principle of *Loring v. Thomas* (1), and hold that the son of the nephew

B of the testatrix who was dead at the date of her will must be included in the class entitled to share in the residuary estate of the testatrix under the substitutionary gift.

Solicitors: *J. W. Asprey; Waller & Co.*

[Reported by C. F. DUNCAN, Esq., Barrister-at-Law.]

C

D

SWAN AND EDGAR LTD. v. MATHIESON

[KING'S BENCH DIVISION (Darling and Bucknill, JJ.), December 16, 1910]

[Reported 103 L.T. 832; 27 T.L.R. 153]

Husband and Wife—Husband's credit—Right of wife to pledge—Termination of authority—Departure of wife from matrimonial home to live with another man.

E

A wife who was living with her husband received authority from the latter to order goods from the plaintiffs. The goods so ordered were booked to the "account address," that being the house at which the wife was living with her husband, and the bills therefor were settled by the husband. The wife left her husband and went to live with another man. Between that date and the time when the husband discovered her whereabouts, the wife ordered goods from the plaintiff which she directed to be booked to the account address and sent to the place where she was actually living. On learning where his wife was, the husband inserted an advertisement in the newspaper stating that he would not be responsible for her debts. In an action by the plaintiffs against the husband to recover the amount due for the goods supplied to his wife after she had left him,

F

G

Held: the ostensible authority given by the husband to his wife to pledge his credit (per DARLING, J.) only continued while she was living with him as a virtuous wife and not after she had left him to live with another man, and (per BUCKNILL, J.) was subject to the limitation that it only applied to such goods as were to be sent to the house where she was living with her husband, and, therefore, the plaintiffs' claim failed.

H

Notes. Referred to: *Wickins v. Wickins* (No. 2), [1918] P. 282.

As to the revocation of the wife's authority by adultery, see 19 HALSBURY'S LAWS (3rd Edn.) 866-867; and for cases see 27 DIGEST (Repl.) 193 et seq.

Case referred to:

I

(1) *Debenham v. Mellon* (1880), 5 Q.B.D. 394; 49 L.J.Q.B. 497; 42 L.T. 577; 28 W.R. 501, C.A.; affirmed, 6 App. Cas. 24; 50 L.J.Q.B. 155; 43 L.T. 673; 45 J.P. 252; 29 W.R. 141, H.L.; 27 Digest (Repl.) 182, 1363.

Also referred to in argument:

Ryan v. Sams (1848), 12 Q.B. 460; 17 L.J.Q.B. 271; 11 L.T.O.S. 221; 12 Jur. 745; 116 E.R. 940; 27 Digest (Repl.) 205, 1623.

Summers v. Solomon (1857), 7 E. & B. 879; 26 L.J.Q.B. 301; 3 Jur. N.S. 962; 5 W.R. 660; 119 E.R. 1474; 1 Digest (Repl.) 404, 636.

Appeal from a decision of JUDGE WOODFALL sitting at the Westminster County Court in an action brought by the plaintiffs for the price of goods delivered to the defendant's wife. A

The county court judge gave judgment for the defendant on the ground that although the defendant by his conduct had held out his wife as his agent to purchase goods from the plaintiffs, it was an implied term and limitation of her agency that such goods when sent should be delivered only to the defendant's house. B

W. de B. Herbert for the plaintiffs.

Rowlatt for the defendant.

DARLING, J.—This case is one of considerable difficulty, and whichever way the learned judge had found I think the party against whom he decided would have to surmount a good many obstacles before showing that any of the authorities upon the subject are authorities in his favour. Although agreeing with the conclusion at which the learned judge arrived, I do not base my judgment upon the ground taken by him. This is not a case of authority on the part of the wife arising from the necessities of the situation, as where a husband turns his wife out of doors and is held to have rendered himself liable for necessities supplied to her. This is a case in which the plaintiffs have shown that the defendant gave his wife authority to order the kind of goods which they sold at their shop. It was a distinct authority to pledge his credit, because the defendant was asked for a reference and furnished one showing who he was and his ability to pay for the goods. For all the goods which were ordered by his wife and sent to the home he has paid. But his wife deserted him, and for some days he was unaware of the fact, so that he could not give notice to the tradesmen with whom she dealt that she was no longer entitled to pledge his credit, because he did not know what had become of her. During that time the wife went to the plaintiffs' shop and ordered goods of the same kind as she had been in the habit of ordering. She directed the goods to be sent, not to the home of her husband, but to some other place. I am not going to say that the authority given to a wife to purchase goods is necessarily limited to ordering goods which are to go to the home where she is living with her husband, and that in the present case it is fatal to the plaintiffs that these goods were not to be sent to the residence of the husband. I think the whole question depends on what was the ostensible authority given by the husband to his wife in the presence of the plaintiffs. He did not say simply: "You may trust this woman and put the goods ordered by her down to me." What in effect he said was this: "This woman is my wife, and because she is my wife you may supply her with such things as you sell." To my mind, that is only an authority to the plaintiffs to supply goods to the wife while she is living with her husband as a virtuous wife. C D E F G

This is not a case of authority arising from necessity, but of an authority given and described either by conduct or words to the person who is going to supply the goods, and I do not think that that authority can be enlarged by saying that it is to be implied to be an authority of this kind: "You may supply this woman, who is my wife living with me, and if she runs away, whether I know it or not, you may still go on supplying her." It cannot be suggested for a moment that the defendant would have given any such authority as this. We must be careful not to extend this doctrine of ostensible authority so as to make it cover more ground than it was meant to cover when the authority was given. I think the observations of THESIGER, L.J., in *Debenham v. Mellon* (1) are authority for that proposition. He said (5 Q.B.D. at p. 403): H I

"If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognised continues."

A So far, that is in the plaintiffs' favour here. Then he continues:

"The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume; just as it would forbid his denying the authority of a servant who had been in the habit of ordering goods for him from the tradesman and whose authority he had secretly revoked."

B I think in that passage after the word "continues" the word "because" should be read in before the words "the husband's quiescence," so that it would read "the authority of the wife which the husband has recognised continues, because the husband's quiescence is in such cases tantamount to acquiescence." The husband in the present case was quiescent, but was his quiescence tantamount to acquiescence? I think that it was not, because here it was merely quiescence totally differing from the acquiescence which would involve that he consented to what was being done. Here the husband was without knowledge of what his wife was doing, and in such a case we cannot treat quiescence as being tantamount to acquiescence. In this case it was for the plaintiffs to make out that the authority given by the defendant to his wife was such as would continue even after she had left him and had gone to live with another man. That is a proposition contrary to all notions of what a man ought to be held liable for in law, and, although one regrets that a tradesman should have been deprived of his goods when he is quite an innocent party, still it seems to me that in order that he should succeed against the husband he must give proof of a kind of authority given by the husband such as there is no proof of here on the facts before us. That being so, I am of opinion that this appeal should be dismissed.

E **BUCKNILL, J.**—I agree. The plaintiffs here sued the defendant for the amount due in respect of goods supplied by them to his wife between Feb. 23 and Mar. 1, 1910. In point of fact the defendant's wife left him on Feb. 17, 1910, and was living in adultery with another man, and it is conceded that the goods supplied to the wife were sent to the flat where she was so living. In these circumstances the question we have to decide is whether the plaintiffs are entitled to recover the price of these goods from the husband.

F It is said that the case is one of agency, and that is so, but in the case of a husband and wife there are peculiar forms of agency. For instance, there may be agency on the part of the wife to pledge her husband's credit for necessities; there may be an express agency or there may be ostensible agency given by the husband in holding out that a certain woman is his wife and is to have his authority to pledge his credit. The latter is the class of agency with which we are concerned in the present case. To establish an agency of that kind it must be shown that it has been communicated to the person who is to supply the goods, because it is a special and particular agency and not a general one, and each case must be decided on its own facts. The facts here are that for about a year the plaintiffs had been supplying goods to the defendant's wife upon the credit of her husband, such goods being always sent to one place—viz., to the place where the defendant and his wife were living together as husband and wife. The method of business was that the goods bought by the wife during the time when the parties were living together were booked to the "account address," that being the defendant's house. That was, in my opinion, an ostensible agency.

H I There must be a limitation in this case to such an agency, and, therefore, I am of opinion, although I say it with some doubt, that the ostensible authority given by the defendant to his wife was to go to the plaintiffs and debit him with the price of goods supplied by them to be sent to the house where the defendant and his wife were living together. What the defendant's wife in point of fact did with regard to the goods in question was to direct that they should be booked in the same way as usual, but sent to some other place. This is one of those cases in which people in the position of the plaintiffs have to run a risk although they

were perfectly innocent parties in the matter. Some light may be thrown upon the nature of the authority given in the present case by considering the case of a servant who has received authority from his master. Take, for instance, the case of a cook who for a year has had ostensible authority to order meat and other things to be sent to the house where she is in service. She leaves the service in which she was, and next day goes to tradesmen with whom she has been in the habit of dealing and orders a number of goods, which she directs are to be debited to her master as before, and takes them away with her or orders them to be sent to the place where she is going to live. In such a case as that I think the master would not be responsible. In the present case, as I have said, I think there was a limitation of the authority given by the principal, and the learned judge, in my view, decided properly. For the reasons I have given I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. H. & A. G. Herbert; Freshfields.*

[Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law.]

R. v. THOMPSON

[COURT OF CRIMINAL APPEAL (Lord Alverstone, C.J., Ridley and Darling, JJ.), January 27, 1910]

[Reported [1910] 1 K.B. 640; 79 L.J.K.B. 321; 102 L.T. 257; 74 J.P. 176; 26 T.L.R. 252; 22 Cox, C.C. 299; 4 Cr. App. Rep. 45]

Criminal Law—Evidence—Statement by co-defendant—Admissibility—Total denial by prisoner.

There is no general rule that a statement made by a defendant is not admissible in evidence against a co-defendant unless it is wholly or in part admitted by the co-defendant.

The appellant and A. were charged with burglary. When the two men were arrested A. made a statement to a police constable in which he said that the appellant had come out of Dartmoor and had then plotted and carried out several burglaries including the one in question. When the appellant was informed of the contents of A.'s statement he said the statement was a pack of lies and that he did not know A. At the trial A. pleaded Guilty, but the appellant pleaded Not Guilty and was tried A.'s statement was given in evidence against him, and he was convicted.

Held: the statement was admissible.

R. v. Smith (1) (1897), 18 Cox, C.C. 470, disapproved.

Notes. Referred to: *R. v. Christie*, [1914-15] All E.R. Rep. 63.

As to confessions by one of two or more defendants, see 10 HALSBURY'S LAWS (3rd Edn.) 475, and for cases see 14 DIGEST (Repl.) 445 et seq.

Cases referred to:

(1) *R. v. Smith* (1897), 61 J.P. 120; 18 Cox, C.C. 470; 14 Digest (Repl.) 448, 4354. I

(2) *R. v. Bromhead* (1906), 71 J.P. 103, C.C.R.; 14 Digest (Repl.) 447, 4341.

Appeal against a conviction for burglary at quarter sessions.

At the trial the appellant was indicted with a man named Archer for burglary. Archer pleaded Guilty but the appellant pleaded Not Guilty, was tried, and convicted and sentenced to seven years' penal servitude. When the two men were arrested Archer made a statement in the nature of a confession to a police officer who took

A it down in writing. This statement, which was signed, was not made in the presence of the appellant. Shortly afterwards the two men were charged together, having been cautioned in the ordinary way. Archer said that he had made his statement and signed it, whereupon the appellant replied that he knew nothing about it. The statement was then produced, identified by Archer as his, and read over to the two prisoners. It related how the appellant having come out from Dartmoor, called on Archer, and went on to describe how the two men plotted and executed sundry burglaries, including the one in question. When the statement had been read, B the appellant said: "It is a pack of lies, I don't know the man at all." At the trial, this statement was tendered in evidence by the prosecution, and, though objected to as inadmissible, was admitted by the chairman. The ground of the objection was that since the appellant had denied the truth of the statement, it C could not be given in evidence against him. The chairman, while admitting the statement, warned the jury that they ought not to accept anything stated in it as true in any way. He told them that the contents of the statement might be absolutely false, and they were not to let the statement prejudice them against the appellant. Archer was then called as a witness for the prosecution. In summing-up the chairman directed the jury that they could not act upon the uncorroborated D evidence of an accomplice, but that there was some corroboration of Archer's story. He then referred again to the statement, indicating its unreliable nature, and pointing out how the appellant had denied the whole of it.

H. T. Wright for the appellant.

Moresby White for the Crown.

E **LORD ALVERSTONE, C.J.**, delivered the following judgment of the court. The ground of the appeal is that a statement made by the appellant's fellow-prisoner Archer to a police officer was admitted in evidence against Thompson, the statement having been read over to both prisoners but denied by the appellant. At the trial Archer pleaded Guilty. I desire to express no opinion with regard to the stage of the proceedings at which the statement, if admissible, should have been F put in. That must depend upon the facts of the case and the way it is conducted. I can conceive many cases in which such a statement ought not to be tendered in evidence until after the other evidence for the prosecution has been given. With regard to the question of the admissibility of the statement, if the decision of HAWKINS, J., in *R. v. Smith* (1) is supposed to have laid down as a matter of law G that a statement similar to the one in this case made by one fellow-prisoner is not admissible in evidence against the other unless it is wholly or in part admitted by the latter, in my opinion it goes too far. It may well be that the judge may not know what answer the person upon his trial made when the statement was read over to him. I adhere to what I said in *R. v. Bromhead* (2) (71 J.P. at p. 104):

H "I am not going to lay down any general rule as regards the admissibility of statements made by one person and read over to the prisoner. I am certainly not going to say that if the prisoner says 'It's a lie' the statement is not admissible, and that if he does not say that, that it is admissible."

I In the present case, after the statement had been given in evidence, the chairman told the jury not to accept such statement as true, even provisionally, and not to let it prejudice them in any way. Moreover, he repeated this warning in the summing-up, so that nothing could have been fairer than the measures adopted. With regard to Archer's evidence, which implicated the appellant, the chairman directed the jury that they could not convict upon it, unless it was corroborated in some material particular. He went on to indicate that there was some such corroboration. In our opinion, the statement of Archer, which was read over in the presence of the appellant, was properly admissible in evidence against him. The most that can be said is that the statement was given in evidence at an earlier stage of the

trial than it might have been if the case had been conducted differently. It was for the jury, upon a proper direction, to judge what weight might be attached to the statement. We cannot follow the ruling of *HAWKINS, J.*, in *R. v. Smith* (1), inasmuch as such a decision would, in strictness, include the case of a prisoner remaining silent. Therefore the point taken on behalf of the appellant fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by G. DONSON, Esq., Barrister-at-Law.*]

SAPWELL v. BASS

[KING'S BENCH DIVISION (*Jelf, J.*), April 27, 1910]

[Reported [1910] 2 K.B. 486; 79 L.J.K.B. 932; 102 L.T. 811;
26 T.L.R. 452]

Damages—Measure—Damage depending upon chance and not ascertainable with reasonable certainty at the time contract made—Breach of contract for service of plaintiff's mare by defendant's stallion—Loss by plaintiff of chance of getting valuable foal.

The defendant was the owner of a famous stallion and he agreed with the plaintiff, a horse breeder, that the stallion should in the season serve one of the plaintiff's mares for a fee of 300 guineas. Before the season the defendant sold the stallion and was unable to carry out the agreement. The plaintiff arranged for the mare to be served by another stallion not belonging to the defendant, at a fee of £100, and brought an action for breach of contract against the defendant. On previous occasions when the defendant's stallion had served mares belonging to the plaintiff, the plaintiff had made an average profit from the sale of the foals so produced of 700 guineas and the plaintiff claimed this sum as damages on the assumption that he had lost a valuable foal.

Held: the law in general regarded damage which depended entirely upon chance as too remote and irrecoverable, and, as the amount of damage could not have been ascertained with reasonable certainty at the time the contract was made, the plaintiff was only entitled to nominal damages.

Notes. Considered: *Chaplin v. Hicks*, [1911-13] All E.R. Rep. 224.

As to remoteness of damage, see 11 HALSBURY'S LAWS (3rd Edn.) 268 et seq., and for cases, see 17 DIGEST (Repl.) 114 et seq.

Cases referred to:

- (1) *Frost v. Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex.Ch.; 17 Digest (Repl.) 108, 224.
- (2) *Hochster v. De la Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 C.L.R. 846; 118 E.R. 922; 17 Digest (Repl.) 103, 174.
- (3) *Roper v. Johnson* (1873), L.R. 8 C.P. 167; 42 L.J.C.P. 65; 28 L.T. 296; 21 W.R. 384; 17 Digest (Repl.) 110, 238.

- A (4) *Fletcher v. Tayleur* (1855), 17 C.B. 21; 25 L.J.C.P. 65; 26 L.T.O.S. 60; 139 E.R. 973; 17 Digest (Repl.) 95, 120.
- (5) *Simpson v. London and North Western Rail. Co.* (1876), 1 Q.B.D. 274; 45 L.J.Q.B. 182; 33 L.T. 805; 24 W.R. 294; 8 Digest (Repl.) 153, 967.
- (6) *Watson v. Ambergate, Nottingham and Boston Rail. Co.* (1851), Cox, M. & H. 495; 17 L.T.O.S. 125; 15 Jur. 448; 8 Digest (Repl.) 28, 169.
- B (7) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

Also referred to in argument:

- C *Marcus v. Myers and Davis* (1895), 11 T.L.R. 327; 17 Digest (Repl.) 129, 365.
- Grébert-Borgnis v. Nugent* (1885), 15 Q.B.D. 85; 54 L.J.Q.B. 511; 1 T.L.R. 434, C.A.; 17 Digest (Repl.) 132, 390.
- Inchbald v. Western Neilgherry Coffee, Tea and Cinchona Plantation Co., Ltd.* (1864), 17 C.B.N.S. 733; 5 New Rep. 52; 34 L.J.C.P. 15; 11 L.T. 345; 10 Jur. N.S. 1129; 13 W.R. 95; 144 E.R. 293; 1 Digest (Repl.) 632, 2118.
- Williams v. Reynolds* (1865), 6 B. & S. 495; 6 New Rep. 293; 34 L.J.Q.B. 221; 12 L.T. 729; 11 Jur. N.S. 973; 13 W.R. 940; 122 E.R. 1278; 17 Digest (Repl.) 128, 361.
- D *Schulze v. Great Eastern Rail. Co.* (1887), 19 Q.B.D. 30; 56 L.J.Q.B. 442; 57 L.T. 438; 35 W.R. 683; 3 T.L.R. 635, C.A.; 8 Digest (Repl.) 154, 974.

Further Consideration of action by the plaintiff, Colonel Sapwell, against the defendant, Sir William Bass, for damages for breach of contract, tried by JELF, J., at Norwich Winter Assizes.

E *Sir Frederick Low, K.C.*, and *Henlé* for the plaintiff.
Hohler, K.C., and *Cababé* for the defendant.

Cur. adv. vult.

F April 27, 1910. **JELF, J.**, read the following judgment.—This action, which raised an important question as to the measure of damages for breach of contract, was brought by Colonel Sapwell against Sir William Bass, and was tried before me without a jury at the last Norwich Winter Assizes and afterwards heard on further consideration in London. The plaintiff is a well-known and experienced breeder of racehorses, and the defendant was the owner of a famous stallion called Cyllene. On April 21, 1909, the plaintiff sued the defendant for damages for breach of an alleged contract made by correspondence in December, 1907, and January, 1908, whereby it was agreed between the plaintiff and Lord Marcus Beresford (as agent for the defendant) that Cyllene should in the season of 1909 serve one of the plaintiff's brood mares, to be selected by the plaintiff, for a fee of £315 to be paid at the time of the said service by the plaintiff to the defendant. In the summer of 1908 the defendant without the consent of the plaintiff and without previous notice to him sold Cyllene for £30,000 to go to America. By letter of July 10, 1908, the plaintiff complained to Lord Marcus of this, and asked what the defendant proposed to do, adding:

I "If, having taken a subscription to Cyllene, I omitted to send a mare to him, I should have been liable all the same for 300 guineas, and I presume if Mr. Bass omits to provide the horse for my mare he is subject to that or a larger forfeiture."

Lord Marcus replied on July 19, 1908:

"Cyllene has never been advertised to stand as a stallion for 1909, and I merely took the subscription in case he did stand at my farm; but the horse has been sold, so neither you nor Mr. Bass are liable for anything."

The plaintiff replied on July 20, 1908, disputing the right of the defendant to set up the above answer, and continuing:

"I am advised that I am entitled to claim a sum equal to the average profit I have made on the horse in the past. In that case my loss would represent 700 guineas :

For my first Cyllene yearling, Auroform, made	850	guineas
My second Cyllene yearling, Sweet Mary, made	840	"
My third Cyllene yearling, Ravenna, made	710	"
My fourth this year made	900	"

	3,300	guineas
Less stud fees, 150, 150, 100, 100	500	"

4)2,800 "

700 guineas

in addition to increase in value of their dams."

But the plaintiff went on to say that he did not want his "pound of flesh" and suggested a compromise, adding

"It struck me that the present would be a good time to settle the matter, but of course I can take no steps until next spring."

It appeared that the plaintiff was unaware of *Frost v. Knight* (1), *Hochster v. De La Tour* (2), and *Roper v. Johnson* (3), and thought that he must wait till the season of 1909 before treating the contract as broken as he was entitled to do. The defendant, however, refused all idea of compromise. Further correspondence followed, Lord Marcus, amongst other things, saying that the defendant would make arrangements with the purchaser of Cyllene to take over the subscription for 1909, and suggesting that the plaintiff should send the mare to the ranch about 500 miles from Buenos Aires. The plaintiff ridiculed this and other contentions put forward on behalf of the defendant. Ultimately at the beginning of the season of 1909 the plaintiff claimed the fulfilment of the contract, which was repudiated by the defendant, and this action was then brought claiming substantial damages. In the meanwhile the plaintiff acted, as I find, reasonably in making the next best arrangement he could to minimise damages by sending one of his brood mares named Dear Mary, which he had recently intended to send to Cyllene, to Cicero, the son of Cyllene. Cicero was considered a very good coming horse, and was a winner of the Derby, but his reputation as a sire was, of course, not yet established. By Cicero Dear Mary became in due course in foal.

The defendant pleaded and set up at the trial a variety of defences; amongst others, that Lord Marcus was not his agent, that there was no complete contract, that there was no breach, and that there was no damage. All of these defences except the last were in my opinion wholly untenable and frivolous, and I considered that the contract had been broken and repudiated by the defendant in a high-handed and wholly unreasonable manner, and I was desirous, if I properly could, to find some mode of legally making the defendant compensate the plaintiff for the way in which he had been treated.

The question of damages, however, presented formidable and, to my mind, insuperable difficulties. It is clear that if the 300 guineas had been paid the plaintiff could have recovered it back. But he had paid nothing. For obtaining the service of Cicero the plaintiff had to pay a fee of £100 only instead of 300 guineas. No other expenses had been incurred or steps taken by the plaintiff in special preparation for the expected service by Cyllene, for such expenses and steps were all available for the service by Cicero. Neither party could suggest nor could I discover any tertium quid by way of compensation. The suggestion of JERVIS, C.J., and WILLES, J., in *Fletcher v. Tayleur* (4), that the average profit made by the use of the chattels not delivered should, by analogy with the interest on money not paid, be the amount of damages, has not been adopted, as a separate rule, and, moreover,

A would not be applicable to the present case. It seems to follow that the damages, if any, applicable in this case would be, on the one hand, the estimated loss of prospective profit on the lines put forward by the plaintiff in the above correspondence and the evidence which was given in respect thereof, or, on the other hand, nominal damages. It will be observed that the expectation of profit arising from the contract at the time it was made was not, and could not be, based on any tangible market price of the expected progeny of Cyllene and the undetermined mare, nor on the enhanced prospective price of such mare, but upon a succession of contingencies which could not be foretold more than a year beforehand, such as the following. (i) That Cyllene would be alive and well at the time of the intended service. (ii) That the mare sent would be a well-bred one, and that the plaintiff would for his own sake and without any obligation towards the defendant make a good and suitable selection of such mare. (iii) That the mare sent would not prove barren, which had happened to another mare sent by plaintiff to Cyllene. (iv) That the mare sent would not slip her foal, and that such foal would be born alive and would be strong and healthy. (v) The chance whether it would be a colt or a filly, the former being more valuable. (vi) That the foal would be all right when offered for sale. (vii) That the relative reputations of Cyllene and other sires and their respective foals would be the same in 1909 as in 1908. (viii) That no substitute for Cyllene (for example, Cyllene's son Cicero) available in 1909 would equal or excel Cyllene in public estimation or results. (ix) That Cicero's offspring would not command as good a price as Cyllene's.

D In a case like this where there is obviously no actual market price to guide one, and where there is not in the contract any liquidated sum agreed on for damages, one could only rely on the weighing of chances. It was not contended that the contract was one of insurance, or that the fee of 300 guineas payable for the service by Cyllene included any premium payable to the defendant for entering into such an onerous contract. But the law in general regards damages which depend entirely upon chances as too remote, and therefore irrecoverable. The cases seem to show that the line may sometimes be difficult to draw between an estimate of damage based on probabilities, as in *Simpson v. London and North Western Rail. Co.* (5), where COCKBURN, C.J., says (1 Q.B.D. at p. 277):

E "To some extent, no doubt, they [that is, the damages] must be matter of speculation, but that is no reason for not awarding any damages at all,"

F and a claim for damages of a totally problematical character, but I think the present case is well over the line. The following passage from MAYNE ON DAMAGES (8th Edn.), at p. 11, forms, I think, a strong argument in favour of the damages in the present case being only nominal:

G "The principle of all these cases seems to me to be that in matters of contract the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance. Now this benefit, the consideration for his promise, is always measured by the primary and intrinsic worth of the thing to be given for it, not by the ultimate profit which the party receiving it hopes to make when he has got it. . . . The price is based on the market value of the thing sold. . . . It is obviously unfair, then, that either party should be paid for carrying out his bargain on one estimate of its value, and forced to pay for failing in it on quite a different estimate. This would be making him an insurer of the other party's profits without any premium for undertaking the risk."

I In *Watson v. Ambergate, Nottingham, and Boston Rail. Co.* (6), commented on in MAYNE ON DAMAGES (8th Edn.) at p. 70, PATTESON, J., seemed to think that the chance of a prize might be taken into account in estimating the damages for breach of contract in sending a machine for loading barges by railway too late for a show; but ERLE, J., appeared to think this damage was too remote. The case went off on another point, but I incline to think the view of ERLE, J., was the correct one, as

the chance of winning a prize was not, in my opinion, of sufficiently ascertainable value at the time the contract was made to be within the contemplation of the parties. Moreover, the contingencies in the present case are far more numerous and uncertain than in the case cited. The American decisions are collected in SEDGWICK ON DAMAGES ((8th Edn.), vol. 1 at pp. 245 et seq., 277, 292-294). The principle above discussed is clearly laid down and it is shown that, in order to be recoverable, damages for loss of profit must not only naturally flow from the breach, or be at the time of contract in the contemplation of both parties, but that the amount also can be ascertained with reasonable certainty. Now, in the present case, although the defendant must be taken to have known the plaintiff's general business object in making the bargain and his expectation of commercial profit in making it, I do not consider that the plaintiff's suggested damage was the reasonable and natural result of the defendant's breach, or that it could have been within the contemplation of both parties at the time of contract made, according to the rule in *Hadley v. Baxendale* (7), and other cases of the same kind.

I, therefore, decide this case on the ground that there is no evidence of any legal damage arising from the breach of contract, and if there had been a jury I should so have directed them. If I had been at liberty to speculate on the chances, I might or might not have come to the same conclusion upon the facts. The price paid for the service by Cicero was £100, instead of the £315 which the plaintiff would have had to pay for the service of Cyllene, and the plaintiff therefore starts with £215 to the good by properly diminishing the damages as best he could, and, looking to all the accumulated chances which have to be taken into account as above enumerated, it is doubtful whether any tribunal would find that the plaintiff lost by having a foal of Cicero and Dear Mary, instead of a foal of Cyllene and Dear Mary, enough to overtop the initial gain, even if it were clear that the difference between the value of a foal by Cyllene and of a foal by Cicero could, under all the circumstances, be put as high as £215. I prefer, however, not to prejudice either party on the legal question of remoteness of damage by making a pure shot or guess on a matter as to which I have in my view no legal basis of assessment to guide me. I therefore reluctantly hold that the plaintiff is not legally entitled to judgment for, at all events, more than nominal damages. I give judgment, therefore, for the plaintiff, damages 1s.

Costs are in my discretion. In an ordinary case in which the plaintiff recovers nothing by way of damages and has substantially failed, I should make him pay the defendant's costs, but, having regard to the attitude taken up by the defendant and his agent throughout, and to the issues on which the defendant has failed, I think justice will be done by ordering each party to pay his own costs.

Judgment for plaintiff.

Solicitors: *Ravenscroft, Woodward & Co.*, for *Purdy & Holley*, Aylsham; *Oliver Richards & Parker*.

[Reported by W. W. ORR, ESQ., Barrister-at-Law.]

BANK OF BOMBAY *v.* SULEMAN SOMJI

[PRIVY COUNCIL (Lord Macnaghten, Lord James of Hereford, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson), May 13, June 2, 1908]

[Reported 99 L.T. 62; 24 T.L.R. 698]

Corporation—Documents—Right of member to inspect.

At common law members of a corporation have no absolute right to inspect, whenever they think fit, all papers belonging to the aggregate body. The privilege of inspection is confined to cases in which the member has in view some definite right or object of his own, and to such documents as would tend to illustrate such right or object.

R. v. Merchant Tailors' Co. (1) (1831), 2 B. & Ad. 115, approved.

Notes. As to inspection of books and documents of a corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 30, 31, and for cases see 13 DIGEST (Repl.) 213 et seq.

Cases referred to :

- (1) *R. v. Merchant Tailors' Co.* (1831), 2 B. & Ad. 115; 9 L.J.O.S.K.B. 146; 109 E.R. 1086; 13 Digest (Repl.) 215, 353.
- (2) *R. v. Wilts and Berks Canal Co.* (1835), 3 Ad. & El. 477; 5 Nev. & M.K.B. 344; 111 E.R. 495; 13 Digest (Repl.) 216, 371.
- (3) *R. v. Lewisham Union*, [1897] 1 Q.B. 498; 66 L.J.Q.B. 403; 76 L.T. 324; 61 J.P. 151; 45 W.R. 346; 13 T.L.R. 154; 41 Sol. Jo. 210, D.C.; 16 Digest (Repl.) 322, 1009.

Appeal from a decision of the High Court of Judicature at Bombay in an action brought by the respondent for a declaration that he was entitled, as a member of the appellant corporation, to inspect the appellant's register at all reasonable times and to copy and take extracts therefrom.

The appellant bank was incorporated in 1876 under the Presidency Banks Act, 1876, and the respondent was the holder of one share in the bank which he acquired on April 18, 1906, at the time when he was engaged in litigation with the appellant bank and his brothers were engaged in litigation with one of the appellant's directors.

On June 1, 1906, the respondent, wishing to inspect the register of shareholders of the bank, made a verbal request for inspection. His request was refused. He then asked to be furnished with a list of shareholders and their addresses on payment for the same. The bank replied that there did not appear to be any provision in the Presidency Banks Act, as to the right of a shareholder or other person to demand such a list, but that to enable the directors to decide definitely on the requisition the respondent should state for what purpose and under what authority he required and claimed a right to be furnished with it. After further correspondence the respondent wrote to the bank a letter before action saying that he was entitled to the inspection as a matter of right; that there had been gross irregularities in the management of the bank, in the election of directors, in the manner in which the directors had acted, and other matters; and that the appellants had precluded him from communicating with the shareholders and taking concerted action by refusing inspection; and that proceedings would be commenced unless inspection were given within three days.

As inspection was not granted the respondent instituted a suit in the High Court of Bombay, which was dismissed with costs by SCOTT, J. This decision was reversed on appeal and the bank appealed.

Levett, K.C., and *F. Russell, K.C.*, for the appellants.

De Gruyther, K.C., and *S. A. Kyffin* for the respondent.

June 2, 1908. **LORD ATKINSON.**—This is an appeal from a decree, dated Jan. 22, 1907, pronounced by the High Court of Judicature at Bombay (sitting in

appeal from its original civil jurisdiction), by which a decree, dated Aug. 6, 1906, of the High Court (sitting in its ordinary original civil jurisdiction) was reversed and set aside. By this latter decree the respondent's action was dismissed with costs.

The respondent is a holder of one share in the appellant company, the Bank of Bombay, one of the banks incorporated in 1876 by the Indian statute of that year entitled the Presidency Banks Act, 1876. It was suggested that the respondent purchased this share for the purpose of causing annoyance to the bank, owing to the fact that some other litigation to which he was a party had been instituted against the bank and was still pending. There was no satisfactory evidence given to sustain this allegation. From the correspondence which took place between the respondent and the bank before the institution of this suit, it is, in the opinion of their Lordships, perfectly plain that the respondent claimed a right to inspect the register of the shareholders of the bank, and to be supplied with a list of such shareholders, as absolute and unqualified as is that conferred on the shareholders of joint stock companies in this country by s. 32 of the Companies Act, 1862, or in India by s. 31 of the Indian Companies Act, 1866 and s. 55 of the Indian Companies Act, 1882. It must be taken that the appellants refused to recognise this absolute and unqualified right, or to comply with the claim based upon it, but in their letter of June 21, 1906, which conveyed this refusal, they informed the respondent that they would be pleased to furnish him with the list which he asked for if he would satisfy them that he required it for use in his own interests as a shareholder.

It is, therefore, clear that, before action brought, the qualified and restricted right to inspect and take extracts from the register contended for in argument on behalf of the respondent was never asserted, nor any limited demand based upon it ever made or refused. In the statement of claim the respondent, for the first time, endeavoured explicitly to base his right and title to inspect, copy, and take extracts from, the register on some definite matters in which he himself was interested. He alleges therein that he had observed irregularities in the management of the bank, in the election of its board of directors, in the advancing of large sums of money to its directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other shareholders and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the bank and the removal of some of the directors, which he intended to propose at the general meeting of the shareholders to take place on Aug. 9, 1906. But though this is the purpose for which, and the occasion on which, he claimed the right to inspect, copy, and take extracts from the register, the decree of the Court of Appeal contains no restriction whatever. It is couched in the widest terms. It ignores both the occasion and the purpose, and declares expressly that the respondent, as long as he is a shareholder of the bank, is entitled at all reasonable times to inspect the register of shareholders of the bank, and to copy and take extracts from the said register, and it then proceeds to order that the bank do give such inspection, and do allow the respondent, as long as he is a shareholder of the bank, to take copies of and extracts from the register, and then restrains the bank from preventing the respondent, as long as he is a shareholder of the bank, from having access at all reasonable times to the register for the purpose of inspection and perusal, and from preventing the respondent, as long as he is a shareholder of the bank, from taking copies of and extracts from the register.

This suit is in truth in its nature, though not in its form, somewhat of the character of an application for a writ of mandamus, and the principles regulating the issue of that prerogative writ should, their Lordships think, apply to a great extent to the granting of the relief prayed for in such a suit as this. One of these principles is this, that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the court, that he has claimed to exercise that right and none other, and that his claim has been refused. Nothing less, therefore, than the absolute

A right claimed by the respondent in the correspondence above referred to could justify the decree appealed from in its present wide and unrestricted form. Now, by s. 231 of the above-mentioned Indian Act, 1866, and s. 256 of the above-mentioned Act of 1882, the appellant bank is expressly exempted from the operation of each of those statutes. There is no statute conferring on the members of this corporation a right to inspect, copy, or take extracts from, the register of its shareholders or any other document belonging to it. The only right which the respondent can have, therefore, against the bank in reference to such matters, is that which at common law belongs to every member of a corporation. Their Lordships have been referred to several authorities in which the nature, extent, and measure of this right is explained and defined: *R. v. Wilts and Berks Canal Co.* (2), *R. v. Lewisham Union* (3). The learned judges in the Bombay Court have referred to others. The result of the authorities is summed up, in their Lordships' view correctly, in TAYLOR ON EVIDENCE ((10th Edn., 1906), vol. 2, para. 1495) in the words following:

"On the application of a member the King's Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down more broadly, and the language ascribed to the court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object."

The strictness with which these limitations on the general and unqualified right of inspection are insisted on may be aptly illustrated by *R. v. Merchant Tailors' Co.* (1). In that case certain members of a corporation claimed a right to inspect all the documents belonging to that body on the grounds (i) that they had heard and believed the revenues of the corporation were misapplied through the malpractices of those who managed the corporation's affairs; (ii) that the fines for admitting freemen and liverymen to the corporation had been unnecessarily and improperly raised; (iii) that lavish expenditure had taken place (in some instances to the applicants' own knowledge) without the consent of the majority of the members of the corporation; (iv) that a clerk of the corporation had, as the applicants had heard and believed, recently misappropriated funds of the company to a large amount, but that no accounts or information had been laid before the freemen or liverymen by which they could have ascertained the amount of the defalcations; and that they (the applicants) could not ascertain, unless they were allowed to look at the documents mentioned, whether the corporate funds had been properly applied and accounted for or not. Every member of the corporation in this case obviously had an interest in each of the matters mentioned, but none of the applicants had in any of them any special interest different from that of his fellow members, nor had they any definite purpose, or object, in obtaining the inspection asked for other than in the words of LITTLEDALE, J., to see "if by possibility the company's affairs may be better administered than they think they are at present." And the writ of mandamus was accordingly refused in that case.

At the trial no witness other than the respondent was produced, and he was only tendered for cross-examination. He stated that he had heard through brokers that the bank had advanced six lacs of rupees to three persons whom he named; that at elections the directors transferred shares to nominees who voted for them (a practice not in itself illegal); that there were now only seven directors, instead of

the maximum nine; that he intended to bring in two respectable people; and that he had in the correspondence given his reasons for asking inspection. It is clear on this evidence that the respondent had no special interest in any of the matters of which he complained, or any interest other than, or different from, that of each member of the corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate; but that, on the contrary, his object was similar to that of the applicants in *R. v. Merchant Tailors' Co.* (1)—namely, to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs. Their Lordships think that, on this point, the case is covered by the authority of *R. v. Merchant Tailors' Co.* (1), that the respondent is not in law entitled to the extended right to which the decree declares him to be entitled, that the limited and qualified right contended for at the trial was never put forward, or insisted on, before action brought, or any claim based upon it ever refused, and they are, therefore, of opinion that the decree appealed from is erroneous and should be reversed with costs, and the judgment and order of SCOTT, J., restored. They will humbly advise His Majesty accordingly. The respondent must pay the costs of this appeal.

Solicitors: *Cameron, Kemm & Co.; Payne & Lattey.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

MATTHEWS v. SMALLWOOD

[CHANCERY DIVISION (Parker, J.), February 24, 25, 28, 1910]

[Reported [1910] 1 Ch. 777; 79 L.J.Ch. 322; 102 L.T. 228]

Landlord and Tenant—Lease—Correction of error—Patent ambiguity on face of lease—Reference to counterpart to explain ambiguity and correct lease.

Where there is an inconsistency between the habendum and the reddendum, both contained in a lease, the terms of the habendum must prevail and those of the reddendum must yield. Where there is an inconsistency between a lease and the counterpart and it is clear that a mistake has been made in not making the counterpart and the lease correspond the counterpart, being the inferior instrument, must give way and the lease must prevail. But where the lease contains a palpable mistake, the court can refer to the counterpart to see where the mistake lies.

A lease contained numerous covenants by the lessee and then provided for a right of re-entry by the landlord in case "the tenant shall commit any breach of the covenant hereinbefore contained and on his part to be performed." In the counterpart the wording was "covenants" in the plural.

Held: there being a patent ambiguity on the face of the lease in that it was impossible to say what was meant by "the covenant hereinbefore contained" when numerous covenants were contained in the prior part of the lease, the court was entitled to look at the counterpart to explain that patent ambiguity and to treat the word "covenant" in the lease as a clerical error for "covenants."

Landlord and Tenant—Lease—Forfeiture—Waiver—Proof—Recognition by landlord of continued existence of lease—Knowledge of facts on which right of re-entry arises—Reservation of right to re-enter—Onus of proof.

Waiver by a lessor of a right of re-entry conferred on him by the lease on breach of covenant by the tenant can only arise where the lessor does some

A unequivocal act recognising the continued existence of the lease with knowledge of the facts on which his right of re-entry arises. That knowledge is essential to the exercise of his right. Whether the unequivocal act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and, therefore, it is not open to a lessor who has knowledge of a breach to accept rent, distrain for unpaid rent, or otherwise treat the tenancy as existing, and then claim to be entitled to reserve his right to re-enter for breach of covenant.

B The waiver takes place when he does the unequivocal act with knowledge. The onus of proving knowledge is on the tenant seeking to prove waiver, but if the landlord offers no evidence of lack of knowledge it is open to the court or jury to draw an inference.

C *Landlord and Tenant—Lease—Forfeiture—Relief—Relief to under-tenant—Jurisdiction to be exercised sparingly—Relief withheld from under-tenant guilty of negligence.*

The power of the court to give to an underlessee relief against forfeiture [see s. 146 (4) of the Law of Property Act, 1925, re-enacting s. 4 of the Conveyancing Act, 1892] should be exercised sparingly, and relief should not be given to an underlessee who has been guilty of negligence, e.g., in the absence of very special reasons, by not investigating the title of the lessee or acquainting himself with the terms of the lease and the possibility that the granting of the underlease might cause forfeiture.

E **Notes.** Considered: *Hurd v. Whaley*, [1918-19] All E.R. Rep. 812. Applied: *Davenport v. Smith*, [1921] 2 Ch. 270. Approved: *Fuller's Theatre and Vaudeville Co. v. Roze*, [1923] A.C. 435. Referred to: *Atkin v. Rose*, [1923] 1 Ch. 522; *P. Samuel & Co., Ltd. v. Dumas*, [1924] All E.R. Rep. 66; *Coe v. London and North Eastern Rail. Co.*, [1943] 2 All E.R. 61; *Oak Property Co. v. Chapman*, [1947] 2 All E.R. 1; *Creery v. Summersell and Flowerdew & Co.*, [1949] L.J.R. 1166.

F As to counterpart and duplicate leases, forfeiture, waiver and relief, see 23 HALSBURY'S LAWS (3rd Edn.) 450, 451, 665 et seq. For cases see 30 DIGEST (Repl.) 466, 467, and 31 DIGEST (Repl.) 512 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

- G** (1) *Burchell v. Clark* (1876), 1 C.P.D. 602; 45 L.J.C.P. 671; reversed 2 C.P.D. 88; 46 L.J.Q.B. 115; 35 L.T. 690; 42 J.P. 132; 25 W.R. 334, C.A.; 30 Digest (Repl.) 467, 1086.
- (2) *Pennant's Case* (1596), 3 Co. Rep. 64 a; 76 E.R. 775; sub nom. *Harvy v. Oswald*, Moore, K.B. 456; Cro. Eliz. 553, 572; 31 Digest (Repl.) 565, 6854.
- (3) *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 39 W.R. 338; 7 T.L.R. 175, C.A.; 31 Digest (Repl.) 547, 6696.
- H** (4) *Quilter v. Mapleson* (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 31 W.R. 75, C.A.; 31 Digest (Repl.) 546, 6678.
- (5) *Imray v. Oakshette*, [1897] 2 Q.B. 218; 66 L.J.Q.B. 544; 76 L.T. 632; 45 W.R. 681; 13 T.L.R. 411; 41 Sol. Jo. 528, C.A.; 31 Digest (Repl.) 554, 6738.

I Also referred to in argument:

- Serjeant v. Nash, Field & Co.*, [1903] 2 K.B. 304; 72 L.J.K.B. 630; 89 L.T. 112; 19 T.L.R. 510, C.A.; 31 Digest (Repl.) 553, 6733.
- Harman v. Ainslie*, [1904] 1 K.B. 698; 73 L.J.K.B. 539; 90 L.T. 624; 52 W.R. 615; 20 T.L.R. 356; 48 Sol. Jo. 328, C.A.; 31 Digest (Repl.) 520, 6427.
- Croft v. Lumley* (1858), 6 H.L. Cas. 672; 27 L.J.Q.B. 321; 31 L.T.O.S. 382; 22 J.P. 639; 4 Jur. N.S. 903; 6 W.R. 523; 10 E.R. 1459, H.L.; 31 Digest (Repl.) 513, 6369.

Ewart v. Fryer, [1901] 1 Ch. 499; 70 L.J.Ch. 138; 83 L.T. 551; 49 W.R. 145; 17 T.L.R. 145; 45 Sol. Jo. 115, C.A.; affirmed sub nom. *Fryer v. Ewart*, [1902] A.C. 187; 71 L.J.Ch. 433; 9 Mans. 281; sub nom. *Watney Combe, Reid & Co. v. Ewart*, 86 L.T. 242; 18 T.L.R. 426, H.L.; 31 Digest (Repl.) 552, 6724.

Ashcombe v. Mitchell (1895), 12 T.L.R. 17, C.A.; 31 Digest (Repl.) 187, 3192.

Doe d. Nash v. Birch (1836), 1 M. & W. 402; 2 Gale, 26; Tyr. & Gr. 769; 5 L.J.Ex. 185; 150 E.R. 490; 31 Digest (Repl.) 561, 6819.

Roe d. Gregson v. Harrison (1788), 2 Term. Rep. 425; 100 E.R. 229; 31 Digest (Repl.) 558, 6786.

Action for a declaration and an order vesting property in the plaintiffs.

The defendant Joseph Smallwood, who was represented by his guardian ad litem, Joseph Warren Smallwood, was the owner of the Fox and Goose Inn, Little Bromwich, near Birmingham, and by an indenture of lease dated July 29, 1893, he leased the premises, together with an adjoining nine acres of pasture land, to William Grove for a term of twenty-one years expiring March, 1914, at a rental of £100 per annum. The lease contained the usual covenants, and in particular that

"The tenant will not during the term hereby granted assign underlet or part with the possession of the said premises or any part thereof or do or commit any act or thing whereby or by means whereof the said premises or any part thereof may be assigned or otherwise disposed of or the possession thereof parted with to any person or persons whatsoever for the whole or any part of the said term without the consent in writing of the landlord first had and obtained for that purpose (but such consent shall not be capriciously withheld from any respectable and responsible tenant)."

The lease also contained the proviso for re-entry by the landlord in case of non-payment of rent, or in case

"The tenant shall commit any breach of the covenant hereinbefore contained and on his part to be performed."

By an indenture dated Mar. 8, 1895, the lessee Grove assigned the demised premises to the defendants Ind, Coope, & Co. for the residue of the term, the written licence of the defendant Smallwood having been first obtained. By an indenture of lease dated April 23, 1896, the defendant Smallwood granted to Ind, Coope & Co. a further term of ten years from the expiration of the original term, part of the land demised by the original lease being excepted from the demise of the further period, but the conditions and covenants in other respects being identical with those of the indenture of 1893. There was a proviso that in the case of forfeiture of the original lease this second term of ten years should become null and void. In 1900 Ind, Coope & Co., issued £1,000,000 mortgage debenture stock, and for the purpose of securing this loan their leasehold hereditaments, among them the Fox and Goose, were sub-demised by a trust deed to trustees for the debenture-holders, of whom the plaintiffs in the present action were now the representatives. To this assignment the consent of the defendant Smallwood was not obtained. Debenture-holder actions having been brought against Ind, Coope & Co. in respect of this and other issues, and receivers having been appointed, the receivers wrote to the defendant Smallwood giving him notice of their appointment. In reply Smallwood's solicitor wrote stating that they were unable to find any trace of their client having given his licence to the assignment of the lease of the Fox and Goose to the trustees, and in subsequent letters they threatened to re-enter upon the premises and determine the two leases on account of the breach that had been committed. The plaintiffs thereupon brought this action claiming a declaration that upon the true construction of the two leases, and in the events which had happened, Smallwood was not entitled to exercise any right of re-entry by reason of the sub-demise of the Fox

A and Goose to the plaintiffs under the trust deed, and alternatively claiming an order vesting the premises in the plaintiffs for the unexpired portion of the two terms. Smallwood counterclaimed for a declaration that he was entitled to re-enter upon the premises and determine the tenancy. There was revealed a discrepancy between the lease of 1893 and the counterpart executed by Grove, the lease, in the proviso for re-entry already quoted, containing the words "the tenant shall commit any breach of the covenant hereinbefore contained," whereas in the counterpart the wording was "covenants."

Romer, K.C., and T. J. C. Tomlin for the plaintiffs.

G. D. Pepys for the defendant company.

Grant, K.C., and Bryan Farrer for the defendant Smallwood.

C **PARKER, J.**—By an indenture dated July 29, 1893, and made between the defendant, Joseph Smallwood, of the one part, and William Samuel Harman Grove, of the other part, premises consisting of a messuage or public-house known as the Fox and Goose Inn, situate at Little Bromwich, in the city of Birmingham, together with land adjoining, were demised to William Samuel Harman Grove for a term of twenty-one years at a rent, and subject to covenants which are specified in the deed. One of the covenants was that the tenant should not during the term thereby granted

D "assign, underlet, or part with the possession of the said premises, or any part thereof, or do or commit any act or thing whereby or by means whereof the said premises or any part thereof may be assigned or otherwise disposed of, or the possession thereof parted with to any person or persons whatsoever, for the whole or any part of the said term, without the consent in writing of the landlord, first had and obtained for that purpose (but such consent shall not be capriciously withheld from any respectable and responsible tenant)."

E There is also in the lease a proviso for re-entry, to which I shall have to refer more particularly presently. In 1896, by an indenture dated April 23 of that year, the term of the lease with regard to the public-house was prolonged, but I do not think that anything of particular materiality is contained in that document. In 1900 the defendants, Ind, Coope & Co., had become the assignees of the lessee under the documents to which I have referred, and were the owners of the leasehold premises, and by a deed dated Sept. 18 of that year they sub-demised (inter alia), the house and land in question for the whole of the term granted, less the last day, to trustees by way of mortgage for securing an issue of debentures of a large amount which they were making at the time, and it is admitted that they executed this deed without obtaining any consent for the purpose from Mr. Smallwood, and accordingly that they were guilty of a breach of a covenant against sub-demising contained in the original lease. The plaintiffs in this action are the present trustees, one of whom, I think, was an original trustee, but, at any rate, they are both of them trustees of that deed, and the claim in the action is to have it declared

G "that upon the true construction of the first lease and second lease respectively, and in the events which have happened, the defendant, Joseph Smallwood, is not entitled to exercise any right of re-entry under such leases or either of them by reason of the sub-demise of the said demised premises by the defendant company contained in the trust deed."

I Alternatively, they ask for relief under the statutes from forfeiture. There is a defence and a counterclaim, and the counterclaim, which I need not particularly refer to, is for possession.

The first point I have to consider, therefore, is whether, according to the true construction of the lease, there was a forfeiture by reason of the fact that in 1900 the assignees, Ind, Coope & Co., sub-demised the house and lands in question to trustees by way of mortgage to secure an issue of debentures. That depends upon

the construction to be put upon the proviso for re-entry. The proviso for re-entry contained in the original lease and incorporated in the lease by which the term was prolonged is in this form :

"Provided always that if the said yearly rent of £100, or any part thereof shall be unpaid for twenty-eight days, whether the same shall have been legally demanded or not, or if the tenant shall commit any breach of the covenant hereinbefore contained, and on his part to be performed, or shall while in the possession of the said premises become bankrupt or suffer his interest in the said premises to be taken in execution, then and in any of the said cases the landlord may re-enter upon the said premises or any part thereof in the name of the whole, and immediately thereupon this demise shall absolutely determine."

There is, therefore, a proviso for re-entry on any breach of the covenant thereinbefore contained. Of course, as there are many covenants thereinbefore contained in the deed, there is there an ambiguity which would be fatal to the exercise of the power of re-entry if it cannot be explained or corrected by some other document. The counterpart of the lease is not in precisely the same form, because there the proviso for re-entry is limited to take effect "if the tenant shall commit any breach of the covenants hereinbefore contained," which would be the usual form in a lease where it was intended to make the proviso for re-entry extend to something more than failure to pay the rent.

The question which arises on this point is whether I am at liberty to correct the lease by reference to the counterpart. With respect to that point, I am referred to what is said in SHEPPARD'S TOUCHSTONE (8th Edn.) at p. 52 :

"All the parts of a deed indented in judgment of law do make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutual deeds of either party, and either party may be bound by either part of the same. And the words of the indenture are the words of either party."

Again :

"And although both parts of the indenture are but as one deed, yet the part of the grantor is as the principal, and the other is not but a counterpart; . . . and if there be any difference between the parts the counterpart shall be made to agree with the principal, and [the errors] shall be deemed the misprision of the clerk."

An analogous point has been raised before in the courts, and was the subject of *Burchell v. Clark* (1). There, by an indenture of lease dated in 1784 and executed by the lessor, he demised certain premises to hold to the lessee and his assigns for the term of ninety-four and a quarter years, yielding and paying therefor during the said term of ninety-one and a quarter years hereby demised a yearly rent. The number of years was not mentioned in any other clause in the lease, but the counterpart, executed by the lessee, which was otherwise identical with the lease, had ninety-one in the habendum as well as in the reddendum. In the action, which was to recover possession against the assignee of the lessee after the lapse of the ninety-one and a quarter years it was held, overruling the judgment of the Common Pleas Division (by COCKBURN, C.J., and BRAMWELL and AMPHLETT, JJ., KELLY, C.B., dissenting), that, there being a manifest clerical error in the lease, the counterpart might be looked at to ascertain where the mistake lay, and that, on the true construction of the lease and counterpart taken together, the "ninety-four" in the lease must be rejected, and the lease read as a grant for "ninety-one and a quarter years" only. COCKBURN, C.J., said (2 C.P.D. at pp. 93, 94) :

"It is perfectly clear that in the deed executed by the lessor there is some clerical error: for the habendum is for ninety-four and a quarter years, while

A the *reddendum* is for 'the said term of ninety-one and a quarter years.' Either, therefore, the ninety-four ought to be ninety-one or the ninety-one ought to be ninety-four. There was a counterpart executed by the lessee at the same time that the lease was executed by the lessor, and the question is whether we can refer to the counterpart in order to see which is the error in the lease. I quite agree that, if there were only one deed, the *habendum* would be the dominant part, and must prevail, and the *reddendum* would be subordinate, and must yield, if there were any inconsistency between the two. I agree, also, if there were an inconsistency between the lease and the counterpart, if it were clear that a mistake had been made in not making the counterpart and lease correspond, according to the canon of construction laid down in SHEPPARD'S TOUCHSTONE, the counterpart must give way, being the inferior instrument, and the lease, which is the superior instrument, must prevail. But here the difference is not between the lease and counterpart independently of any inconsistency in the lease itself. Here the lease executed by the lessor contains a palpable mistake, and the canon of construction does not exclude us from looking to see where the mistake lies by referring to the counterpart. There is nothing in the canons of construction to show that the lease and counterpart may not be treated as one common instrument, and, consequently, I can see no reason in common sense, and I find no authority, why we should not ascertain where the manifest error lies. And when we find a manifest discrepancy between the *habendum* and *reddendum* in the lease, but no such discrepancy in the counterpart, the *habendum* and *reddendum* in the latter being for the same term of years, and when we consider that the counterpart was the deed which the lessor accepted from the lessee, we may well resort to the counterpart to see how the discrepancy between the *habendum* and the *reddendum* in the lease itself is to be solved."

In that case it was possible in looking at the lease to say it meant this or that, and the counterpart was referred to to determine which it should be—whether in fact it should be ninety-one and a quarter years or whether it should be ninety-four years.

F In the present case it is not possible on the lease itself to say that the mistake which undoubtedly has been made must be this mistake or that mistake, and that is the only difference between the two cases. The question for me to decide is whether the principle which is enunciated in SHEPPARD'S TOUCHSTONE, as explained by *Burchell v. Clark* (1) is applicable to the present case. It is perfectly clear, looking at the lease alone, that there is some mistake; there is a patent ambiguity on the face of the deed, it being impossible to say what is meant by "the covenant hereinbefore contained," because there are numerous covenants which are contained in the prior part of the deed. The question is simply whether I can look at the counterpart to see whether there is any particular covenant which is referred to, or whether the mistake lies in the lease in using the word "covenant" in the singular instead of, as in the ordinary cases, "covenants" in the plural. In my opinion, the principle laid down in SHEPPARD'S TOUCHSTONE, and in the case to which I have been referred, do enable me to look at the counterpart to explain that patent ambiguity on the face of the lease. Looking at the counterpart it appears to me I am entitled to treat the word "covenant" in the lease as a clerical error for "covenants" so that I am to read the deed as though it were a proviso for re-entry "upon breach by the tenant of the covenants hereinbefore contained," and not of any particular covenant. Reading it in that way, it appears to me, on the admitted facts, that there was in 1900 a forfeiture giving the lessor the right to re-enter.

I The next point which arises for consideration is whether that right of re-entry, which I have held had accrued to the lessor in 1900, has been waived. I think that the law on the subject of waiver is reasonably clear. The right to re-enter is a legal right which apart from release or of abandonment in some way or another

will exist and can be exercised at any period within the period fixed by the statutes of limitations, and if a defendant in an action for ejectment based upon that right of re-entry alleges a release or abandonment or waiver, logically speaking the onus ought to lie upon him to show the release or the abandonment or the waiver. Waiver of a right of re-entry can only arise where the lessor, with the knowledge of the facts upon which his right of re-entering arises, does some unequivocal act recognising the continued existence of the lease. It is not enough that he should do the act which recognises, or appears to recognise, the continued existence of the lease unless, at the time when the act was done, he had knowledge of the facts under which, or from which, his right of entry arises. Therefore, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place. It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and, therefore, it is not open to a lessor who has knowledge of the breach to say: "I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain, but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve." That is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then by law he waives, and nothing he can say by way of protest against the law will avail him anything.

Logically, therefore, a person who relies upon waiver ought to show: first an act unequivocally recognising the subsistence of the lease; and, secondly, knowledge of the circumstances from which the right of re-entry arises at the time when that act is performed. My attention was called to an early case, *Pennant's Case* (2), from which it was suggested that when once the unequivocal act had been proved, the onus of proving want of knowledge lay upon the plaintiff in ejectment. That was, in effect, an action for ejectment in which the tenant pleaded that the landlord had, since the right arose, done some unequivocal act in recognition of the subsistence of the lease, and it was only by way of reply that the question of knowledge came in. The reply was: "True, I did the act, but I did not know all the circumstances under which the right to re-enter arose at the time that I did the act." It was suggested from that form of pleading that when once the defendant in ejectment had shown the act which could be said to be an unequivocal recognition of the lease, the onus was shifted, and that the plaintiff in ejectment had to show want of knowledge at the time the act was done. I do not think, whatever might have been the position at the time that that case occurred, that it now represents the law as it stands with respect to the onus of proof. It appears to me that the defence in each case has to show those circumstances from which the law will imply waiver. It is quite true that where you have a plaintiff in ejectment who does not go into the box and say whether he did or did not know the true facts at the material dates, it is open to the court or the jury to draw an inference. But I still think that it is incumbent upon the defendant to give some evidence of knowledge at the time, and if no evidence of knowledge at the time is given it appears to me it would be a case where the judge would have to say that there was no evidence on that point to go to the jury. Therefore, sitting as both judge and jury here, I could not decide in favour of upholding a defence of that sort unless there were some evidence that the plaintiff in ejectment knew, at the time of the act relied upon, that there had occurred something which gave rise to his right of re-entry.

[His LORDSHIP considered the evidence and held that it was never brought home to Mr. Smallwood that there had been a sub-demise by way of mortgage, and, even if he had been aware of that fact, it certainly was not brought home to him that there had ever been a breach of the covenant in respect of which a right of re-entry might arise, and he continued:] Lastly I come to the question whether I can give relief under s. 14 of the Conveyancing Act, 1881 [see now Law of Property Act, 1925, s. 146] against the forfeiture which has occurred. I am not quite sure that

A the law which regulates the circumstances under which relief ought to be given is absolutely clear, or quite satisfactory, but this does appear, that prior to the Act the only breach of covenant against which equity relieved as a matter of course, was the failure to pay rent. In no other case did equity relieve unless there were something additional in the nature of accident or mistake, and it was held that
B carelessness on the part of the person claiming relief could not be considered in a court of equity to be a mistake or accident of that nature, which could afford a ground for relief. I think that appears from *Barrow v. Isaacs & Son* (3). In that case KAY, L.J., goes into the whole history of the subject, and comes to the conclusion that the principle on which relief is given if there were accident or mistake could not be extended to the case of carelessness, because it was one of those cases to which the maxim *vigilantibus non dormientibus leges subveniunt* ought to be
C applied. Relief against forfeiture for failure to insure was granted by courts of equity under the Law of Property Amendment Act, 1859, and by courts of law under the Common Law Procedure Act, 1860, s. 2, provided there had been no fraud or gross negligence. That, I think, was the condition of the law when the Conveyancing Act, 1881, came into force. That Act provides for relief being given to a lessee in respect of any covenant contained in the lease, with certain excep-
D tions, and one of those exceptions is a breach of the covenant not to assign, underlet, or part with possession of the property [s. 14 (6) (i) of the Act of 1881, now s. 146 (8) (i) of the Law of Property Act, 1925, where the breach occurred before the commencement of the Act of 1925]. I do not know why that exception was introduced, but there it is, and even now, in spite of the amending Acts, no relief can be given to a lessee in respect of a breach of covenant against assignment or under-letting. But with regard to the difference between the principles adopted
E in giving relief before and after the Act, my attention was called to a case decided almost immediately after the Act was passed—*Quilter v. Mapleson* (4). That was a case of relief from a proviso of re-entry for breach of a covenant to insure. When the case came on in the court below the Act of 1881 had not yet been passed, and relief was refused, as far as I can make out, on the ground that there had been
F gross negligence, that is to say, that it was not within the Law of Property Amendment Act, 1859, s. 4. When the case came on in the Court of Appeal, the Act of 1881 had been passed, and relief was given under that Act. That, therefore, amounts to a decision that in the case of a covenant to insure, relief could be given under the Conveyancing Act, 1881, notwithstanding that the person who had
G covenanted to insure had been guilty of gross negligence in not insuring. It would appear, therefore, that as far as relief to a lessee who had assigned or underlet in breach of covenant was concerned under the Act of 1881, the question of negligence or otherwise is immaterial. Under the Act of 1881, it was held that no relief could be given to an under-lessee, and that led to the passing of the Conveyancing Act, 1892, s. 4 of which enables the court to give relief to an underlessee in every case,
H not only those cases in which they could give relief to a lessee under the earlier statutes, but also those cases in which they could not give a lessee relief, including the case of a covenant not to assign or underlet [see now Law of Property Act, 1925, s. 146 (4)]. That was decided in *Imray v. Oakshette* (5), but a good deal more appears to have been decided in that case. In that case L. had purchased an underlease under a contract which did not give him a right to call for the title of the original lessee, who was bound by covenant not to assign or underlet without
I licence, and he purchased with the intention to lay out a considerable sum upon the property. The court held that L. had been guilty of negligence in entering into such a contract; that he was precluded from investigating the title, and that relief against forfeiture by the original lessee for breach of the covenant ought not to be granted to him because of that negligence. It would appear, therefore, that though negligence is immaterial in respect of cases in which relief can be given to a lessee now and to an underlessee under the earlier Act, yet with regard to the covenants excepted in the earlier Act against which the court can give relief

to an under-lessee but not to a lessee, in one case negligence was immaterial, and in the other, the latter case, it is material. A

Therefore, if I take that as being the law upon the subject, I have to consider in the present case whether there was any such negligence on the part of the trustees of the debenture trust deed as to preclude them from having relief under this statute. I may say I feel myself bound by the decision in *Imray v. Oakshette* (5), though it has been a good deal criticised by counsel, and I am not sure that the argument on which it proceeds is not sound. Certainly the covenant against assignment and subletting is placed by the two Acts read together in a totally different position from any other covenant. Against this particular covenant no relief can be given to a lessee; that is one of the things, and the great thing. Though it may be given to an under-lessee, yet, inasmuch as no relief can be given to a lessee, it is not unreasonable to say that the circumstances under which relief would be given to an under-lessee must be closely scrutinised, and if the court has power it is a power which must be exercised sparingly. If exercised sparingly I see no reason why you should not fall back on the old principle of equity that the law is not for people who neglect their own interest, but only for those who act with a view to the protection of their interests. Whatever the theory underlying the case it appears to me that I am bound by it, and that I ought not to give relief against this particular covenant unless I am satisfied that the person who wants relief has not been guilty of such negligence as is referred to in this case. I am, therefore, thrown back on the circumstances under which the sub-demise was made to the trustees of the debenture trust deed. It appears that the trustees took the security without investigation of title, intending to rely upon the title that the company would give them. They also took their sub-demise without considering whether it was a sub-demise which, having regard to the terms of the lease, would be operative, or whether it might cause forfeiture. From the point of view of a business man, having regard to the fact that it was a large property and the circumstances under which the debenture issue was made, that may have been a justifiable course. At the same time if a man says: "This is a case where I will run the risk of there being a defect in the title," or, "I will run the risk of the sub-demise which I am taking operating as a forfeiture," I do not see why the court should interfere to protect him against that very risk. A prudent man when he is advancing money upon mortgage will investigate the title, and even if he thinks that he can dispense with investigations of the title, he will, in the case of leasehold, take care that the instrument under which he takes, is in conformity with the terms of the lease under which the property is held. There may be reasons, and special reasons, why he should not act in that way in a particular case, but not so to act is a disregard of his own interest, and a taking of a risk which he is not compelled to take. It appears to me, therefore, that by not investigating the title, and not examining the lease to see whether a sub-demise had been granted, the trustees in the present case were acting with that so-called negligence that is really a disregard for their own interests which I take to be at the base of the decision in *Imray v. Oakshette* (5). Under the circumstances it appears to me that I cannot give relief in this case without acting contrary to what has been laid down by the Court of Appeal, and, therefore, the claim for relief also fails. B C D E F G H

Solicitors: *Skewes-Cox, Nash & Co.*; *Stow, Preston & Lyttleton*, for *Crowder & Smallwood*, Birmingham.

[Reported by WHITFIELD HAYES, Esq., Barrister-at-Law.]

BROWNE v. FLOWER

[CHANCERY DIVISION (Parker, J.), November 2, 3, 21, 1910]

[Reported [1911] 1 Ch. 219; 80 L.J.Ch. 181; 103 L.T. 557; 55 Sol. Jo. 108]

Landlord and Tenant—Covenant by neighbouring tenant not to do or permit nuisance—Erection on landlord's land—Letting scheme—Flats—Terms of all leases similar—Compliance with stipulations in head lease.

The landlord of a block of flats permitted the tenant of a first floor flat to erect an outside staircase leading from her flat to the garden which interfered with the privacy of the plaintiffs, the tenants of the ground floor flat. In an action by these tenants against the landlord alleging derogation from her grant and breach of a covenant for quiet enjoyment, and against the tenant and sub-tenant of the first floor flat for breach of a covenant not to do or suffer anything on the demised premises which might be a nuisance to the other tenants of the landlord,

Held: (i) there was no derogation from the landlord's grant since that principle extended to confer on the tenant only rights in the nature of easements, and to prevent the landlord from rendering the premises unfit or materially less fit for the particular purpose for which the demise was made; a right of privacy could not exist as an easement, and the flat was still fit for residential purposes: (ii) to constitute a breach of the landlord's covenant for quiet enjoyment there must be some physical interference with the enjoyment of the demised premises and a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise was not enough: (iii) the tenant of the first floor flat had not erected the staircase on premises demised to her, but on adjoining land of the landlord, hence, even if there had been a letting scheme which would have made the covenant relating to nuisance enforceable by one tenant against another, neither she nor her sub-tenant would be liable.

Per **Curlam:** A letting scheme will not be constituted even though all the leases of the flats contain similar stipulations if the object is not to benefit all the tenants generally, but is, for example, to comply with stipulations in the head lease.

Notes. Considered: *Harmer v. Jumbil (Nigeria) Tin Areas*, [1920] All E.R. Rep. 113; *Port v. Griffith*, [1938] 1 All E.R. 295; *Kelly v. Battershell*, [1949] 2 All E.R. 830; *Owen v. Gadd*, [1956] 2 All E.R. 28. Referred to: *O'Cedar, Ltd. v. Slough Trading Co.*, [1927] All E.R. Rep. 446; *Matania v. National Provincial Bank, Ltd.*, [1935] All E.R. Rep. 923; *Newman v. Real Estate Debenture Corp., Ltd.*, and *Flower Decorations, Ltd.*, [1940] 1 All E.R. 131.

As to a landlord's duty not to derogate from his grant, see 23 HALSBURY'S LAWS (3rd Edn.) 608; as to covenant for quiet enjoyment, see *ibid.* pp. 601 et seq.; and as to landlord's obligation to observe a letting scheme, see *ibid.* p. 608. For cases see 31 DIGEST (Repl.) 128 et seq.

Cases referred to:

- (1) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest (Repl.) 135, 872.
- (2) *Spicer v. Martin* (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 37 W.R. 689, H.L.; 40 Digest (Repl.) 336, 2744.
- (3) *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; 63 L.J.Ch. 601; 71 L.T. 119; 42 W.R. 553; 10 T.L.R. 452; 38 Sol. Jo. 458; 8 R. 352; 19 Digest (Repl.) 51, 280.
- (4) *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q.B. 836; 63 L.J.Q.B. 661; 71 L.T. 362; 42 W.R. 626; 10 T.L.R. 506; 9 R. 819, C.A.; 19 Digest (Repl.) 20, 71.

- (5) *Herz v. Union Bank of London* (1854), 2 Giff. 686; 24 L.T.O.S. 137; 1 Jur. N.S. 127; 3 W.R. 49; 66 E.R. 287; 19 Digest (Repl.) 152, 995.

Also referred to in argument:

Hudson v. Cripps, [1896] 1 Ch. 265; 65 L.J.Ch. 328; 73 L.T. 741; 60 J.P. 393; 44 W.R. 200; 12 T.L.R. 102; 40 Sol. Jo. 131; 31 Digest (Repl.) 142, 2805.

Tebb v. Cave, [1900] 1 Ch. 642; 69 L.J.Ch. 282; 82 L.T. 115; 48 W.R. 318; 44 Sol. Jo. 262; 31 Digest (Repl.) 142, 2809.

Myers v. Catterson (1889), 43 Ch.D. 470; 59 L.J.Ch. 315; 62 L.T. 205; 38 W.R. 488; 6 T.L.R. 111, C.A.; 19 Digest (Repl.) 53, 289.

Tod-Heatly v. Benham (1888), 40 Ch.D. 80; 58 L.J.Ch. 83; 60 L.T. 241; 37 W.R. 38; 5 T.L.R. 9, C.A.; 31 Digest (Repl.) 175, 3088.

Manchester, Sheffield and Lincolnshire Rail Co. v. Anderson, [1898] 2 Ch. 394; 67 L.J.Ch. 568; 42 Sol. Jo. 609; sub nom. *Anderson v. Manchester, Sheffield and Lincolnshire Rail Co.*, *Manchester, Sheffield and Lincolnshire Rail Co. v. Anderson*, 78 L.T. 821; 14 T.L.R. 489, C.A.; 31 Digest (Repl.) 143, 2813.

Davis v. Town Properties Investment Corp., Ltd., [1903] 1 Ch. 797; 72 L.J.Ch. 389; 88 L.T. 665; 51 W.R. 417; 47 Sol. Jo. 383, C.A.; 31 Digest (Repl.) 130, 2677.

Sanderson v. Berwick-upon-Tweed Corp. (1884), 13 Q.B.D. 547; 53 L.J.Q.B. 559; 51 L.T. 495; 49 J.P. 6; 33 W.R. 67, C.A.; 31 Digest (Repl.) 141, 2801.

Witness Action for an order to remove a staircase outside the plaintiffs' premises and damages.

By a memorandum of agreement, dated Nov. 25, 1907, the plaintiffs, Commander and Mrs. Browne, became tenants of a flat in Fulthorpe House, Paddington, described in the agreement as being on the "garden floor." The agreement contained a provision that

"The tenants will occupy the said premises as a private residence only and will not do or suffer or permit anything to be done or carried on thereon which may be or become a nuisance to the landlord or his other tenants or the occupiers of the adjoining or neighbouring premises or to the head landlords, or which may tend to depreciate or lessen the value of the hereditaments for the time being forming part of the Paddington estate. . . . The tenants performing their part of this agreement may quietly hold and enjoy the demised premises according to the tenour of these presents without any eviction, interruption, or disturbance by the landlord or any person claiming from or in trust for him."

By an agreement dated Sept. 29, 1905, and containing precisely similar provisions, the flat immediately over that of the plaintiffs had been let to the defendant Mrs. Lightbody for the term of five years. In the spring of 1909 Mrs. Lightbody was granted a licence to sub-let the back portion of her flat to the defendant Kendrick, and, being desirous of providing her sub-tenant with a separate entrance, she applied for a licence to erect a staircase, leading from the garden to his premises. The defendant Mrs. Flower, who had then become second mortgagee in possession of the ground lease of Fulthorpe House, assented to the erection of the staircase on receiving an assurance from Mrs. Lightbody that she had satisfied the plaintiffs. From December, 1909 to January, 1910 the plaintiffs were away from home, and during their absence the staircase was erected by the agents of Mrs. Lightbody. This action was brought by the plaintiffs for an order that the defendants should forthwith remove the staircase, and for damages. In their statement of claim they pleaded that the staircase and the user of it constituted an interruption and disturbance to the enjoyment of their premises, that the value of their flat as a residence was thereby lessened, that the staircase interfered with the access of light and air, and that the user of it was a nuisance. Evidence was given to the effect that the staircase ascended from the garden to the first floor, midway between two of the plaintiffs' bedroom windows, and that persons going up or down could see into the plaintiffs' rooms.

A Grant, K.C., and F. Baden Fuller for the plaintiffs.
Martelli, K.C., and E. A. Wurzburg for the defendant Mrs. Flower.
W. H. Cozens-Hardy for the defendant Lightbody, and J. Israel for the defendant Kendrick.

B PARKER, J. stated the facts and continued: This staircase is situated between the windows of two of the plaintiffs' rooms on the ground floor, which are used as bedrooms, and the fact that it constitutes and is used as the only means of access to Mr. Kendrick's premises on the first floor seriously affects the plaintiffs' privacy; for persons using the staircase can, of course, see directly into these rooms. It is not contended that the staircase itself interferes with the light coming to the plaintiffs' windows to such an extent as to be actionable on the principles laid down in C *Colls v. Home and Colonial Stores* (1), but it is said, and I think truly said, that if the plaintiffs, in order to ensure their privacy notwithstanding the existence of the staircase, curtain their windows with material of sufficient extent and thickness to prevent persons seeing into their rooms, the diminution of light in their rooms will be appreciably demonstrated and their comfort interfered with. The question is whether, under these circumstances, the plaintiffs are entitled, as they claim, D either to have the staircase removed or to be compensated in damages.

The plaintiffs put their case in various ways. First, as against Mrs. Lightbody, they say that she has committed a breach of her agreement not to do anything on the premises, the subject of the demise to her, which may be or become a nuisance to the occupiers of the adjoining or neighbouring premises (including the plaintiffs' flat), or which may tend to lessen the value of the hereditaments for the time being E forming part of the Paddington estate or any part thereof, and that they are entitled to enforce this agreement upon the principles of *Spicer v. Martin* (2) and other well-known cases. In my opinion, what Mrs. Lightbody has done is not on the demised premises at all, within the meaning of the agreement; it is on adjoining land belonging to her lessor. Further, I do not see my way to hold that there was any such scheme for letting Fullthorpe Mansions in flats as would bring the case within *Spicer* F *v. Martin* (2). It is true that there is a similar stipulation in all the leases of flats in the mansions, but this was because of certain covenants in the head lease, and not in order to benefit the tenants of the flats generally. It is quite certain that in other respects there was no single form of lease prepared or adopted for all the flats, nor did the plaintiffs inquire, nor were they informed, as to the terms upon which the other flats in the building were let or intended to be let.

G The plaintiffs next relied on the maxim that "no one can be allowed to derogate from his own grant." This maxim is generally quoted as explaining certain implications which may arise where an owner of land grants or demises part of it, retaining the remainder in his own hands, unless there be something in the terms of the grant or demise, or in the circumstances of the particular case, rebutting the implication. The real difficulty is in each case to ascertain how far such implications H extend. It is well settled that such a grant or demise will confer on the grantee or lessee, as appurtenant to the land granted or demised to him, easements over the land retained, corresponding to the continuous and apparent quasi easements enjoyed at the time of the grant or demise by the property granted or demised over the property retained. For example, if the owner of a house with windows overlooking vacant land of the same owner grant or demise the house, the grant or I demise will in general, by implication, confer on the grantee or lessee an easement of light and support over or by the vacant land; the terms of the grant or demise, or the special circumstances of the case, may, however, rebut the implication. Further, the circumstances of the case may be such, that though at the time of the grant or demise there are no continuous or apparent quasi easements enjoyed by the property granted or demised over the property retained, yet easements over the property retained may be impliedly created and become appurtenant to the property granted or demised. Thus, if the grant or demise be for the purpose of erecting a

building with defined windows overlooking the retained land of the grantor or lessor, an easement of light to such windows over such other land will be created, and similarly there will be created an easement of support for the house or building to be built, by the land retained. But, again, these implications may be rebutted by the special circumstances of the case, and, inasmuch as our law does not recognise any easement of prospect or privacy, and, as I have already held, the plaintiffs' lights are not really interfered with, it is difficult to find any easement which can have been interfered with by the erection of the staircase in question.

But the implications usually explained by the maxim that no one can be allowed to derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied, on the part of the grantor or lessor, obligations which restrict the user of the land retained by him further than can be explained by any easement known to the law. Thus, if the grant or demise be made for any particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit, or materially less fit, for the particular purpose for which the grant or demise was made. In *Aldin v. Latimer Clarke, Muirhead & Co.* (3) land having been demised for the purpose of carrying on the business of a timber merchant, the lessors came under an obligation not to build on land retained by them so as to interrupt the free access of air to sheds on the demised property, used for drying timber, although the law does not recognise any easement of air unless it comes through or to some definite passage or aperture. Similarly in *Grosvenor Hotel Co. v. Hamilton* (4) the lessee was held to be entitled to prevent the lessor from using property retained by him in such a way as to cause, on the demised property, vibrations which did not amount to a legal nuisance; though there is no such easement known to the law as an easement of freedom from vibrations, any more than there is an easement of freedom from noise. Once again, though possibly there may not be known to the law any easement of light for special purposes, still the lease of a building to be used for a special purpose requiring an extraordinary amount of light might well be held to preclude the grantors from diminishing the light passing to the grantee's windows, even in cases where the diminution would not be such as to create a nuisance within the meaning of the recent decisions: *Herz v. Union Bank of London* (5). In none of these cases would any easement be created, but the obligation implied on the part of the lessor or grantor would be analogous to that which comes from a restrictive covenant.

It is to be observed that, in the several cases to which I have referred, the lessor had done or proposed to do something which rendered, or would render, the demised premises unfit or materially less fit to be used for the particular purpose for which the demise was made. I can find no case which extends the implied obligations of a grantor or lessor beyond this. Indeed, if the implied obligations of a grantor or lessor with regard to land retained by him were extended beyond this, it is difficult to see how they could be limited at all. A landowner may sell a piece of land for the purpose of building a house, which, when built may derive a great part of its value from advantages of prospect or privacy; it would, I think, be impossible to hold that, because of this, the vendor is precluded from laying out the land retained by him as a building estate, though in so doing he might destroy the views from the purchaser's house, interfere with his privacy, render the premises noisy, to a great extent interfere with the comfortable enjoyment, and diminish the value of the property sold by him. It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose, but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which would prevent his using land retained by him for any lawful purpose whatsoever, merely because his so doing might affect the amenities of the property he has sold. After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort. Under these circumstances, the question is whether the existence of the staircase renders the plaintiffs'

A premises unfit or materially less fit to be used for the purposes for which they were demised; that is, for the purposes of a residential flat. In my opinion, it does not. The two rooms in question can be and still are used for the same purposes for which they were used prior to the erection of the staircase. It is only the comfort of the persons so using the rooms that is interfered with by what has been done. Either they have less privacy, or, if they secure their privacy by curtains, they have less light. Much as I sympathise with the plaintiffs, it would, in my opinion, be extending the implications based on the maxim that no one can derogate from his own grant to an unreasonable extent, if I were to hold that what has been done in this case were a breach of an implied obligation.

Lastly, it has been suggested that what has been done constitutes a breach of the covenant for quiet enjoyment contained in the plaintiffs' agreement. I do not think that this point was really pressed, and indeed it could hardly be pressed after recent decisions on the value of such a covenant. It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance, such as might arise from noise, invasion of privacy, or otherwise, is not enough. In my opinion, therefore, the action fails.

Solicitors: *Leggatts & Carruthers; Ellis, Munday & Clarke; Sweystone, Stone, Barber & Ellis; Evan P. Houle.*

[*Reported by* WHITFIELD HAYES, ESQ., *Barrister-at-Law.*]

E

F

STEAMSHIP KNUTSFORD, LTD. v. E. TILLMANN & CO.

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford and Lord Dunedin), July 2, 3, 1908]

G

[*Reported* [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 24 T.L.R. 786; 11 Asp. M.L.C. 105; 13 Com. Cas. 334]

Shipping—Bill of lading—Exception—Port of discharge “inaccessible”—Inability of ship to enter without inordinate delay—Port of discharge “unsafe in consequence of war, disturbance, or any other cause”—“Other cause”—Ejusdem generis rule—Absence of safety leading to inordinate delay—“Error in judgment of master whether in navigating ship or otherwise.”

H

Goods were shipped in England on board a steamship for carriage to Vladivostok under bills of lading which contained the following conditions and exceptions: “Error in judgment, negligence or default of . . . master . . . whether in navigating the ship or otherwise. . . . Should a port be inaccessible on account of ice . . . or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port . . . at some other safe port or place, at the risk and expense of the shippers, consignees, or owners of the goods; and upon such discharge the ship’s responsibility shall cease.” On Feb. 12, 1906, the ship arrived off her port of destination and was prevented from getting in by ice. She remained off the port for three days, and then proceeded to another port and discharged her cargo. There is evidence that if she had waited one day longer she would have been

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able to get into her port of destination, as the ice by then would have been broken up. In an action by holders and indorsees of the bills of lading against the shipowners for damages for breach of the contract to carry the goods to Vladivostok, or, alternatively, the repayment of freight paid in advance,

Held: (i) for a port to be inaccessible within the meaning of the exception it must be inaccessible in a commercial and reasonable sense, i.e., that a ship could not enter it without inordinate delay, and there was no ground on which it could be said that a delay of three days on a journey so long as from England to Vladivostok could be regarded as inordinate delay; the words "any other cause" must be construed as referring to a cause ejusdem generis as those causes which immediately preceded those words, namely, "war" and "disturbance," and not as referring to danger from ice which was specifically dealt with just previously, and, further, absence of safety within the exception meant absence of safety for an inordinate period; "error in judgment" by the master referred to error in navigating the ship or some kindred duty; and, therefore, plaintiffs were entitled to succeed.

Notes. Referred to: *Larson v. Sylvester & Co.*, ante p. 247; *Mudie & Co. v. Strick* (1909), 100 L.T. 701; *Thorman v. Dowgate Steamship Co.*, ante p. 175; *The Okehampton*, [1913] P. 173; *Akt. Frank v. Namaqua Copper Co.* (1920), 90 L.J.K.B. 36; *SS. Magnhild v. McIntyre Bros. & Co.*, [1920] 3 K.B. 321; *Ambatielos v. Anton Jurgens Margerine Works*, [1922] All E.R. Rep. 543; *Wilton Steamship Co. v. Weir* (1925), 31 Com. Cas. 111; *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K.B. 48; *Spanish Government v. North of England Steamship Co.* (1938), 54 T.L.R. 852; *G. W. Grace & Co. v. General Steam Navigation Co.*, [1950] 1 All E.R. 201; *Chandris v. Isbrandtsen-Moller Co., Inc.*, [1950] 1 All E.R. 768; *Re Latham*, [1961] 3 All E.R. 903.

As to exceptions in a charterparty relieving the shipowner and as to the shipowner's duty to complete the voyage, see 35 HALSBURY'S LAWS (3rd Edn.) 288-303, 437 et seq. For cases see 41 DIGEST 407 et seq., 517 et seq.

Case referred to:

- (1) *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; 36 W.R. 337; 3 T.L.R. 764; 6 Asp. M.L.C. 200, H.L.; 29 Digest 197, 1575.

Also referred to in argument:

- Wehner v. Dene Steam Shipping Co.*, [1905] 2 K.B. 92; 74 L.J.K.B. 550; 21 T.L.R. 339; 10 Com. Cas. 139; 41 Digest 402, 2496.
- Anderson v. Anderson*, [1895] 1 Q.B. 749; 64 L.J.Q.B. 457; 72 L.T. 313; 43 W.R. 322; 11 T.L.R. 253; 14 R. 367, C.A.; 17 Digest (Repl.) 283, 905.
- Baerselman v. Bailey*, [1895] 2 Q.B. 301; 64 L.J.Q.B. 707; 72 L.T. 677; 43 W.R. 593; 8 Asp. M.L.C. 4; 14 R. 481, C.A.; 41 Digest 430, 2703.
- Metcalf v. Britannia Ironworks Co.* (1877), 2 Q.B.D. 423; 46 L.J.Q.B. 443; 36 L.T. 451; 25 W.R. 720; 3 Asp. M.L.C. 407, C.A.; 41 Digest 518, 3477.
- Price & Co. v. Union Lighterage Co.*, [1903] 1 K.B. 750; 72 L.J.K.B. 374; 88 L.T. 428; 51 W.R. 477; 19 T.L.R. 328; 8 Com. Cas. 155; 9 Asp. M.L.C. 398; affirmed [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 41 Digest 426, 2677.
- Re Richardsons and M. Samuel & Co.*, [1898] 1 Q.B. 261; 66 L.J.Q.B. 868; 77 L.T. 479; 14 T.L.R. 5; 8 Asp. M.L.C. 330; 3 Com. Cas. 79, C.A.; 41 Digest 306, 1680.
- Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp. M.L.C. 181; 1 Com. Cas. 436; 41 Digest 521, 3501.
- Norman v. Binnington* (1890), 25 Q.B.D. 475; 59 L.J.Q.B. 490; 63 L.T. 108; 6 T.L.R. 418; 6 Asp. M.L.C. 528, D.C.; 41 Digest 306, 1678.

A **Appeal** by the defendants in the action, owners of the steamship *Knutsford*, from a decision of the Court of Appeal (VAUGHAN WILLIAMS, FARWELL and KENNEDY, L.J.J.) ([1908] 2 K.B. 385), affirming a decision of CHANNELL, J., ([1908] 1 K.B. 185), in an action tried by him without a jury.

B The plaintiffs, who were holders and endorsees of certain bills of lading, claimed damages for breach of a contract to carry goods in the *Knutsford* to Vladivostok. Alternatively, they claimed a return of freight paid in advance as money had and received to their use, the consideration for such payment having wholly failed. The bills of lading were in the following form :

C "Eastern trade bill of lading outwards—via Suez Canal. Shipped in apparent good order and condition by John Batt & Co. (London), Ltd., on board the steamship *Knutsford* . . . now lying in or off the port of Middlesbro' and bound for Vladivostok . . . a quantity of foundry coke . . . to be delivered from the ship's side where the ship's responsibility shall cease in the like good order and condition at the port of Vladivostok or so near thereto as the ship may safely get, unto order or his or their assigns, subject to exceptions and conditions hereinafter enumerated. . . . The following are the conditions and exceptions hereinbefore referred to: (1) Act of God . . . (2) . . . barratry, misfeasance, . . . **D** error in judgment, negligence or default of pilot, master, officers, engineers, seamen or firemen, or other persons in the service of the ship, whether in navigating the ship or otherwise; risk of craft or hulk or transshipment; and all and every the dangers and accidents of the land and water, and of navigation of whatsoever nature and kind . . . (4) Should a port be inaccessible on account of ice . . . or should entry and discharge at a port be deemed by the master **E** unsafe in consequence of war, disturbance, or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees, or owners of the goods; and upon such discharge the ship's responsibility shall cease. . . ."

F Clause 12 of the time charter provided that :

G "The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or their agents, or in otherwise complying with the same, and the owners shall be responsible for full, true, and proper delivery of the cargo. . . ."

H Watts, Watts & Co. were the time charterers of the vessel. One of the bills of lading was signed by the time-charterers, to whom the shippers of the goods paid the freight, the other three by the master.

I The shipowners alleged that the bills of lading were not signed on their behalf, and that they were signed by the master of the vessel as agent for the time-charterers. The *Knutsford* proceeded on the voyage and on Feb. 12, 1906, arrived within forty miles of Vladivostok, where ice was encountered. The master made three unsuccessful attempts to get through the ice—i.e., on Feb. 12, 13 and 14—and, being informed by a pilot that that weather might continue for some time, considered the port to be inaccessible and left on Feb. 14, 1906, for Nagasaki, where the cargo was discharged. A day after the vessel's departure for Nagasaki the entrance to Vladivostok was blown by the wind clear of ice. CHANNELL, J., gave judgment for the plaintiffs, and his decision was affirmed by the Court of Appeal. The shipowners appealed to the House of Lords.

J. R. Atkin, K.C., and *Lewis Noad* for the appellants.

J. A. Hamilton, K.C., and *A. Adair Roche* for the respondents.

LORD LOREBURN, L.C.—I am clearly of opinion that this judgment ought to be affirmed. What took place was this. The vessel went from Middlesbrough to Japan to deliver most of her cargo, and then she was to go forward to Vladivostok. When she arrived within forty miles of Vladivostok she found that she could not get into the port by reason of ice. There was some danger to her propeller, it is said, from ice. There was also some fear—rather a vague fear—of submarine mines, and there was some danger, if the wind changed, from a lee shore. The vessel tried for three days in vain to get through the ice and then went back to Nagasaki, and, by order telegraphed from England, there discharged her cargo. The day after she had turned back the ice cleared off, the access to the port was as safe as ever it was or ever would be, and other vessels entered there, while this vessel went back to Nagasaki, and it is asserted that she was entitled to do so.

Is this conduct justifiable within the terms of the fourth clause of the bill of lading? Was the port of Vladivostok “inaccessible” on account of ice? At the moment and for two or three days, undoubtedly it was; but the meaning of this bill of lading, in my opinion, is that the port must be inaccessible in a commercial sense, so that a ship cannot enter without inordinate delay. There is no ground whatever for saying that a delay of three days on a journey so long as the one from England to Vladivostok could be regarded as inordinate delay. The next point taken was that by the bill of lading she may discharge at the nearest port, “should the entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause.” That, also, does not mean unsafe at the moment, but it means unsafe for a period which would involve inordinate delay. The master never decided that the port was unsafe in that sense, and never could have decided anything of the kind. Accordingly, the shipowners are not entitled to the benefit of those words either. Then it was said that there was an error of judgment within the second clause of the bill of lading. I think that that is inapplicable. I do not see that the master ever exercised his judgment upon either of those points. He thought (admittedly, acting in good faith) that he could go back; and he went back. He simply broke his contract—that is all that he did. The other point—namely, that one of the bills of lading was signed by Messrs. Watts instead of by the captain, to my mind is destitute of validity in law, and even more destitute in merits. If the captain had been directed to sign it, he was obliged to sign it. The point is a merely technical point, that the proper signature was not there. I should be very sorry to lay down any rule that under such a contract the charterer or shipowner could always sign, but I am not satisfied that the captain did not know perfectly well of this signature and sanction it. I think that there is absolutely nothing in that point also. Accordingly, I am of opinion that this appeal should be dismissed with costs.

LORD MACNAGHTEN.—I agree with my noble and learned friend on the Woolsack on all the three points. One of them I think ought not to have been raised, and about that I will not say anything. With regard to the other two, I think that the judgments of CHANNELL, J., and the Court of Appeal are quite right. I do not think that the port of Vladivostok was inaccessible within the meaning of the documents, although the captain could not make his way there through the ice for three days. I do not think that he was justified in giving up the attempt after so short a trial, considering that he had plenty of coal on board, and I do not think that, having regard to the fact that the whole of the freight having been paid in advance, he was justified in landing the goods at Nagasaki. While the goods were still on board he heard that the port of Vladivostok was accessible, and I think that he was bound to prosecute his voyage to the destination mentioned in the bills of lading. As regards the point, on the later words of cl. 4—“any other cause,” I think that the rule of ejusdem generis applies as laid down in *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (1), and I prefer to take the settled rule on a point of that sort from a case which did deal with bills

A of lading and shipping documents rather than from cases that dealt with real property and settlements. On the whole I think that the appeal ought to be dismissed.

B **LORD JAMES OF HEREFORD.**—The main question in this case is entirely one of fact, and I concur in the opinion which has just been delivered by my noble and learned friend LORD MACNAGHTEN on that point. It seems to me that the master when he gave up the attempt to enter Vladivostok, went to Japan, and there delivered his cargo, was acting in the interests of the shipowners so as to get rid of the burden of that cargo, and not in the interests of the charterers. He did not wait the time which a person acting in the interests of the charterers would have waited near the mouth of the river to see whether the ice did or did not pass away. If he had done so for a reasonable time, none of this litigation would have arisen. For the reasons given by my noble and learned friend, I concur in the order proposed.

D **LORD DUNEDIN.**—The appellants were bound by at least three of the bills of lading to deliver this cargo at Vladivostok. Admittedly they did not do so, but delivered it at Nagasaki. They must, therefore, be liable in damages for the failure, unless they can show that they are excused in respect of any of the exceptions in the bills.

E Their principal defence was based on cl. 4, the terms of which I need not again read to your Lordships. They plead the protection of both branches of the clause. As to the first, have they shown that *de facto* Vladivostok was inaccessible on account of ice? It is obvious that inaccessibility must be judged of reasonably. Here the practical inaccessibility lasted but three days, and, though the captain may have been right, in view of the danger of his anchorage under the lee of Askold Island, to give up the attempt to enter Vladivostok when he did, I see no reason why he should not have renewed his attempt when the weather conditions changed, as they did on the very next day. As to the second part of the clause, I have come, after consideration, to agree with the learned judges of the Court of Appeal in thinking that "any other cause" must be limited there to causes *ejusdem generis* as war and disturbance, and cannot apply to ice, which is specially dealt with in the first portion of the clause. But even were that not so, I think that the same considerations as to the facts which prevent the appellants from sheltering themselves under the first portion apply here also. In other words, I should hold that the condition of unsafeness must at least endure until the delivery at the alternative port has been effected.

G The other clause appealed to was the general enumeration in cl. 2, in which, *inter alia*, figures "error in judgment of the master, &c. . . . whether in navigating the ship or otherwise." I can only say that this seems to me to have no application. The non-delivery of the goods at Vladivostok was not due to an error in judgment of the captain. The proper application of the clause is sufficiently indicated by the words "in navigation or otherwise." It seems to me fantastic to extend it to the idea of a captain forming a wrong legal opinion on the meaning of a clause in the bill of lading and then proceeding to act upon it. The only point remaining is whether the appellants are bound in respect of the fourth bill of lading. The point is a narrow one, but I am content with the judgment of CHANNELL, J., and I cannot think that your Lordships would regard with any favour a defence which, unless it were accompanied by an allegation that the charterers were not in a position to indemnify the owners, amounts to a mere multiplication of procedure, it being clear that the shipper could recover against the charterers either as upon a contract or in respect of warranty of authority. Nor do I think that any new and dangerous liability, as was urged, is being imposed on owners, because it must be clearly understood that the condition of the argument is that it is admitted that this was a bill of lading which the master could rightly have been called on to sign. Had the

bill of lading contained stipulations of such an extraordinary character that the master might have refused to sign, then that defence would have been equally open upon the question of whether the signature of the charterers bound the owners.

Appeal dismissed.

Solicitors : *W. A. Crump & Son; Botterell & Roche.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

FORSTER v. BAKER

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.), April 20, 1910]

[Reported [1910] 2 K.B. 636; 79 L.J.K.B. 664; 102 L.T. 522; 26 T.L.R. 421]

Chose In Action—Assignment—Debt—Judgment debt—Assignment of part of debt—Right of assignee to issue execution.

A judgment creditor assigned part of the judgment debt for valuable consideration. The assignee having applied under R.S.C. Ord. 42, r. 23, for leave to issue execution on the judgment,

Held: the assignor could have issued one execution only on the judgment and not a series of executions in respect of parts of the debt; he could not give to the assignee any greater right than he himself possessed; and, therefore, the assignee was not entitled to leave to issue execution.

Notes. The Supreme Court of Judicature Act, 1873, s. 25 (6), has been replaced by the Law of Property Act, 1925, s. 136.

Applied: *Rothschild v. Fisher*, [1920] 2 K.B. 243. Referred to: *Re Steel Wing Co., Ltd.*, [1920] All E.R. Rep. 292; *Re Freshwater, Yarmouth and Newport Rail.* (1913), 29 T.L.R. 568; *Longdon-Griffiths v. Smith*, [1951] 1 K.B. 295; *Metropolitan Police District Receiver v. Croydon Corpn.*, [1956] 2 All E.R. 785.

As to assignment of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 483 et seq.; and for cases see 8 DIGEST (Repl.) 547 et seq. For the Law of Property Act, 1925, s. 136, see 20 HALSBURY'S STATUTES (2nd Edn.) 715.

Case referred to:

- (1) *Goodman v. Robinson* (1886), 18 Q.B.D. 332; 56 L.J.Q.B. 392; 55 L.T. 811; 35 W.R. 274; 3 T.L.R. 212, D.C.; 8 Digest (Repl.) 615, 564.

Also referred to in argument:

Skipper and Tucker v. Holloway and Howard, [1910] 2 K.B. 630; 79 L.J.K.B. 91; 26 T.L.R. 82; reversed, 79 L.J.K.B. 496; 26 T.L.R. 357, C.A.; 8 Digest (Repl.) 553, 81.

Durham Bros. v. Robertson, [1898] 1 Q.B. 765; 67 L.J.Q.B. 484; 78 L.T. 438, C.A.; 8 Digest (Repl.) 571, 216.

Jones v. Humphreys, [1902] 1 K.B. 10; 71 L.J.K.B. 23; 85 L.T. 488; 50 W.R. 191; 18 T.L.R. 54; 46 Sol. Jo. 70, D.C.; 8 Digest (Repl.) 555, 90.

Re Clements, Ex parte Clements, [1901] 1 K.B. 260; 83 L.T. 464; 49 W.R. 176; 45 Sol. Jo. 81, D.C.; 4 Digest (Repl.) 93, 835.

James Nelson & Sons, Ltd. v. Nelson Line (Liverpool), Ltd., [1906] 2 K.B. 217; 75 L.J.K.B. 895; 95 L.T. 180; 54 W.R. 546; 22 T.L.R. 630; 10 Asp. M.L.C. 265; 11 Com. Cas. 228, C.A.; 18 Digest (Repl.) 19, 134.

Appeal by the plaintiff from a decision of BRAY, J., on a Special Case Stated.

On Dec. 21, 1908, one Bowles recovered judgment against the defendant Baker for £675. On May 14, 1909, by a deed, which recited that there was still owing to Bowles by the defendant in respect of principal, interest and costs on the judgment

A the sum of £686, and that Bowles had agreed with the plaintiff Forster for the absolute sale to her of the debt due from the defendant to Bowles to the extent of £560 thereof, Bowles, in consideration of £560 paid to him by the plaintiff, assigned to the plaintiff,

B "Her executors, administrators, and assigns, all that the said judgment debt due from the said Baker to the vendor to the extent of £560 thereof to hold the same unto the purchaser absolutely."

C Notice in writing of the assignment was given by the plaintiff to the defendant on May 24, 1909. On May 28, 1909, on an ex parte application under R.S.C., Ord. 42, r. 23, the plaintiff obtained leave to issue execution on the judgment of Dec. 21, 1908, and issued a bankruptcy notice against the defendant in respect of the judgment, which was duly served. On July 19, 1909, on an application by the defendant to set aside the order giving leave to the plaintiff to issue execution on the judgment, it was ordered that the order should be discharged, and that an issue whether the plaintiff was entitled to leave to issue execution should be determined by means of a Special Case. BRAY, J., held that there could not be an absolute assignment of part of a debt within s. 25 (6) of the Supreme Court of Judicature Act, 1873, and gave judgment for the defendant. The plaintiff appealed.

D By the Supreme Court of Judicature Act, 1873, s. 23 (6) :

E "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. F Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court under and in conformity with the provisions of the Acts for the relief of G trustees."

By R.S.C., Ord. 42, r. 23 :

H "In the following cases, viz. : (a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; . . . the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly. And such court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such court or judge may impose such terms I as to costs or otherwise as shall be just."

Montague Shearman, K.C., and *Tindale Davis* for the plaintiff.
J. R. Atkin, K.C., and *E. W. Hansell* for the defendant.

VAUGHAN WILLIAMS, L.J.—I am of opinion that this appeal fails and must be dismissed. It is only necessary for me to deal with one point. Some points have been raised about which there seems to be some doubt, but I do not propose to deal with them. In my opinion, the assignor of this judgment debt could not have

issued a series of writs of fieri facias in respect of parts of this judgment debt, the total of them going to make up the whole amount of this judgment debt. He could have issued one execution only. The assignor could not give to the assignee any greater right than he had himself, and, therefore, it is not true to say that the assignee was in a position to issue execution in respect of a part of the judgment debt. I understand that this is sufficient for the decision of this case, because the plaintiff will be unable to go on with the bankruptcy proceedings against the defendant if he is not in a position to issue execution.

FLETCHER MOULTON, L.J.—I am of the same opinion. I also do not intend to decide any of the points which it is not necessary to decide now. I wish, however, to guard myself with respect to one point which has arisen. I am not prepared to hold that the assignee of the whole of a judgment debt is in the position of a judgment creditor with regard to that debt. I am aware, of course, of the decision in *Goodman v. Robinson* (1), but I think that the point there decided will have to be carefully considered if it comes before the Court of Appeal. I am of opinion that, as **VAUGHAN WILLIAMS, L.J.**, has said, the assignor of this judgment debt could not himself have issued execution in respect of a part only of that judgment debt, and he could not pass on to his assignee a right which he did not himself possess. This was not a "legal or other remedy" which the assignor could pass to the assignee under s. 25 (6) of the Supreme Court of Judicature Act, 1873.

FARWELL, L.J.—I agree.

Appeal dismissed.

Solicitors: *Sparks & Russell; Blair & W. B. Girling.*

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

THAIRWALL v. GREAT NORTHERN RAIL. CO.

[KING'S BENCH DIVISION (Bray and Lord Coleridge, JJ.), June 17, 18, 1910]

[Reported [1910] 2 K.B. 509; 79 L.J.K.B. 924; 103 L.T. 186; 26 T.L.R. 555; 54 Sol. Jo. 652; 17 Mans. 247]

Company—Dividend—Authority of directors to prescribe conditions of payment. Company—Dividend—Payment by dividend warrant—Warrant lost in post—Obligation of company to stockholder.

The powers of management and superintendence of the affairs of a company authorised to directors under s. 90 of the Companies Clauses Consolidation Act, 1845, include the power to prescribe within reasonable limits the mode, date and other conditions of payment of dividends duly declared by a resolution of the stockholders.

Stockholders resolved at a general meeting to declare the amount of a dividend as proposed by the directors, but passed no resolution as the mode of payment. The company posted a dividend warrant to a stockholder's registered address in payment of the dividends, but the warrant was lost in the post. It was found that the stockholder had impliedly agreed to the payment of dividends by cheque or warrant sent through the post.

Held: the obligation of the company was merely to send the warrant by post; they had done so; and, therefore, they were discharged from liability to the stockholder.

Norman v. Ricketts (1) (1886), 3 T.L.R. 182, applied.

Notes. Referred to: *Rhokana Corp., Ltd. v. I.R. Comrs.*, [1938], 2 All E.R. 51.

A As to dividends, see 6 HALSBURY'S LAWS (3rd Edn.) 72, 396; and for cases see 9 DIGEST (Repl.) 627 et seq. For the Companies Clauses Consolidation Act, 1845, s. 90, see 3 HALSBURY'S STATUTES (2nd Edn.) 312.

Cases referred to :

- (1) *Norman v. Ricketts* (1886), 3 T.L.R. 182, C.A.; 12 Digest (Repl.) 533, 4041.
B (2) *Hansard v. Robinson* (1827), 7 B. & C. 90; 9 Dow. & Ry. K.B. 860; 5 L.J.O.S. K.B. 242; 108 E.R. 659; 6 Digest (Repl.) 393, 2805.
 (3) *Wain v. Bailey* (1839), 10 Ad. & El. 616; 2 Per. & Dav. 507; 113 E.R. 234; 6 Digest (Repl.) 397, 2843.

Also referred to in argument :

- Pennington v. Crossley & Son* (1897), 77 L.T. 43; 13 T.L.R. 513; 41 Sol. Jo. 661, C.A.; 12 Digest (Repl.) 533, 4039.
C *Bavins, Junr. and Sims v. London and South Western Bank*, [1900] 1 Q.B. 270; 69 L.J.Q.B. 164; 81 L.T. 655; 48 W.R. 210; 16 T.L.R. 61; 5 Com. Cas. 1, C.A.; 3 Digest (Repl.) 272, 789.
Rolt v. Watson (1827), 4 Bing. 273; 12 Moore, C.P. 510; 5 L.J.O.S.C.P. 172; 130 E.R. 772; 6 Digest (Repl.) 395, 2831.
D *Ramuz v. Crowe* (1847), 1 Exch. 167; 16 L.J.Ex. 280; 11 Jur. 715; 154 E.R. 70; 6 Digest (Repl.) 393, 2807.

Appeal from a decision of His Honour JUDGE EDGE, sitting at the Clerkenwell County Court.

The plaintiff was the registered holder of certain three per cent. preference stock, preferred converted ordinary stock and deferred converted ordinary stock of the defendants. On Feb. 4, 1909, the directors issued a half-yearly report and statement of accounts to their stockholders, including the plaintiff, stating that they proposed that a dividend should be declared at certain rates on these stocks. On the back of the report was printed in large letters a notice in the following form :—"The dividend warrants will be payable on Tuesday, Feb. 16, 1909, and will be sent by post to the proprietors on the previous day. Proprietors are requested to give notice, without delay, of any change of address, so that their warrants may not be missent." On Feb. 12, 1909, at the half-yearly meeting of the defendants, the stockholders passed a resolution that the dividend payable to proprietors on the defendants' register was and was thereby declared. On Feb. 15, 1909, a dividend warrant for the amount due to the plaintiff was sent by post to his registered address, but it failed to reach him, nor was it presented for payment by anyone else. The warrant was crossed "& Co.," and was addressed to the defendants' bankers directing them to pay to the plaintiff or his order, and endorsed on the face of it was the following note :—"This warrant must be signed by the person to whom it is payable, and presented for payment through a banker. It will not be honoured after three months from the date of issue unless specially endorsed by the secretary." The plaintiff wrote to the defendants informing them that he had not received the warrant, and, on the defendants replying that it had been duly posted to his registered address, he requested them to stop payment by their bankers, which was done. On the expiration of the three months in which the warrant had been in force, the plaintiff wrote to the defendants requesting the issue of a duplicate warrant to him. The defendants agreed to do so, provided the plaintiff signed an indemnity, which he refused to do. In an action by the plaintiff for the amount of the dividend, less income tax, due to him and payable on Feb. 16, 1909, the county court judge gave judgment for the plaintiff. The defendants appealed.

Simon, K.C., and Eustace Hills for the defendants.

Joyce Thomas for the plaintiffs.

BRAY, J.—This is an action brought to recover the amount of a dividend payable on on three different stocks of the defendants. A resolution of the stockholders was passed that these dividends should be declared, and afterwards a dividend warrant

was sent to the plaintiff, which became lost in the post and never reached the plaintiff. Nobody knows where it is. It has not been presented for payment, and it is correct to say, I believe, that this action was not brought until after the expiration of three months. The defendants' answer is that this dividend has been paid by the sending by post to the registered address of the plaintiff a dividend warrant, and that, according to the principle laid down in *Norman v. Ricketts* (1) is payment. A

The principle laid down in that case is that the parties can agree to make and accept payment in some other form than cash, and that, when the creditor requests the debtor to send a cheque in payment by post, if the debtor does send a cheque by post, then the risk falls on the creditor, and the fact of the debtor sending the cheque by post is payment. It is true, of course, that, in that case, the cheque got into the hands of a third person, who had fraudulently endorsed it, forged the name of the plaintiff, and the money had been paid; but I can find nothing in the judgment to show that that entered into the consideration of the court. The ground of their decision was that the creditor had agreed that that should be payment, and, therefore, it was payment. B C

The first question we have to consider is whether there was any agreement, or any obligation, which would be as valid as an agreement by the plaintiff, to accept a dividend warrant as payment. In the first place, reliance is placed on a clause at the back of the certificate. The clause differs a little in the different certificates, but, substantially, it is this: Dividends are payable by warrants which will be sent by post to the proprietor's registered address or to any person duly authorised to give a receipt for the same. It is said that two of the stocks in question are governed by s. 9 of the Great Northern Railway (Capital) Act, 1890, which is to this effect: D

"The terms and conditions on which any preferred converted ordinary stock or deferred converted ordinary stock is issued shall be stated on the certificate thereof." E

It is said that this clause at the back of the certificate is a condition that was so stated. In answer to this, it is said, first, that there is no proof that it was issued subject to those conditions, and that the fact that it is stated on the back of the certificate is no evidence that it was so issued, and that it is not one of the terms and conditions intended to be referred to in s. 9. I think there is considerable difficulty about that, and I am not prepared to decide this case on that ground. Exactly the same question would arise with regard to the preference stock, and that would depend on s. 15 of the Companies Clauses Act, 1863. F

The next point taken by the defendants is as to what the directors did and what the stockholders did prior to the sending of this dividend warrant. The directors made a report and sent a statement of accounts to the stockholders, and stated that they proposed that a dividend should be declared at certain rates on these stocks. They then, in very large letters, put this notice on the report: G

"The dividend warrants will be payable on Tuesday, Feb. 16, 1909, and will be sent by post to the proprietors on the previous day. Proprietors are requested to give notice, without delay, of any change of address so that their warrants may not be missent." H

In other words, this notice informs them that the directors have decided that the dividends will be payable on Tuesday, Feb. 16, and that they will be sent by post to the proprietors on the previous day. The first question is whether the directors had power to do that. That question depends on s. 90 and s. 91 of the Companies Clauses Consolidation Act, 1845, which deal with the powers of directors. Section 90 says: I

"The directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special Act to be transacted by a general meeting of the company; but all the powers so to be exercised

A shall be exercised in accordance with and subject to the provisions of this and the special Act; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting."

B Then s. 91 provides :

"Except as otherwise provided by the special Act, the following powers of the company . . . shall be exercised only at a general meeting of the company,"

C and one of those powers is the declaration of dividends. I think that it was within the powers of the directors, under the terms that they shall have the management and superintendence of the affairs of the company, to specify how dividends should be paid and when they should be paid, within certain reasonable limits. They would not have the power to say that dividends shall not be paid within six years or anything of that kind, but it seems to me they would have the power to name the day on which the payment should be made, and to say how it should be paid.

D But, supposing they had not that power, let us see what took place. After the statement of accounts had been sent to them, and after they had received this notice, what did the stockholders do? They resolved that

"the dividend payable to the proprietors on the register of the company on Jan. 18, 1909, be and is hereby declared for the half-year as follows."

E They did not say on what day the dividend was to be paid, but, in my opinion, this resolution was equivalent to a resolution "that the dividend which shall be payable to the proprietors on the register of the company on Jan. 18, 1909, at the time and in the manner proposed by the directors be and is hereby declared for the half-year ending so and so." In effect, therefore, in my opinion, the stockholders have decided among themselves, by a proper resolution which was within their power, to say that the dividend shall be paid on a certain day and shall be paid in a certain manner. In my opinion, that is equivalent to the request, and the posting of the warrants to the compliance with the request, which was referred to in *Norman v. Ricketts* (1). The stockholder, after that resolution, became entitled to a dividend payable in that way and in that way alone, and, therefore, when the defendants had done what was proposed to be done—namely, sent the proprietor by post a proper dividend warrant on Tuesday, Feb. 15—they had paid the dividend, and the shareholder had no further remedy except such remedy as he had on the dividend warrant itself.

G It is said that that is not so, in the first place because the document sent is not a cheque. It is submitted that a dividend warrant must be a cheque, and that the document sent is not a cheque because it has the condition at the foot of it: "It will not be honoured after three months from date of issue unless specially endorsed by the secretary," and consequently, the case is distinguishable from that of *Norman v. Ricketts* (1). I have had a good deal of doubt whether this is a cheque and a bill of exchange because of this condition, but, on the whole, I am inclined to think that this is, within s. 3 of the Bills of Exchange Act, 1882,

H "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time"

I a sum certain in money; and I think it is none the less so because of that statement at the bottom. I do not think that it is necessary to say more than that. But whether it be a cheque or not, in my opinion, it was the document which it was provided that the stockholder should receive. What he was to receive was a dividend warrant, and I am satisfied that no point was taken in the court below that this was not an ordinary dividend warrant, and the learned county court judge in his judgment describes it as a dividend warrant. If the point had been taken in the

court below that this was not a proper dividend warrant because of the statement which appears on the bottom of it, I am perfectly satisfied from my own knowledge that it could have been proved in two seconds that it was an ordinary dividend warrant, and none the less so because of this statement on the bottom. A

Therefore, I prefer to ground my decision on this, that the obligation of the defendants, and the only obligation of the defendants, was to pay the dividend by means of sending this warrant; that they sent it; and thereupon they became discharged from the obligation. It is unnecessary to say what the remedies of the plaintiff are. If the document is a cheque, as I am inclined to think it is, he is entitled at once to go to the defendants, having given the indemnity provided by s. 69 of the Bills of Exchange Act, and to have another document given to him; and if he does not get that, probably he may have an action for damages, or he may bring an action on the warrant, and then he may get an order for the payment of the money. As I have said, however, I base my decision on the ground that the obligation of the defendants was merely to send this dividend warrant by post; that they sent it, and that thereupon they became discharged. In my opinion, therefore, this appeal must be allowed. B C

LORD COLERIDGE, J.—I agree. Of old it was held that, if a bill of exchange was lost, you could not recover on it at common law because you could not produce it, unless, possibly, you could prove not merely its loss, but its destruction; nor could you recover on the consideration given, because the bill itself was the consideration. But you could recover in equity, provided you gave an indemnity for the amount of the bill: *Hansard v. Robinson* (2). This, however, applied only to negotiable instruments. Thus, you could recover on a lost promissory note payable to A., not to order or bearer: *Wain v. Bailey* (3). But now, by the Bills of Exchange Act, 1882, the definition of what are negotiable instruments has been extended so as to include documents which were not so of old, and the law as to recovery on such lost instruments has, therefore, been extended so as to include such instruments. D E

The first question is whether this warrant was or was not a bill of exchange or cheque within the meaning of the Bills of Exchange Act, 1882. It was argued that it was not, on the ground that it was not an unconditional order in writing, inasmuch as it was both payable on demand and within three months. Speaking for myself, I regard the three months as only a definition arrived at by the directors, acting under the authority of the stockholders, as to what was a reasonable time within which the warrant should be presented, having regard to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. This condition merely gave notice that they fixed that as a reasonable time after which inquiries would have to be made before the instrument was honoured. F G

The next point is whether the posting of the warrant to the registered address was payment. To establish this, it is necessary to prove either a request to pay by such means or an agreement that payment shall be thus made. Where there has been such a request, payment is made by proof of posting although the cheque never is received, being stolen in transit: *Norman v. Ricketts* (1). Here the certificate held by the plaintiff had a notice on it that the dividends were payable by warrants sent by post to the proprietor's registered address. Further, there was authority so to provide by s. 9 of the Great Northern Railway (Capital) Act, 1890, which enacts that the terms and conditions on which any of the stock in question is issued shall be stated on the certificate. The warrant was sent and the dividend was paid by warrant in pursuance of a resolution of the stockholders to declare a dividend in accordance with the certificates, which amounts, I think, to a contract that they are payable in accordance with the terms embodied in the certificates. The directors are clearly authorised by the Companies Clauses Consolidation Act, 1845, s. 90, to act on the stockholders' behalf in and about the management and superintendence of the affairs of the company, and that implies H I

A a request from the stockholders to the directors that they shall so act if it be within their powers. Whether it was within their powers to declare the mode of payment seems to me a question which can only be answered in the affirmative. The dividend was declared by resolution of the stockholders. That authorised the directors having the management and superintendence of the affairs of the company to prescribe within reasonable limits the mode, date and other conditions of payment, and, indeed, I have some doubt whether the directors would have had authority to make payments otherwise than according to the terms of the certificate.

This being so, it is not necessary to decide whether the remedy of the plaintiff is or is not under the provisions of s. 69 of the Bills of Exchange Act, 1882. For the reasons I have given, I think that this appeal must be allowed.

Appeal allowed.

C Solicitors: *R. Hill Dawe; Thairwall & Son.*

[Reported by PHILIP B. DURNFORD, ESQ., Barrister-at-Law.]

GALBRAITH v. GRIMSHAW

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford and Lord Dunedin), June 22, 23, 1910]

[Reported [1910] A.C. 508; 79 L.J.K.B. 1011; 103 L.T. 294;
54 Sol. Jo. 634; 17 Mans. 183]

Execution—Garnishee order—Judgment in Scotland extended to England—Garnishee order in England—Subsequent bankruptcy of judgment debtor in Scotland—Rights of trustee in bankruptcy—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 117.

Judgment for a sum of money was obtained by the respondents in Scotland against a debtor, that judgment was extended to England under the Judgments Extension Act, 1868, and the respondents obtained a garnishee order nisi against a firm in England which owed a debt to the judgment debtor. After the order was served on the English firm, the estate of the judgment debtor was sequestrated under Scottish bankruptcy law and the appellant was appointed trustee. In an interpleader issue in England between the appellant and the respondents as to the right to the garnished debt,

Held: as the respondents had, by the service of the garnishee order nisi, obtained attachment in England before the date of the sequestration, their title to the garnished debt prevailed over that of the appellant; furthermore, it was not affected by s. 117 of the Bankruptcy Act, 1883, which affected procedure only.

Notes. The Bankruptcy Act, 1883, has been repealed. For s. 117 of that Act, see now s. 121 of the Bankruptcy Act, 1914.

Applied: *Singer v. Fry* (1915), 84 L.J.K.B. 2025; *Anantapadmanabhaswami v. Secunderabad Official Receiver*, [1933] A.C. 394. Referred to: *Plunkett v. Barclays Bank, Ltd.*, [1936] 1 All E.R. 653.

As to attachment of debts, see 16 HALSBURY'S LAWS (3rd Edn.) 79 et seq.; and for cases see 21 DIGEST 617 et seq. For the Bankruptcy Act, 1914, s. 121, see 2 HALSBURY'S STATUTES (2nd Edn.) 423.

Cases referred to:

(1) *Goetze v. Aders* (1874), 2 R. (Ct. of Sess.) 150; 12 Sc.L.R. 121; 4 Digest (Repl.) 49, *161.

- (2) *Solomons v. Ross* (1764), 1 Hy. Bl. 131, n; 126 E.R. 79; 5 Digest (Repl.) 870, 7305. A

Also referred to in argument :

Re Combined Weighing and Advertising Machine Co. (1889), 43 Ch.D. 99; 59 L.J.Ch. 26; 61 L.T. 582; 38 W.R. 67; 6 T.L.R. 7; 1 Meg. 393, C.A.; 21 Digest 639; 2185.

Norton v. Yates, [1906] 1 K.B. 112; 75 L.J.K.B. 252; 54 W.R. 183; 50 Sol. Jo. 95; 21 Digest 639, 2192. B

Cairney v. Black, [1906] 2 K.B. 746; 75 L.J.K.B. 1014; 96 L.T. 111; 22 T.L.R. 776; 50 Sol. Jo. 697; 14 Mans. 58; 21 Digest 638, 2184.

Rogers v. Whiteley, [1892] A.C. 118; 61 L.J.Q.B. 512; 66 L.T. 303; 8 T.L.R. 418, H.L.; 21 Digest 627, 2121.

Sill v. Worswick (1791), 1 Hy. Bl. 665; 126 E.R. 379; 5 Digest (Repl.) 871, 7309. C

Jollet v. Deponthien (1769), 1 Hy. Bl. 131, n; 126 E.R. 80, L.C.; 5 Digest (Repl.) 870, 7306.

Holmes v. Tutton (1855), 5 E. & B. 65; 24 L.J.Q.B. 346; 25 L.T.O.S. 177; 1 Jur. N.S. 975; 3 C.L.R. 1343; 119 E.R. 405; 4 Digest (Repl.) 387, 3514.

Re Melbourn, ex parte Melbourn (1870), 6 Ch. App. 64; 40 L.J.Bcy. 25; 23 L.T. 578; 19 W.R. 83, L.J.J.; 4 Digest (Repl.) 364, 3312. D

Folliot v. Ogden (1789), 1 Hy. Bl. 123; 126 E.R. 75; 11 Digest (Repl.) 537, 1471.

Neale v. Cottingham (1764), 1 Hy. Bl. 131, n; 126 E.R. 79; Wallis by Lyne 54.

Hunter v. Palmer, 3 Sh. (Ct. of Sess.) 586.

Appeal by the trustee of a sequestrated estate from a judgment of the Court of Appeal (FARWELL, BUCKLEY and KENNEDY, L.JJ.), reported [1910] 1 K.B. 339, reversing an order of RIDLEY, J., at the trial of an interpleader issue before him without a jury. E

On Oct. 22, 1908, the respondents obtained judgment for the sum of £311 and costs against Merrens & Sons in the Court of Session in Scotland. On Oct. 26, 1908, that judgment was extended to England under the Judgments Extension Act, 1868. On Oct. 27, 1908, the respondents obtained a garnishee order nisi, attaching all debts due in England from Hamilton, Smith & Co. to Merrens & Sons to answer the judgment debt, and that order was served on Hamilton Smith & Co. on the same day. On Nov. 12, 1908, the estate of Merrens & Sons was sequestrated in Scotland, and the appellant was appointed trustee in the sequestrated estate. An interpleader issue was ordered as to the priority between the respondents and the appellant to the amount that the garnishees were, at the date of service of the garnishee order nisi, indebted to Merrens & Sons. RIDLEY, J., gave judgment for the appellant. F

Radcliffe, K.C., and *H. Dobb* for the appellant.

Rawlinson, K.C., and *W. M. R. Pringle* for the respondents. G

LORD LOREBURN, L.C.—In this case I think that the conclusion arrived at by the Court of Appeal ought to be supported. To my mind, your Lordships would be wise to apply the rule explained by LORD PRESIDENT INGLIS in *Goetze v. Aders* (1). I think that the rule is applicable in England also. An attachment in England will not prevail against a claim of a foreign trustee in a bankruptcy which is prior in date, provided that the effect of the bankruptcy is to vest in the trustee the assets in question. If the attachment is prior in date, then I do not think that it will be affected by the title of the trustee in a foreign bankruptcy; and the reason is that a foreign law making the title of the trustee relate back to transactions which the debtor himself could not have disturbed has no operation in England, while the English law as to relation back applies only to cases of English bankruptcy, and, therefore, the trustee may find himself—as in this case—falling between two stools. I think that in each case the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title H

accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he cannot have it unless the bankrupt could himself have assigned it. It follows that the trustee cannot have this debt free from the garnishee order because the bankrupt could have only assigned it on Nov. 12, 1908, subject to the garnishee order.

With regard to s. 117 of the Bankruptcy Act, 1883, I think that it affects procedure and does not enlarge the rule to which I have referred, and I am not prepared to accept and act on *Solomons v. Ross* (2), which is scantily reported (1 Hy. Bl. 181, n), to which we have been referred. I am not prepared to accept that case as an authority against the rule which I have mentioned. I will not say that there may not be exceptions to that rule—as, for example, if the effect of the foreign bankruptcy were to transfer to the trustee only part of the assets of the bankrupt. Such points, to my mind, ought not to be settled or treated as settled except after consideration of the cases in which they actually arise. But I think it enough to say that, in the present case, I see nothing that should disturb the rule, or the principle to which I have adverted.

LORD MACNAGHTEN.—This is rather a singular case. If the bankruptcy had been an English bankruptcy, the attachment, being uncompleted, would not have prevailed against the claim of the judicial factor or the trustee in bankruptcy. If the attachment, or the process in Scotland that corresponds more or less with attachment, had been pending there, the claim of the judicial factor or the trustee in bankruptcy must have succeeded. But, as it is, a creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence.

It may have been intended by the legislature that bankruptcy in one part of the United Kingdom should produce the same consequences throughout the whole kingdom. But the legislature has not said so. The Bankruptcy Act, 1883, does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. The English court, no doubt, is bound to carry out the orders of the Scottish court, but, in the absence of special enactment, the Scottish court can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt attached by the order nisi was, at the date of the sequestration, earmarked for the purpose of answering a particular claim—a claim which in due course would have ripened into a right. With this inchoate right the Scottish court had no power to interfere, nor has it even purported to do so. Therefore, I think that the appeal fails.

LORD JAMES OF HEREFORD.—I concur.

LORD DUNEDIN.—I concur with the opinions which have been delivered. I think that the general principle which underlies every bankruptcy system is that, after bankruptcy, the bankrupt is no longer really the owner of his property, but holds it as trustee for the whole of his creditors for equal division. That carries with it necessarily the idea that some of his creditors may already have got security or may have taken part of the property in execution; and if the matter went no further than that, it is quite clear that both of those positions would be good as against the bankrupt himself, and, consequently, as against the rest of his creditors. It is a very natural development of that principle, in working out a bankruptcy system, that you should introduce a law of relation back, and that, within a certain period, which will always be an arbitrary period determined by positive enactment, you should hold that the security given or the execution affected should have no

effect, and that that property should be like the rest of the property of the bankrupt. A

So far as the general principle is concerned, it is quite consistent with the comity of nations that it should be a rule of international law that, if the court finds that there is already pending a process of universal distribution of a bankrupt's effects, it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which *Goetze v. Aders* (1) is only one example. But if you wish to extend that not only to the question of recognising a process of universal distribution, but also of introducing the law of relation back, then it seems to me that you get at once into rather great difficulties, because the question arises: According to which law will you apply the doctrine of relation back? If you take the law of the country of the bankruptcy, then the execution or security in question may be, and often is, of a kind which is quite foreign to the system of law which you are administering in the Bankruptcy Court. If, on the other hand, you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal. Accordingly, to say the least of it, there has been quoted to us no instance where, as a question of international law, a court has applied the rule of relation back, and certainly there are dicta of LORD PRESIDENT INGLIS which seem to point completely the other way. Of course, that would not prevent the matter being dealt with in the United Kingdom by means of positive enactment. I need say no more as to that, because I entirely concur with what fell from the Lord Chancellor as to the true meaning of s. 117 of the Bankruptcy Act, 1883. B C D

Appeal dismissed.

Solicitors: *Heath & Hamilton*, for *Walter & W. B. Galbraith*, Glasgow.; *Julius A. White*. E

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*] F

LIVERPOOL CORPORATION *v.* WEST DERBY UNION ASSESSMENT COMMITTEE

[COURT OF APPEAL (Sir Gorell Barnes, P., Fletcher Moulton and Farwell, L.JJ.), June 1, 2, 1908] G

[Reported [1908] 2 K.B. 647; 77 L.J.K.B. 1032; 99 L.T. 435; 72 J.P. 397; 24 T.L.R. 701; 6 L.G.R. 706; 2 Konst. Rat. App. 719]

Rates—Rateable occupation—Park—Power to local authority to sell surplus land—Power to close park to public on special occasion and charge for admission. H

By s. 14 of the Liverpool Improvement Act, 1865: "the corporation . . . may purchase by agreement the fee simple . . . of and in any lands . . . they may think suitable for public parks . . . for the inhabitants of the borough, and may . . . lay out and appropriate the same or any part or parts thereof." By s. 16: "The corporation may . . . sell . . . all or any part of the lands to be acquired by them under the authority of this Act which shall not be required for the purposes of this Act . . ." By s. 52 of the Liverpool Improvement and Waterworks Act, 1871: "The corporation may make byelaws for all or any of the following purposes relating to any park . . . For regulating the days and hours . . . during which the park . . . is to be open or shut and the terms of and prices for admission to the park on any special occasion. Provided that the days on which the park shall be shut shall not exceed seven days in the whole in any one year . . ." In 1897 a byelaw was made by the corporation I

giving effect to this last-named provision and authorising the corporation or any person to whom the use of the park or a part of it might have been given to charge for admission a sum not exceeding 5s. for each person.

Held: the corporation having dedicated and appropriated land as a park under s. 14 of the Act of 1865, they were not in beneficial occupation of the land, but were custodians or guardians of it for the public: *Lambeth Overseers v. London County Council* (1), [1897] A.C. 625, applied; their position was not affected by the provisions of s. 16, which related only to surplus land and not to land which had been appropriated as the park or part of it, nor by those of s. 52 of the Act of 1871 and the byelaw made thereunder providing for the closing of the park, for those provisions were to be regarded as ancillary to the public user and made for the benefit of the public and not as justifying the use of the park to enable the corporation to make a profit; and, therefore, the corporation were not in rateable occupation of the park.

Notes. For what have been held to be "special occasions" under other statutes see cases in the Reprint Index under LICENSING and ROAD TRAFFIC.

Distinguished: *North Riding of Yorkshire County Valuation Committee v. Redcar Corpn.*, [1942] 2 All E.R. 589. Considered: *Burnell v. Downham Market U.D.C.*, [1952] 1 All E.R. 601. Referred to: *Sheffield Corpn. v. Tranter (Valuation Officer)*, [1957] 2 All E.R. 583.

As to rateable occupation, see 32 HALSBURY'S LAWS (3rd Edn.) 16 et seq., and for cases see 38 DIGEST (Repl.) 476 et seq.

Cases referred to:

- (1) *Lambeth Overseers v. London County Council*, [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; 46 W.R. 79; 13 T.L.R. 527; sub nom. *St. Mary, Lambeth (Churchwardens and Overseers) v. London County Council*, 61 J.P. 580, H.L.; 36 Digest (Repl.) 351, 13.
- (2) *Hare v. Putney Overseers* (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 29 W.R. 721, C.A.; 38 Digest (Repl.) 480, 38.

Also referred to in argument:

- Manchester Corpn. v. Chorlton Union Assessment Committee* (1899), 15 T.L.R. 327, D.C.; 36 Digest (Repl.) 352, 14.
- Liverpool Corpn. v. West Derby Union* (1905), 92 L.T. 467; 69 J.P. 277; 53 W.R. 633; 21 T.L.R. 469; 3 L.G.R. 647; 1 Konst. Rat. App. 219, D.C.; 38 Digest (Repl.) 579, 611.
- Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H.L. Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur. N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, 395.
- London Corpn. v. Stratton* (1875), L.R. 7 H.L. 477; 45 L.J.M.C. 23; 30 L.T. 37; 40 J.P. 244; sub nom. *St. Thomas's Hospital v. Stratton*, 23 W.R. 882, H.L.; 38 Digest (Repl.) 539, 356.
- West Bromwich School Board v. West Bromwich Overseers* (1884), 13 Q.B.D. 929; sub nom. *R. v. West Bromwich School Board*, 53 L.J.M.C. 153; 52 L.T. 164; 48 J.P. 808; 32 W.R. 866, C.A.; 38 Digest (Repl.) 551, 428.

Appeal of the West Derby Union Assessment Committee from a decision of the Divisional Court (LORD ALVERSTONE, C.J., RIDLEY and DARLING, JJ.) on a Case Stated on an appeal to quarter sessions against a poor rate.

By the Liverpool Improvement Act, 1865:

"Section 14. The corporation from time to time as they think fit may purchase by agreement the fee simple, whether in possession or reversion, of and in any lands situate either within or beyond the limits of the borough which they may think suitable for public parks or playgrounds and places of recreation for the inhabitants of the borough, and may from time to time as

they think fit lay out and appropriate the same, or any part or parts thereof respectively, or with the approval of the Lords Commissioners of Her Majesty's Treasury, any lands now belonging to the corporation for any of such purposes, and may from time to time make byelaws, rules, and orders for the management and regulation thereof and of persons resorting thereto; and may also from time to time repeal, alter, or vary all or any of such byelaws, rules, or orders. . . . Section 16. The corporation may from time to time sell and absolutely dispose of or otherwise at their option may demise and grant upon building or other leases for such term of years and to such person or corporation and on such terms and conditions as they may think fit, all or any part of the lands to be acquired by them under the authority of this Act which shall not be required for the purposes of this Act, and the corporation shall apply to the purposes of this Act, or towards the repayment of any money which they may borrow under the authority of this Act, the proceeds of any such sale and the annual or other sums or rents to arise from any such lease."

By the Liverpool Improvement and Waterworks Act, 1871, s. 52 :

"The corporation may make byelaws for all or any of the following purposes relating to any park or place of public resort or recreation under their control, whether within or beyond the limits of the borough—namely : . . . For regulating the days and hours on or during which any footpath into or through the park or place may be closed and during which the park or place is to be open or shut and the terms of and prices for admission to the park or place on any special occasion. Provided that the days on which the park shall be shut shall not exceed seven days in the whole in any one year, and that on all other days no footpath shown upon the deposited plans as substituted footpaths for the public footpaths respectively authorised to be stopped up shall be closed between 5 a.m. and 7 p.m. from Sept. 30 to April 1, or between 5 a.m. and 10 p.m. on any other days except as aforesaid. . . ."

By byelaw 8 of byelaws made by the corporation in 1897 :

"The parks or any part thereof may be closed on such days (in addition to any days on which the parks may be closed for military purposes in pursuance of s. 19 of the Liverpool Improvement Act, 1886) not exceeding in the whole seven days in any one year, consecutive or otherwise, as the corporation may, by giving three days' notice at the least, by a paper published in the city, direct, and the corporation may charge or allow any person or persons to whom the use of the parks or any part thereof may have been given to charge for admission on any such days such sums as the corporation may think fit, not exceeding 5s. for each person."

The Divisional Court held that the corporation were not liable to be rated, and ordered the rate to be quashed. The assessment committee appealed.

Horridge, K.C., and *F. A. Greer* for the assessment committee.

Macmorran, K.C., and *A. H. Maxwell*, for the corporation, were called on to argue only the point in respect of the power to close the park for seven days and charge for admission.

SIR GORELL BARNES, P.—This is an appeal against an order of the Divisional Court, quashing a poor rate made by the overseers of the township of Walton in the city of Liverpool.

To appreciate the points which have to be decided it is necessary to state the facts shortly from the Special Case. The poor rate was made by the overseers, on April 2, 1906, and in that rate the mayor, aldermen, and citizens of the city of Liverpool, were rated as occupiers of certain land vested in them and appropriated to the use of the public as a public park, known as Stanley Park, and certain bowling greens. The Case states that the rate was on a total gross rateable value of £293, and a net rateable value of £279. The rate, as I understand it, was based

A upon treating this land as accommodation land, but the question which has been raised is as to its rateability at all. The land covers an area of 89 acres which was acquired by the corporation of Liverpool under the powers conferred upon them by the Liverpool Improvement Act, 1865, and the question in this case turns a great deal upon the construction of that Act. One of the recitals in it is to this effect:

B "And whereas the establishment and maintenance of public parks, playgrounds, and places of recreation by the corporation would be for the public benefit of the inhabitants and improvement of the borough, and it is expedient that the corporation should be empowered to provide such public parks, playgrounds, and places of recreation . . ."

C The sections to which I think it is worth while to refer are, first, s. 6, which deals with the general powers to take lands, and s. 14 which gives the power to acquire lands for public parks. The same term "appropriate," I may notice, is used in s. 15 in relation to the site of a church. [His LORDSHIP read s. 16, and continued:] Then s. 28 deals with the power for the application of moneys, received by the corporation under the provisions of the Act, "from the proceeds of the sale of any lands which may have been purchased by them by means of the improvement rate, or money obtained on the credit of that rate." That is the Act under which this park was acquired. The corporation appear to have taken free conveyances from the owners of land of a slightly larger area—namely, ninety-nine acres, but ten acres were disposed of in another way, which does not matter to this case, and eighty-nine acres were appropriated as the public park called the Stanley Park. The park was completed and laid out in 1870, and byelaws appears to have been passed at that time. I do not think it is necessary to refer at any length to them, because they are repeated in another form at a later date, possibly under s. 14 of the Act of 1865, or under s. 52 of the Liverpool Improvement and Waterworks Act, 1871. The park was opened in 1870, and according to the Case it was appropriated and devoted for the purpose of public resort and recreation and for the use and enjoyment by the public, subject to the byelaws, rules, and regulations time to time made by the council for the regulation thereof. The Act of 1871 contains sections to which I wish to refer. Under the heading of that part which relates to parks there is s. 52, which provides that:

G "The corporation may make byelaws for all or any of the following purposes relating to any park or place of public resort or recreation under their control, whether within or beyond the limits of the borough—namely: For appointing or regulating keepers or servants employed therein. For regulating the days and hours on or during which any footpath into or through the park or place may be closed and during which the park or place is to be open or shut, and the terms of and prices for admission to the park or place on any special occasion. Provided that the days on which the park shall be shut shall not exceed seven days in the whole in any one year, and that on all other days no footpath shown upon the deposited plans as substituted footpaths for the public footpaths respectively authorised to be stopped up shall be closed between five o'clock in the morning and seven o'clock in the evening from Sept. 30 to April 1, or between five o'clock in the morning and ten o'clock in the evening on any other day except as aforesaid."

I Then there are a good many other purposes for which byelaws may be made, all of which substantially seem to me to relate to the good government and proper protection of the park so far as material to the present case. Section 107 (7), provides that:

"Any byelaw shall not take effect until it is allowed by one of Her Majesty's Principal Secretaries of State (who may allow or disallow the same as he thinks proper, and from time to time repeal or vary the same)."

The byelaws which are in existence at the present time, as I understand, are those made in the year 1897, the eighth of which deals with the closing of the park. I only wish to say with regard to the Liverpool Improvement Act, 1886, that it contained a provision in s. 19 that:

"Notwithstanding anything contained in s. 52 of the Liverpool Improvement and Waterworks Act, 1871, or in any byelaws made thereunder, the corporation may at any time and from time to time close any public park or recreation ground under their control or any part thereof for such periods as they may think fit for the purpose of allowing the same to be used for military purposes by any of Her Majesty's regular, reserve, or auxiliary forces."

I do not think any argument was addressed to us which sought to utilise that. Substantially, although there is an Act of 1905, I think I have referred to those Acts and those byelaws which really require reference in order to make the point that I have to consider plain.

Paragraph 6 of the Case states what has been done with regard to this park. There is an account of the benefits derived by the public from what has been done, and one may state it generally. There is a good number of varieties of shrubs, shelters, pavilions, and so forth, bowling greens, an aviary, a park superintendent's house and a lodge for parkkeepers; it is the usual description of what one understands by a public park. The next statement in the Case to which I must refer is that which is contained in para. 7 which is as follows:

"Pursuant to the power conferred on the corporation by the statutes and byelaws hereinbefore mentioned, the corporation have on several occasions closed the park to the public and have permitted it to be used for purposes of a fête or fancy fair in aid of a local hospital. The corporation did not make any charges for admission to the park, but the persons who were so permitted to use the park did in fact make certain charges for admission. Save as aforesaid, the park has never been closed to the public under the said statutes or byelaws."

So that, apparently, the corporation have never for thirty-eight years themselves exercised the power of closing the park for the purpose of making any charge on any special occasion. The actual annual cost of working the park, taking it on an average for the last five years, appears to be £3,525, and there is a small income over those years of £62 10s. per annum. Some of it seems to have been derived from the use of some bowling greens, which are let to clubs, and a charge for a bar and other small sums.

In these circumstances the contention on the part of the corporation was, first, that they were not liable in law to be rated in respect of the park and bowling greens on the following grounds—that they were not occupiers thereof, and, secondly, that, if they were occupiers, they were by reason of the matters and things hereinbefore stated not liable to be rated in respect thereof. The assessment committee contended that the corporation were in occupation of the park and bowling greens and were liable to be rated in respect of the same. The question before the court was which of the contentions was correct, and the court below has decided in favour of the corporation and quashed the rate. From that there is this appeal.

I do not think after the discussion that this case has undergone that it is necessary to go into the cases or statutes at any substantial length. It is quite clear that the corporation can only be rated under the statute of Elizabeth [Poor Relief Act, 1601] if they are occupiers, but the point can be raised that, even if they were occupiers in a direct sense, there was no beneficial occupation within the meaning which has been placed upon that term by case after case decided in the courts. So far as this case is concerned it was substantially admitted in the course of the argument that *Lambeth Overseers v. London County Council* (1) covers this case, unless the points which were suggested in argument can be made out as destroying

A the effect of that decision so far as it is applicable to this particular case. One of these points depends upon the construction of s. 14 and s. 15 of the Act of 1865. The contention on the part of the corporation is that by virtue of those sections they have bought and appropriated to the public use the park in question, and that they are not able now to depart from that appropriation, except that, as is stated in the Case, in laying out and appropriating the park it was found that certain small portions, trimmings of the ground, were not necessary and they were disposed of. But the broad point is that, the park having been by virtue of s. 14, as stated in the Case, "appropriated and devoted to the public use," there is now no longer any power to sell and dispose of or in any way deal with the park except by using it for the public interest and permitting the open use of it by the public so long as things endure on their present footing for the purposes of the Act. The contention on the other side is that the true construction of these sections amounts to this—that the corporation are not pledged by the appropriation which has been made, but may dispose of this ground as and when they please, and either substitute or buy some other lands or deal with the matter as in their judgment they think most suitable. Therefore, the contention between the two parties is as to the construction which ought to be placed upon these two sections.

D My view is that when this Act is considered as a whole, especially when one starts with the recital which I have read and refers to s. 14 and its terms, especially the word "appropriate," and the limitation on the powers of disposition expressed in s. 16, the construction contended for by the corporation is correct—that is to say, as one would expect, when matters are being dealt with for the benefit of a city or borough and its improvement, this park is intended to be dedicated to the public for the public use alone. That, therefore, if the view which I take of the construction of the Act is correct, makes an end of the question except upon one other point, and that other point may be very shortly stated. It is that the powers to make byelaws conferred by the statute of 1865, amplified possibly by the power to make byelaws contained in s. 52 of the Act of 1871—has had an effect upon the position of the corporation which has turned them from being persons who are not occupiers into persons who are occupiers.

F In considering the first question I asked myself what is the logical outcome of the different contentions on the two sides? It seems to me it is this, having regard to the principles which have been enunciated in *Lambeth Overseers v. London County Council* (1). If the evidence of the corporation is correct, they have dedicated and appropriated this park to the public use, and they cannot withdraw from that position. Therefore, if that is the true position, they are not occupiers; they are mere custodians, guardians of the property for the public, and the public are the occupiers. The position, it seems to me, would be different if the contention were to prevail that upon the terms of this Act the corporation had immediate power of disposal, because then there would be no appropriation to the public. They would be in a position in which they could themselves utilise the ground in some other way, and probably a beneficial way, and, therefore, the logical outcome of settling which contention is correct is that the corporation remain simply and solely custodians or guardians, or whatever term you like to apply to it, for the public, and the public are the true occupiers of a place like this, on the principles laid down in *Lambeth Overseers v. London County Council* (1), almost exactly the same as they would have been if we were dealing with the case of a bridge, as in *Hare v. Putney Overseers* (2).

I But there is a second point, which is that by reason of the provisions of the Act of 1871 the corporation have taken themselves out of that position, because they have reserved to themselves a certain right which, it is said, is a right of occupation during seven days in the year. In the first place, it is exceedingly difficult to see how that would work out. If it were treated as reserving any right of occupation at all for a particular day, or any seven days which might be chosen or not chosen, or one or other of which might be chosen or not chosen, I feel great

difficulty in seeing how, on the *prima facie* look of the matter, it is possible to convert non-occupation into an occupation simply because they had reserved to themselves the right of closing the park for seven days in the year. But the matter does not rest there, because my view is that this power is really part and parcel of that which is done for the purpose of regulating the park for the public benefit. It arises under s. 52 of the Act of 1871 which confers power to make byelaws for keeping the park under proper control. For instance, one of the byelaws excludes the public on special occasions, and so forth. If that is the true view to take of this power, there is no real interference in any sense or form with the occupation by the public, and no conversion of the corporation into the position of occupiers, by the fact that for special occasions, which I should think mean occasions on which it would be to the public interest, there should be a reservation for some special purpose, and by that they have not deprived themselves of the position which I think was the original position contemplated, that they should be merely keepers for the benefit of the public. If this power had been utilised by the corporation, I am not sure that it would have made any difference; but, assuming it would have done so, they have not, in fact, taken any step which has placed them in a position to utilise the powers that they have of closing the park for a special occasion, and charging prices for admission on such occasion. They never seem to have put in force these powers, and they have never, in fact, done anything which converted them from their original position of non-occupiers into that of occupiers. If they had done so, it might give rise to the question whether their occupation, if it became an occupation at all, could be an occupation which was capable of producing a beneficial result. We have no figures before us to guide us, so I do not think it would be wise to say anything about that. But I confess that I see very great difficulty in saying that there can be any special advantage in taking admission fees as against the costs of keeping up the park. No such case was suggested, I understand, in the cause of the inquiry which led to the statement of the Special Case, and I can only say it seems extremely doubtful whether such a case can be made out. That seems to me to dispose of this case. One starts with what is practically an admission that this case is governed by *Lambeth Overseers v. London County Council* (1), unless it can be distinguished on the two grounds to which I have referred. Those grounds I think I have disposed of, and it seems to me that the case is one as to which the Divisional Court has arrived at a right decision and their decision should be upheld.

FLETCHER MOULTON, L.J.—I am of the same opinion. I think that this case is best dealt with by putting out of sight at first the question of the seven days during which the park may be used for special purposes and then considering whether the existence of those powers makes any difference whatever to the liability of the corporation.

If we put out of sight the question of the seven days, we have the corporation acquiring the fee simple of certain lands under the powers of s. 14 of the Liverpool Improvement Act, 1865, and under the provisions of that section laying it out and appropriating it for a public park. In *Lambeth Overseers v. London County Council* (1), in the House of Lords, it is clearly laid down that where lands are appropriated for a public park there is no occupation by the corporation or the persons owning the fee simple of the land. As LORD HALSBURY says: "I do not think there is here a rateable occupation by anybody. The 'public' is not a rateable occupier." LORD HERSCHELL says in substance the same where he states:

"Moreover, I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is, no doubt, vested in them. They seem to me to be merely custodians or trustees to hold it and manage it for the use of the public."

So that we start with this, that the purpose for which it is appropriated is not a purpose which makes the corporation rateable occupiers at all.

Then it is suggested that the provisions of s. 16 entirely alter the position of the corporation, because it is said that the corporation under that section might sell and dispose of this land. I am not at all certain that s. 16 does enable them to dispose of land which has once been appropriated for a public park; but what I am clear about is that it does not give the corporation at their own will and pleasure any power to sell this land or any part of it, because all that they may sell is that portion of the land which shall not be required for the purposes of the Act, and beyond question this land is not only appropriated for purposes of the Act, but is just as much as it ever was required for the purposes of this Act. So s. 16 has no application to this land, and I am inclined to think it never can have. But I am only dealing with the rate for a particular year, and without the faintest hesitation I say that throughout the whole of that year this land was and might be foreseen to be required for the purposes of the Act, and, therefore, is utterly free from the provisions of s. 16 empowering the corporation to sell, as if these powers were not in the Act at all. I am inclined to think, taking ss. 16 and 14 together, that it was intended that this dedication should be for ever; but certainly it is a dedication of so permanent a kind that no question can possibly arise as to the occupation, during the year we are now considering, being an occupation throughout as a public park under statutory provisions and restrictions. That being so, we have the authority of *Lambeth Overseers v. London County Council* (1) for saying that such an occupation is not a rateable occupation.

Has it been altered at all by the special powers given to use in an exclusive manner on a small number of days in a year this park for special purposes? The first thing I have to say is this. The Act of 1871 has been appealed to as giving the power to use this park in this exclusive way for not more than seven days in the year. When I read s. 52 of the Liverpool Improvement and Waterworks Act, 1871, I find no increase of the powers of user. I find powers to make byelaws to regulate certain uses, but I find no increase of powers of user given by the Act at all. One is, therefore, thrown back on one of two alternatives. Either this user is granted impliedly in the dedication as a public park or else it is not granted at all by any of the previous statutes, and then s. 52 must be read to mean that, wherever their possession of the land is such as to permit them to use it for the special purposes, then under s. 52 they might make byelaws to regulate that. Liverpool Corporation has, no doubt, land which it has acquired in a great variety of ways for different purposes. Some may be land of which they possess the freehold, and that they can, if they like, exclude the public from at any moment. The user of the public is purely permissive. With regard to those lands the corporation would naturally have the power to use them for a special purpose, and under s. 52 they would have power to make byelaws for the purpose. But s. 52 must in such a case be read to mean that, where they have power to use for a special purpose, they shall not do it for more than seven days in the year, and they shall be empowered to make byelaws with regard to the use. But I myself prefer the other alternative—namely, that a moderate restricted user of an exclusive kind of this sort is ancillary to and is not excluded by the dedication of the land as a public park. If that be so, then the provisions of the Act of 1865, which entitled them to dedicate the land as a public park, impliedly gave them the power of using it in a special way, because it is a better user for the public that they should have these moderate powers of exclusion than if they had not. It does not create anything of a beneficial occupation other than or different from the dedication as a public park. That we saw in *Lambeth Overseers v. London County Council* (1). I am inclined to think that the legislature took the view that these powers were ancillary, and, therefore, they gave power to make byelaws to regulate, and I am strongly confirmed in that view by finding that in the year 1890 the legislature passed a general Act, applying to all places outside the metropolis, giving a limited power of this kind to all local authorities possessing public parks. I cannot bring myself to believe for one moment that by such a general Act as that the legislature intended to alter the

occupation of those public parks by the public authorities so as to make that rateable which was not rateable before. I think it only recognised in a statutory way that a limited power of this kind was ancillary to user as a public park, that it ought to be recognised by statute, and the power of regulating it ought to be given by statute. So I come to the conclusion that this power of user for a special purpose for this small number of days does not alter the character of the occupation at all; in fact, it goes with the grazing rights which were admitted to exist in *Lambeth Overseers v. London County Council* (1). Grazing rights in themselves are essentially of the nature of a beneficial occupation, but the House of Lords there recognised that the grazing rights, the power to erect bandstands, which is an exclusion of the public from the site where they are erected, and all those things, were reasonable powers to increase the public user of the parks, to enable the public to enjoy them more, and that they were in no sense antagonistic to complete dedication of the park as a public park. For these reasons I think that the existence of this power does not alter the character of the occupation, and it remains unrateable, just as it did in *Lambeth Overseers v. London County Council* (1).

FARWELL, L.J.—I am of the same opinion. By the Special Case it is found that on May 14, 1870, the city council declared the park open to the public and appropriated to their use, subject to the reservations in the byelaws. In my opinion, from that day these lands and every part thereof must be held in perpetuity to the use of the public, and are, therefore, not rateable.

On the construction of the Act I have very few words to add. The preamble shows that the intention was the establishment and maintenance of public parks, playgrounds, and places of recreation by the corporation for the benefit of the inhabitants, and for the improvement of the borough. Section 14 gives a power to acquire by purchase the fee simple of land and to appropriate the same or any part thereof, and so on, for public purposes. It is to be noted that the power to purchase and the power to appropriate are co-extensive, and fitted in the one with the other. There is no power to appropriate the same "or any interest therein." It is the whole of the fee simple which is purchased which is appropriated, and that is what one would naturally expect. When one comes to s. 16, one has to bear in mind that s. 6 gives the power of acquiring land for other purposes, and that the Lands Clauses Acts are incorporated, and s. 16 is nothing more nor less than a surplus land section; in fact, if my memory serves me right, the very words used are the words used in the fasciculus of sections in and the preamble to the Lands Clauses Act which deals with surplus lands. The words "from time to time," of course, do not apply so as to cut down the appropriation which has been already made, but refer to the lands which were acquired under the Act or which may be acquired from time to time, not necessarily all at one time, either for parks or roads and streets which are mentioned in s. 6. They afford no difficulty. The rest of the section simply provides that they may sell all or any part of the lands to be acquired by them under the Act which shall not be required for the purposes of this Act. The land having already been appropriated irrevocably, it can no longer fall within those words. The corporation can no more treat as surplus lands under this section part of this park than a railway company can so treat part of its permanent way; it is required for the purpose of the undertaking. The appropriation is an act done and made once for all, and when made is conclusive. That being so, this case is within the decision in *Lambeth Overseers v. London County Council* (1).

Then, do the seven days which have been mentioned so much make any difference? In my opinion, they do not. The byelaws, which have to be allowed by the Secretary of State, are for the good management of the park as appropriated to the public. I can find nothing that would suggest any idea of allowing the corporation to use the park for their own profit. The object appears to me to be to enlarge the public benefit intended to flow from its use as a park by allowing the park to be utilised during the seven days for some charitable or public purpose, for which a small

charge may be made, or possibly to enable the corporation themselves to recoup the expenses to which they may be put by holding some show there which may be of general public interest. I very much doubt if, on the true construction of these bye-laws, the corporation are entitled to use the park for the purpose of making a profit for themselves. I have considerable doubt whether the Attorney-General could not successfully interfere to prevent their doing it. This power to charge is only inserted parenthetically, as it were, in a number of byelaws for the better regulation of the park as a public park; but, assuming the corporation strain it to make it include a right to charge for their own profit, they never have done it, and I cannot see myself how the existence of such a power, if it does exist, can turn that which, according to *Lambeth Overseers v. London County Council* (1), is not a beneficial occupation into an occupation for their own benefit. It only enlarges to a very small extent that power of exclusion and of making charges which existed in that case. I think this case is really governed by that case.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Cleaver, Holden & Co.*, Liverpool; *F. Venn & Co.*, for *E. R. Pickmere*, Liverpool.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

Re SPANISH PROSPECTING CO., LTD.

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), October 26, November 9, 1910]

[Reported [1911] 1 Ch. 92; 80 L.J.Ch. 210; 103 L.T. 609; 27 T.L.R. 76;
55 Sol. Jo. 63; 18 Mans. 91]

Company—Winding-up—Profits—Sale of securities by liquidator—No previous ascertained value—Securities not included in company's accounts before liquidation.

The fundamental meaning of "profits" is the amount of gain made by a business during a specified period, generally a year, and ascertained by deducting the value of the total assets of the business at the beginning of the specified period from the value of the total assets at the end of that period. Some of the assets to be valued may be such that there are no market quotations or contemporaneous sales or purchases to afford a guide to their value, and often companies avoid the difficulty thus presented and refer in their accounts to assets of that type without placing any specific value on them, but this does not prevent the need to regard these assets as forming part of the assets of the company which must be included in the calculation by which *de facto* profits are arrived at. There is a wide field for variation of practice in estimations of profit in the domestic arrangements of a business, but this liberty ceases when the rights of third persons intervene, e.g., the Revenue who, when assessing income tax, are not bound by the profit and loss accounts of the business. When the rights of third parties come in "profits" mean actual profits calculated as closely as possible in the way indicated above.

At the date of the winding-up of a company, the business of which included the purchase and sale of shares, part of the assets consisted of debentures in another company. These debentures were then of no ascertained value, but they were afterwards sold by the liquidator and realised a substantial sum. The plaintiffs were entitled under an agreement with the company to a cumulative

salary out of the "profits" of the company. The creditors had been paid in full, all the subscribed capital had been returned, and there was a balance in the hands of the liquidator.

Held: although the debentures were sold in the liquidation after the company ceased to carry on business, the balance in the hands of the liquidator was "profit" out of which the plaintiffs were entitled to be paid.

Per FARWELL, L.J.: Money which has in fact resulted from profits made in trading is none the less profit because it is carried over to a suspense account or reserve fund. It remains as undistributed profits.

Re Bridgewater Navigation Co. (1), [1891] 2 Ch. 317, applied.

Frames v. Bultfontein Mining Co. (2), [1891] 1 Ch. 140 and *Rishton v. Grissell* (3) (1870), L.R. 5 Eq. 326, distinguished.

Notes. Referred to: *I.R. Comrs. v. Burrell*, [1924] All E.R. Rep. 672; *Naval Colliery Co. v. I.R. Comrs.* (1928), 138 L.T. 593; *Edwards v. Saunton Hotel Co.*, [1943] 1 All E.R. 176; *L.C., Ltd. v. G. B. Ollivant, Ltd.*, [1944] 1 All E.R. 510.

As to kinds of profits, see 6 HALSBURY'S LAWS (3rd Edn.) 399, 400, and for cases see 9 DIGEST (Repl.) 643-646.

Cases referred to:

- (1) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317; 60 L.J.Ch. 415; 64 L.T. 576; 7 T.L.R. 360, C.A.; 10 Digest (Repl.) 1067, 7403.
- (2) *Frames v. Bultfontein Mining Co.*, [1891] 1 Ch. 140; 60 L.J.Ch. 99; 64 L.T. 12; 39 W.R. 134; 7 T.L.R. 129; 2 Meg. 374; 9 Digest (Repl.) 480, 3138.
- (3) *Rishton v. Grissell* (1870), L.R. 5 Eq. 326; L.R. 10 Eq. 393; 18 W.R. 821; 34 Digest 96, 710.
- (4) *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239; 63 L.J.Ch. 456; 70 L.T. 516; 10 T.L.R. 393; 38 Sol. Jo. 384; 1 Mans. 136; 7 R. 170, C.A.; 9 Digest (Repl.) 181, 1170.
- (5) *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch.D. 1; 58 L.J.Ch. 408; 61 L.T. 11; 37 W.R. 321; 5 T.L.R. 260; 1 Meg. 140, C.A.; 9 Digest (Repl.) 179, 1161.
- (6) *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353; 71 L.J.Ch. 246; 86 L.T. 10; 50 W.R. 295; 18 T.L.R. 249; 46 Sol. Jo. 280; 9 Mans. 69; 9 Digest (Repl.) 627, 4191.

Also referred to in argument:

Bishop v. Smyrna and Cassaba Rail. Co., [1895] 2 Ch. 265; 64 L.J.Ch. 617; 72 L.T. 773; 43 W.R. 647; 11 T.L.R. 393; 39 Sol. Jo. 469; 2 Mans. 429; 13 R. 561; 10 Digest (Repl.) 1068, 7405.

Re Crichton's Oil Co., [1902] 2 Ch. 86; 71 L.J.Ch. 531; 86 L.T. 787; 18 T.L.R. 556; 9 Mans. 402, C.A.; 10 Digest (Repl.) 1068, 7406.

Re Espuela Land and Cattle Co., [1909] 2 Ch. 187; 78 L.J.Ch. 729; 101 L.T. 13; 13 Mans. 251; 10 Digest (Repl.) 1069, 7410.

Bisgood v. Henderson's Transvaal Estates, Ltd., [1908] 1 Ch. 743; 77 L.J.Ch. 486; 98 L.T. 809; 24 T.L.R. 510; 52 Sol. Jo. 412; 15 Mans. 163, C.A.; 10 Digest (Repl.) 1087, 7526.

Birch v. Cropper, Re Bridgewater Navigation Co., Ltd. (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, 7391.

Appeal by the plaintiffs from a decision of SWINFEN EADY, J.

The following statement of the facts is taken from the judgment of COZENS-HARDY, M.R. The Spanish Prospecting Co., Ltd., is in voluntary liquidation. The creditors, except Messrs. Punchard and Vivian, the plaintiffs, have been paid in full, all the subscribed capital has been returned, and there is a surplus of upwards of £3,000 in the hands of the liquidator. This sum, less costs, is claimed by Punchard and Vivian under the following circumstances. By an agreement dated June 4, 1901, Punchard and Vivian were, for the valuable consideration therein

mentioned, to receive a salary at the rate of £41 13s. 4d. per month each, subject to the proviso that they should not be entitled to draw their salary

"except only out of profits, if any, arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits as aforesaid."

The business of the company included the purchase and sale of shares. In 1901 the company purchased 6,000 fully-paid shares of £1 each in Spanish Minerals Development, Ltd., the consideration being the allotment of 6,000 fully-paid shares in the Prospecting Co. Twelve hundred of the Development Co.'s shares were sold, leaving 4,800 in the company's hands. The Development Co. was wound-up, and the Prospecting Co. received in respect of their holding (a) £3,840 in cash; (b) £3,840 debentures of the Esperanza Co.; and (c) 3,360 shares in the Esperanza Co. In the balance-sheet for 1906 the cash was subtracted from the £4,800, and the shares were put as an asset at the figure of £960. A note was added that the company had also received items (b) and (c), but no value was attributed to them in the balance-sheet. In 1907 the shares (item c) were sold, the proceeds were carried to the credit of the profit and loss account, and it was stated that there would be a further credit when the debentures (item b) were realised. In 1908 the report of the directors stated that the debentures were still in the hands of the company and that it was proposed to wind-up the company. The debentures were sold by the liquidator shortly after his appointment. There was no goodwill and no fixed capital. The assets consisted solely of cash, loans, shares, and the debentures. SWINFEN EADY, J., held that at the commencement of the winding-up the debentures formed a part of the assets of the company, but that there was still a debit balance on profit and loss account, that the company's business came to an end with the winding-up, and that the plaintiffs were not entitled to be paid.

Gore-Browne, K.C., and Clauson, K.C., for the plaintiffs.

Frank Russell, K.C., and Arthur Sims for the shareholders opposing the payment.

A. E. Hughes for the liquidator.

Cur. adv. vult.

Nov. 9, 1910. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—This appeal turns upon the meaning of the word "profits." The proceeds of the 6,000 shares from time to time realised by the company were properly entered in the accounts and placed to the credit of profit and loss. This appears from the accounts for 1907. The balance-sheet for the same year recognises that the company held the debentures which had at present no market quotation, and the directors did not put any estimate of value upon them. The liquidator has, however, realised these debentures, and I can see no reason why the proceeds should not be placed to the credit of profit and loss. The realisation of this asset was not new business carried on by the liquidator. If goods are sold and bills given by the purchaser which have not matured at the commencement of the winding-up the liquidator can collect the bills or discount them without embarking on new business. The language of LINDLEY, L.J., in *Re Bridgewater Navigation Co.* (1) seems to me to be a clear authority in support of this view. He points out that, although, while the company was carrying on business, debts owing to it were under-estimated, this was done from motives of prudence, but that when the actual value was known the difference between the estimated and ascertained value really represented undrawn profits. In the present case no estimate was put upon the debentures, and the result is that the entire proceeds realised by the liquidator should be treated as undrawn profits arising from the company's business, out of which the plaintiffs are entitled to be paid. It follows that in my opinion the appeal should be allowed, and the plaintiffs should

be declared entitled to the balance in the hands of the liquidator, subject to the costs of the liquidation, including the liquidator's remuneration, and the costs of this summons here and below.

FLETCHER MOULTON, L.J.—The question for our decision in the present case is of some general interest because it turns upon the legal meaning of the word "profits," and inasmuch as I believe that the decision of the learned judge in the court below is erroneous, and that uncertainty or error in so fundamental a matter may lead to serious confusion, I shall, in the first place, consider the general question and then proceed to deal with the special facts of the case.

The word "profits" has, in my opinion, a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. "Profits" implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes these assets, in calculating profits, must be valued and not merely enumerated. An enumeration might be of little value. Even if the assets were identical at the two periods it would by no means follow that there had been neither gain nor loss, because the market value—the value in exchange—of these assets might have altered greatly in the meanwhile. A stock of fashionable goods is worth much more than the same stock when the fashion has changed. And, to a less degree, but no less certainly, the same consideration must apply to buildings, plant, and other fixed assets used in the business, because one form of business risk against which business gains must protect the trader is the varying value of the fixed assets used in the business. A depreciation in value, whether from physical or commercial causes which affect their realisable value, is in truth a business loss.

We start, therefore, with this fundamental definition of profits, viz., if the total assets of the business at the two dates be compared, the increase which they show at the later date as compared with the earlier date (due allowance, of course, being made for any capital being introduced into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question. But the periodical ascertainment of profits in a business is an operation of such practical importance as to be essential to the safe conduct of the business itself. To follow out the strict consequences of the legal conception in making out the accounts of the year would often be very difficult in practice. Hence the strict meaning of the word "profit" is rarely observed in drawing up the accounts of firms or companies. These are domestic documents designed for the practical guidance of those interested, and so long as the principle on which they are drawn up is clear their value is diminished little, if at all, by certain departures from this strict definition which lessen greatly the difficulty of making them out. Hence certain assumptions have become so customary in drawing up balance-sheets and profit and loss accounts that it may almost be said to require special circumstances to induce parties to depart from them. For instance, it is usual to exclude gains and losses arising from causes not directly connected with the business of the company, such, for instance, as a rise in the market value of land occupied by the company. The value assigned to trade buildings and plant is usually fixed according to an arbitrary rule by which they are originally taken at their actual costs, and are assumed to have depreciated by a certain percentage each year, though it cannot be pretended that any such calculation necessarily gives their true value either in use or in exchange. These, however, are merely variations of practice by individuals. They rest on no settled principle. They mainly arise from the sound business view that it is better to underrate than to overrate your profits, since it is impossible for you to foresee all the risks to which a business may in future be exposed. For instance,

there are many sound business men who would feel bound to take account of depreciation in the value of business premises (or in the value of plant specially designed for the production of a particular article), although they would not take account of appreciation in the same arising from like causes. To render the ascertainment of the profits of a business of practical use it is evident that the assets, of whatever nature they may be, must be represented by their money value. But as a rule these assets exist in the shape of things or rights, and not in the shape of money. The debts owed to the company may be good, bad, or doubtful. The figure inserted to represent stock-in-trade must be arrived at by a valuation of the actual article. Property, of whatever nature it be, required in the course of the business has a value varying with the condition of the market.

It will be seen, therefore, that in almost every item of the account a question of valuation must come in. In the case of a company like that with which we have to deal in the present case this process of valuation is often exceedingly difficult, because the property to be valued may be such that there are no market quotations and no contemporaneous sales or purchases to afford a guide to its value. It is not to be wondered at, therefore, that in many cases companies that are managed in a conservative manner avoid the difficulty thus presented and content themselves by referring to assets of a speculative type, without attempting to affix any specific value to them. But this does not in any way prevent the necessity of regarding them as forming part of the assets of the company which must be included in the calculation by which de facto profits are arrived at. Profits may exist in kind as well as in cash. For instance, if a business is, so far as assets and liabilities are concerned, in the same position that it was the year before with the exception that it has contrived during the year to acquire some property, say mining rights, which it had not previously possessed, it follows that those mining rights represent the profits of the year, and this whether or not they are specifically valued in the annual accounts. But though there is a wide field for variation of practice in these estimations of profit in the domestic documents of a firm or a company, this liberty ceases at once when the rights of third persons intervene. For instance, the Revenue has a right to a certain percentage of the profits of a company by the way of income tax. The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid. A company may wisely write off liberally under the head of depreciation, but they will be only allowed to deduct the sums representing actual depreciation for the purpose of calculating the profits for the purpose of income tax. The same would be the case if a person had a right to receive a certain percentage of the profits made by the company. In the absence of special stipulations to the contrary "profits," in cases where the rights of third parties come in, mean actual profits, and they must be calculated as closely as possible in accordance with the fundamental conception or definition to which I have referred.

I would have it clearly understood that these remarks have no bearing upon the vexed question of the fund out of which dividends may legally be paid in limited companies. Cases such as *Verner v. General and Commercial Investment Trust* (4) and *Lee v. Neuchatel Asphalte Co.* (5) show that this fund may in some cases be larger than what can rightly be regarded as profits, and the decisions in these cases depend largely on the fact that there is no statutory enactment which forbids it to be so. In the present case, however, no question as to the limitations of this fund arises, so that I shall not make any further reference to these decisions or to the principles on which they rest, as they do not affect the matter before us.

We have now to apply these principles to the facts of the present case. The claim of the plaintiffs is under an agreement with the Spanish Prospecting Co., Ltd., whereby they were to act as technical advisers to the company in connection with the acquisition, development, or turning to account of any rights or properties in Spain which it might at any time during the continuance of the agreement be

interested in or desire to acquire. The clause fixing their remuneration reads as follows :

"In consideration of the premises the company shall during the continuance of this agreement pay to each of the vendors a salary at the rate of £41 13s. 4d. a month commencing from Feb. 15, 1910. Provided, nevertheless, that the said William Charles Punchard and Stephen Vivian shall not be entitled to draw their said salary except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall, nevertheless, be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits available as aforesaid."

The phrase "profits (if any) arising from the business of the company" gives rise to no difficulty. The memorandum of association was of the widest possible kind, and even if we reject the more general clauses it is evident that the acquisition, development, and turning to account of mineral interests in the kingdom of Spain was in a special sense a business which the company proposed to carry on. It is only to such business that the facts of this case relate. During the existence of the company it acquired certain shares in a company called the Spanish Minerals Development Co., Ltd. That company sold part of its property to the Esperanza Copper and Sulphur Co., Ltd., and subsequently went into liquidation and distributed its assets partly in cash and partly in specie among its shareholders. Inasmuch as the Spanish Prospecting Co., Ltd., was a holder of shares in this company at the date of its liquidation it participated in this distribution of the assets in specie, and accordingly received 3,360 shares, and 3,840 debentures of the Esperanza Co. Nothing here turns on its possession of the shares which were subsequently sold by it at a substantial sum considerably above their face value, and the amount so realised was brought into the accounts of the company in the ordinary way. But the 3,840 debentures of that company were retained in specie and formed part of the assets of the Spanish Prospecting Co. at the date when it went into voluntary liquidation. The liquidator realised its assets and among them the debentures in question, and after repaying to the shareholders in full their capital and the interest due in respect of it there remained a surplus of £3,328. This sum had no doubt principally, but not entirely, arisen from the realisation of the debentures in question. It is suggested that these shares were treated as valueless by the company at the date of the liquidation, and that this has some legal effect on the status of the money obtained by their realisation. I can see no grounds for such a suggestion in fact or law. The shares of the Esperanza Co., which necessarily ranked behind the debentures, had recently been sold for a substantial sum, and there is certainly nothing in the documents of the company which justifies the suggestion that they were thought to be of no value. They were referred to as being in the hands of the company in the balance sheets for 1906 and 1907, and in the report of the directors in 1908 which was sent to the shareholders with the accounts of that year, and it is plain that they were regarded as assets the value of which it was difficult to fix, but which had some value. But I do not go at length into this question, because in my opinion it is immaterial. Whether of much or little value, these debentures were unquestionably profits in kind made by the company in its business during the time it was carrying on that business, and when turned into money by realisation the sum so realised stood in precisely the same position as the assets which it represented. It follows, therefore, that at the date of liquidation the company had in its hands "profits" now represented by this sum of £3,328. No question arises as to the date at which such profits were earned because the right of the plaintiffs to payment is independent of any such question.

But the shareholders contend, and have induced the learned judge in the court below to decide, that this sum is not "profits" because it was not in the form of money at the date of the liquidation but was turned into money during the realisation. I am wholly incapable of appreciating this argument. It would apply to

every asset of the company except the cash in the till or safe at the moment of liquidation. All the other assets exist in the form of land or chattels or rights which have to be realised before they can be treated as money and applied to the payment of liabilities to creditors or returned to the shareholders as capital, or paid as profits to the persons entitled to them. What seemed to be mainly relied upon by counsel for the shareholders in support of this view was that there would probably have been a difficulty in ascertaining the value of the debentures at the moment of liquidation. But there is nothing in the agreement which necessitates that any such valuation should be taken. The profits existed in the shape of the debentures, and they did not cease to be profits because the company adopted the safer process of actual realisation to the more hazardous one of acting on the then view of any person or persons as to the value of these debentures. It was also suggested that this value must have been very precarious because a suit was instituted on behalf of the debenture-holders to protect their interests which were apparently in jeopardy through some act of the *Esperanza Co.* itself. Even if such considerations were material, which, in my opinion, they are not, I can attach no weight to an argument which contends that a security must be valueless because its owners think it worth while to bring an action to protect it.

But the main argument on behalf of the shareholders was based on certain decisions which are supposed to have established that if assets are realised by means of liquidation they can no longer be counted in the calculation of profits. The two cases thus relied upon are *Frames v. Bultfontein Mining Co.* (2) and *Rishton v. Grissell* (3). In the former case the directors of a company were entitled to be paid in each year as remuneration for their services a sum equal to three per cent. of the net profits of the company for such year. The business of the company was sold to another company for a very large sum, and the directors claimed to take that sum into account in calculating the profits of the year in which it occurred for the purpose of ascertaining their remuneration. CHITTY, J., held that they could not do so, and I cannot see how he could have come to any other conclusion. The sale included the goodwill of the business of the company, and, therefore, they were seeking to take the value of the goodwill of a company into account in ascertaining its profits. This is fundamentally wrong. The capital value of goodwill is an alternative to profits, not part of them. It is the price at which a person renounces his rights to future profits. Hence the goodwill of a business can never appear in the calculation of its profits. But CHITTY, J., realised that the company might have made profits during the time that it was carrying on its business, although those profits could not be ascertained from the figures of sale which subsequently took place, because it was impossible to sever the consideration and ascertain how much of the price was paid on account of assets and how much on account of goodwill. He, therefore, said that the plaintiffs might have an account of the net profits made by the company during the year. Such an account must, of course, have rested on a valuation of the assets acquired by the company and in its hands at the date of the liquidation, and not on the sum actually realised by those assets, because there were, as I have said, no means of calculating what that sum was. *Rishton v. Grissell* (3), so far as it has any application at all, illustrates precisely the same point. Neither of these cases gives, in my opinion, any support to the contention of the shareholders. I am, therefore, of opinion that the decision of the learned judge in the court below was erroneous, and that this appeal should be allowed.

FARWELL, L.J.—The plaintiffs are creditors of the company for a sum of £8,000 or thereabouts for arrears of salary under the agreement of June 4, 1901, but are bound by the proviso in cl. 5 of that agreement not to claim payment thereof

“except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary

shall, nevertheless, be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits available as aforesaid."

I think the plaintiffs were not, during the existence of the company, entitled to challenge any valuation or the amount of a reserve fund or the like fairly made, and accordingly that they cannot now impeach the omission of the Esperanza debentures from the balance sheet of 1908, or their valuation at nil in that of 1907. This, however, does not alter the character of the monetary results of the company's business or affect the rights of the plaintiffs whose claim is cumulative and not confined to the profits of any one year. Money which has, in fact, resulted from the profits made in trading is none the less profit because it is carried over to a suspense account or to a reserve fund; if it is lost in the trading of subsequent years there is an end of it, but so long as it remains in statu quo it remains as undistributed profits: see LORD LINDLEY's judgment in *Re Bridgewater Navigation Co.* (1).

The first question, then, is: Are these Esperanza debentures profits arising from the business of the company? I am of opinion that they are. The business carried on by the company was that of speculators and dealers in mining properties, and these are among the objects included in their memorandum of association. The profits arising from the business of a company are not necessarily the same as the profits of that company. A company may have fixed capital as well as circulating capital, as I endeavoured to explain in *Bond v. Barrow Haematite Steel Co.* (6), and in that case the profits of its business would be those arising from the use of its circulating capital, excluding its fixed capital, for instance, the profits arising from a draper's business would not include the increase over cost price of a freehold warehouse used in the business and afterwards sold. But in this case the company acquired in the course and for the purposes of its business certain shares and debentures in the Esperanza Co. The shares were sold in 1907, and the proceeds thereof duly and rightly brought into the profit and loss account of that year; the debentures appear in the same account, but have no value set against them, and for the purposes of that account are treated as of no value, and in 1908 are mentioned in the director's report as still in the hands of the company, but do not appear at all in the balance sheet annexed to that report. Before any further report or balance sheet was issued the company went into voluntary liquidation, the Esperanza debentures have been sold by the liquidator for £3,072, and all the creditors of the company other than the plaintiffs have been paid in full, the shareholders have received back all their share capital, and there remains a net balance of £3,328 7s. 8d., which the plaintiffs claim as profits arising from the business of the company. It is not suggested that the company had anything that could be called fixed capital; the liquidator's account shows the realisation of divers assets, all such as formed the general stock-in-trade with which the company dealt. The liquidator has simply wound-up the business by realising that stock-in-trade.

The learned judge has decided against the plaintiffs on two grounds. First, because the profits mentioned in cl. 5 are confined to profits arising while the business of the company is being carried on. But, assuming this to be so, it does not preclude the plaintiffs from obtaining payment of profits made but not realised during the continuance of the business. When a company is wound-up, its assets are applied in paying debts and liabilities irrespective of the nature and origin of such assets, but when all debts and liabilities have been paid and contributories have rights which depend on the nature and origin of the assets, it becomes necessary to analyse them and ascertain their origin. The question usually arises between preference and ordinary shareholders, but creditors with a claim against profits only are in at least as good a position as preference shareholders. The second ground on which the learned judge decided the case was that on the authorities the surplus of realised assets on winding-up over and above the subscribed capital is not a profit arising from the business of the company. This, in my opinion,

depends on the nature of the company's business and assets, and cannot be predicated as universally true of all companies, and the authority of *Frames v. Bultfontein Mining Co.* (2), on which the learned judge relies, is really an authority against his decision. In that case the whole of the assets of the company were sold, including goodwill; the directors were entitled to three per cent. on the "net profits" of the company in each year. The company owned and worked a diamond mine. The assets shown on the balance sheet included the value put on this mine (less a sum for depreciation) and diamonds sold and the like. The plaintiff was paid down to May 31, 1887. The company went into liquidation in April, 1888, and CHITTY, J., while rejecting the claim to any part of the profit made by the sale of the mine and goodwill, directed an inquiry as to the net profits made by the company down to May, 1888. He could not have directed such an inquiry if there was no right at all to any profits after the winding-up. In the present case all the profits arise from the sale of part of the stock-in-trade after liquidation. There is no need for an inquiry because the amount is ascertained. I am of opinion that the judgment should be reversed.

Solicitors : *Slaughter & May; Pemberton, Cope, Gray & Co.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

Re ETHERINGTON AND LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE CO., LTD.

[COURT OF APPEAL (Vaughan Williams, Farwell and Kennedy, L.JJ.), February 4, 5, 1909]

[*Reported* [1909] 1 K.B. 591; 78 L.J.K.B. 684; 100 L.T. 568;
53 Sol. Jo. 266; 25 T.L.R. 287]

Insurance—Policy—Construction—Ambiguity—Construction against insurers.

An ambiguous clause in an insurance policy should be construed against the insurers.

Insurance—Accident—Death—Exception—Policy not insuring against death "where direct or proximate cause thereof is disease or other intervening cause"—"Intervening cause"—Pneumonia following riding accident and exposure to wet.

An insurance policy provided that if during the continuance of the policy the insured sustained any bodily injury caused by accidental means, in case such injury should within three months of the accident directly cause the death of the insured the company would pay to the legal personal representatives of the insured a capital sum of money. The policy contained the following proviso : "this policy only insures against death . . . where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby." The insured when hunting fell at a fence, was violently thrown to the ground, and got wet through. As the result of the fall he suffered a severe shock to his nervous system whereby the general vitality of his body was impaired. After the fall he remounted his horse and rode home. Next day he travelled to London against the advice of his medical attendant and transacted business there. This still further impaired his vitality, and he developed pneumonia from which he died.

Held: "intervening cause" within the proviso meant a new cause, independent of the accident and breaking the connection between the accident and the death; the pneumonia from which the insured died was not such a cause; and, therefore, his administratrix was entitled to recover under the policy.

Notes. Considered: *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918-19] All E.R. Rep. 443. Approved: *Condogianis v. Guardian Assurance Co.*, [1921] 2 A.C. 125. Considered: *Smith v. Cornhill Insurance Co.*, [1938] 3 All E.R. 145. Referred to: *Ystradowen Colliery Co. v. Griffiths*, [1909] 2 K.B. 533; *Re Bradley and Essex and Suffolk Accident Indemnity Society*, [1912] 1 K.B. 415; *Alloa Coal Co. v. Drylie* (1913), 6 B.W.C.C. 398; *Lake v. Simmons*, [1926] 1 K.B. 366; *Re Jamaica Street Stepney*, 36, 38, 40 & 42, [1946] 2 All E.R. 658.

As to interpretation of insurance policies and as to accident insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 15, 211. and for cases see 29 DIGEST 68, 395.

Cases referred to :

- (1) *Joel v. Law Union and Crown Insurance Co.* [1908] 2 K.B. 863; 77 L.J.K.B. 1108; 99 L.T. 712; 24 T.L.R. 898; 52 Sol. Jo. 740, C.A.; 29 Digest 354, 2858.
- (2) *Anderson v. Fitzgerald* (1851), 4 H.L. Cas. 484; 17 Jur. 995; 29 Digest 350, 2836 v.
- (3) *Isitt v. Railway Passengers Assurance Co.* (1889), 22 Q.B.D. 504; 37 W.R. 477; sub nom. *Re Isitt and Railway Passengers Assurance Co.*, 58 L.J.Q.B. 191; 60 L.T. 297; 5 T.L.R. 194; 29 Digest 400, 3172.
- (4) *Grill v. General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600; Har. & Ruth. 654; 35 L.J.P.C. 321; 14 L.T. 711; 12 Jur. N.S. 727; 14 W.R. 893; 2 Mar. L.C. 362; affirmed (1868), L.R. 3 C.P. 476; 37 L.J.P.C. 205; 18 L.T. 485; 16 W.R. 796; 3 Mar. L.C. 77, Ex.Ch.; 36 Digest (Repl.) 6, 9.
- (5) *Fenton v. Thorley & Co., Ltd.* [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 34 Digest 266, 2264.

Also referred to in argument :

Mardorf v. Accident Insurance Co., [1903] 1 K.B. 584; sub nom. *Re Mardorf and Accident Insurance Co.*, 72 L.J.K.B. 362; 88 L.T. 330; 19 T.L.R. 274; 29 Digest 400, 3173.

Ionides v. Universal Marine Insurance Co. (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur. N.S. 18; 11 W.R. 858; 1 Mar. L.C. 353; 143 E.R. 445; 29 Digest 229, 1854.

Appeal by the defendants from a decision of CHANNELL, J., on a Special Case stated by arbitrators in an arbitration between the claimant as administratrix of the estate of Ambrose Herbert Etherington, deceased, under a policy of insurance issued by the respondent insurance company dated Feb. 25, 1900. By the terms of the policy the insurers undertook, subject to the provisions and exceptions therein-after mentioned, and to the conditions endorsed on the back thereof, that

" . . . if at any time within twelve calendar months from the date hereof, or during the continuance of this policy by renewal, the insured sustains any bodily injury caused by violent, accidental, external, and visible means, then : (A) In case such injury shall within three calendar months from the occurrence of the accident causing such injury directly cause the death of the insured, or the total and irrecoverable loss of all the sight of both eyes, or the physical separation, whether by accident or by surgical operation consequent thereon, of both hands (above the wrists) or both feet (above the ankles), or of one hand (above the wrist) or one foot (above the ankle) together with all the sight of one eye, or of one hand (above the wrist) together with one foot (above the ankle), to pay to the legal personal representatives of the insured or to the said insured, as the case may be, the capital sum of £1,000 . . . Provided always and it is hereby as the

essence of this contract agreed as follows . . . (3) That this policy only insures against death, amputation, loss of sight, or other injury where accident within the meaning of the policy is direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby."

On Feb. 13, 1907, the insured went hunting. Hounds began drawing at 11.30 a.m., and they found shortly before noon. At about 12.30 p.m. the insured, while endeavouring to jump his horse over a fence in which a strand of wire was concealed, was violently thrown to the ground, upon the far side of the fence. The ground was very wet, and the arbitrators found as a fact that he was made wet to the skin by the fall, and suffered a severe shock to the nervous system, whereby the general vitality of his body was impaired. After the fall the insured remounted his horse, and rode towards home. He was overtaken by his second horse, on which he then continued his journey home at a trot, where he arrived at about 2 p.m. The arbitrators found as a fact that to ride home in the way he did was in the circumstances the course least likely to aggravate the effects of the accident, and was rendered inevitable by it. The effect of the shock from which he suffered was to lower his general vitality, and the effect of the ride home in his then condition was to lower his vitality still further. The cumulative effect of both these causes, but not the effect of either exclusively of the other, was to lower the general vitality of his body to an extent which made the onset of pneumonia possible, and the arbitrators found that that onset thereupon took place one and a half hours after the accident.

On Feb. 14, the insured, against the opinion of his medical attendant, being still in great pain, took a journey occupying one hour and a half by train to London. He there transacted business until 6 p.m., when he developed the first physical sign of pneumonia. The arbitrators found as a fact that he was by 6 p.m. on Feb. 14, twenty-nine and a half hours after the accident, suffering from fully developed pneumonia, from which he died on Feb. 20. The journey to London and a day's work in the condition in which he then was tended to, and the arbitrators found as a fact that they did, impair still further his vitality and diminish his resistance to the pneumococci, so increasing the severity of the attack. The question for the opinion of the court was whether the death of the insured was caused in such a manner as to entitle the claimant to payment of the sum assured by the policy. CHANNELL, J., held that the death of the insured was the consequence of the accident within the meaning of the policy and gave judgment for the claimant. The insurers appealed.

McCall, K.C., and *J. D. Crawford* for the insurers.

Clavell Salter, K.C., and *Lyttelton Chubb* for the claimant.

VAUGHAN WILLIAMS, L.J.—I think that the judgment of CHANNELL, J., was right and ought to be affirmed. I am not going to say that I think that the construction of this policy is easy: I do not think it is. But I start with this, that it is well established by authorities to which I have referred in the course of the argument, that if you have to construe a policy of insurance, no matter whether it is life or fire, or, for that matter, anything, and you have an ambiguous clause, it is right that you should construe that clause against rather than in favour of the insurance company.

That has been held by this court in *Joel v. Law Union and Crown Insurance Co.* (1) and was particularly emphasised by FLETCHER MOULTON, L.J., in the course of his judgment in that case. He says [1908] 2 K.B., at p. 886:

"Hence I fully agree with the words used by LORD ST. LEONARDS in his opinion in the case of *Anderson v. Fitzgerald* (2) (4 H.L. Cas., at p. 507) to the effect

that in this way provisions are introduced into policies of life assurance which, unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable proportion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written."

I think this insurance policy should be construed *fortius contra proferentem*. That being so, I am going to consider its construction, but I want to say a word or two before I do so. The first thing is that we ought to remember in construing this policy that in *Isitt v. Railway Passengers Assurance Co.* (3) there was a decision which, if followed in this case, would make it more difficult for the insurance company to maintain their defence, because there the court held in effect that where a death resulted from an accident as the proximate cause or direct cause, whatever view you take of those words, that would be a case in which the ultimate cause was a mere result that you might expect from the accident which was the cause. I rather think that all the accident insurance companies did not like that decision, and that, therefore, the clause which we are now considering was introduced. When we are construing it we must remember that it was passed for the very purpose of getting rid of *Isitt v. Railway Passengers Assurance Co.* (3). I have no reason to doubt that that was the object of the clause, but I do not think that, though that was their desire, the insurance companies have had the commercial courage of their desire, and I do not think that they have expressed with as great plainness as they might have done that which they wished to express—that is, that in no sense should there be applied against their policies what has been laid down by WILLS, J., and HUDDLESTON, B., in the *Isitt Case* (3).

There is one other word I wish to say before I try to construe this policy, and that is this—that one must not construe it merely in reference to this particular case. One must recollect that this sort of document is regularly issued by insurance companies to persons who are desirous of effecting insurances against accidents, and one must consider where the construction which is urged upon us on behalf of the insurance company would lead if we were to adopt it. As far as I can see, if we adopt the construction that their counsel urged upon us it would be very difficult to establish the liability of the insurance company in any case except those cases in which death resulted in circumstances which used to be described as "on the spot," because the moment you have not got death on the spot there is always a possibility of an intervening cause, and it would be very difficult to look forward with any certainty to any sum being recoverable on a policy if one were to put a construction such as that which has been suggested on these policies.

I will now deal with the first words that were used by CHANNELL, J. He says :

"The first question one has to consider is what is meant by an intervening cause when used in connection with the well-known doctrine about the *causa proxima* in order that you may say in law, whether it is caused by some other thing or whether it may be said to be directly caused. I think the expression 'new cause intervening' is practically the same as that used here, 'or other intervening cause,' and that it means some new and independent thing started which together with the existing cause in some way or another—one more than the other possibly, but the two together—ultimately causes a certain result, and that you must have something that must be called a new intervening cause, in order to prevent the existing cause which is operating as producing a well-known result; you must have something new started in the way of a cause to prevent the cause which you have got being really said to be the real cause of what has happened."

I think that passage in the judgment of CHANNELL, J., is quite right. In my view, if that passage is right, and you look at the facts as found in the award here, the result is that the personal representative of Mr. Etherington is entitled to recover

A on this policy. Counsel for the insurers asked us to say, with regard to the interven-
ing cause mention in this policy, that it matters not whether it is dependent or
independent. I do not agree. I think when the intervening cause is dependent
one has a right to say that it includes all those things which could be fairly considered
as the usual attendant results of the particular accident in question. Let us see
B here how it stands. We have a fall from a horse, and a fall from a horse is un-
doubtedly a heavy fall, and, though it caused no breakage of bones, no wound, and
no obvious internal hurt, yet it involved a great shock accompanied by a severe
wetting and a ride home without any change of the wet clothes. Clearly the first
C result of such an accident would be the lowering to a great extent of the vitality of
the person who had been subjected to such a shock. In the second place, it seems
to me beyond a doubt that such a lowering of vitality in the ordinary course of things
would be likely to produce a great development of the pernicious activity of these
germs which are said to exist in the respiratory organs of every human being, and
that this pernicious activity of these germs would certainly produce, unless the
vitality was quickened again, pneumonia. It was from pneumonia so produced that
Mr. Etherington died.

D That being so, I do not trouble myself much with the cases, to see how the courts
have dealt with the question of the peril or the accident, or whatever it may be, or
whether fire or anything else was the proximate cause of the injury in respect of
which it was sought to enforce the policy. I think it is impossible to limit that
which is being put forward as the proximate cause to the one fact of the accident.
The truth of the matter is that the accident itself produces, and ordinarily produces
E certain results, according to the nature of the accident, and the result produced
according to the nature of the accident is the final step in the consequences, and it
seems to me the whole transaction is really the proximate cause of the death that
results. I do not know without looking at the cases how they deal with the case of
fire, but if the contents of the building where the fire is are more or less destroyed by
fire and by the water that is thrown upon them on account of the fire, I should be
F very much inclined to think that the resultant damage by water was due to the fact
of the fire and that in construing the policy you would treat the proximate cause
as being the fire, although there was an intervening deluge of water to put out the
fire which caused so much of the goods as were not destroyed by the fire to be spoilt.
In the present case the insurers state in the policy :

"We hereby undertake, subject to the provisions and exceptions hereinafter
mentioned, and to the conditions indorsed on the back hereof, that if at any
time within twelve calendar months from the date hereof, or during the con-
tinuance of this policy by renewal, the insured sustains any bodily injury caused
by violent, accidental, external, and visible means."

That is the first part of it, and there is no dispute about this gentleman having had
an accident coming within the policy of insurance. [HIS LORDSHIP read cl. A, and
continued :] I have no doubt that in that clause the insurance company are including
the things they are to be liable for under the policy, and among them is one thing
which happens not immediately upon the accident, but in the course of the remedies
applied to the accident, because it says, "or by surgical operation consequent there-
on." I will pass to the proviso, cl. 3 of which provides that "this policy only
insures against death, amputation, &c."—including, therefore, the one instance I
have just given where they will be responsible in respect of a death which results
from the accident plus a surgical operation rendered necessary by the accident. It
says :

"this policy only insures against death, amputation, loss of sight, or other
injury, where accident within the meaning of the policy is the direct or proximate
cause thereof but not where the direct or proximate cause thereof is disease or
other intervening cause. . . ."

In my opinion, the intervening cause means an intervening cause independent of the accident, and its usual and ordinary results. The proviso goes on: A

“Even although the disease or other intervening cause may itself have been aggravated by such accident [I put the same meaning upon intervening cause there] or have been due to weakness or exhaustion consequent thereon or the death accelerated thereby.”

Notwithstanding the fact that it would perhaps be natural to construe the words “weakness and exhaustion” as covering the case where the weakness and exhaustion were brought about by the accident itself, in my opinion, none of these words ought to be so construed. They mean that if you have got a weakness or exhaustion which is independent of the accident, then, although that weakness or exhaustion may cause an accelerated death or may be aggravated by the accident, yet the company will not be liable if the intervening cause is a cause which is independent of the accident. That is the way that I construe this policy, and in those circumstances I think we ought to affirm the judgment of CHANNELL, J., and dismiss the appeal with costs. B C

FARWELL, L.J.—I am of the same opinion. No one who has heard the able arguments on both sides in this case can feel any doubt as to the ambiguity of this policy read as a whole. That being so, I agree entirely with what VAUGHAN WILLIAMS, L.J., has said, and with what FLETCHER MOULTON, L.J., said in *Joel v. Law Union and Crown Insurance Co.* (1). An insurance company that prepares with great care, even bringing it up to date, as we have been told, so as to meet recent legal decisions, and issues to the public a printed form, is bound to make its meaning as clear as possible, and, if there is ambiguity, it does not lie in their mouths, after taking the premiums for years, to try and get out of the liability by a clause which is not clear. Moreover, if there is one thing which is clear in this policy it is the original liability in cl. A. I do not think anyone could doubt that, in any case in which death occurred within three calendar months from the occurrence of the accident causing the injury, the accident directly caused the death of the deceased, so that the deceased would come within that clause. Here the fact that a period of three months has been fixed shows that it is not intended to be confined to sudden death, a death arising merely from the accident, because I venture to think that in very few cases in which a man lingers for three months after an accident does he die of the accident pure and simple, but always of some supervening malady, such as heart failure, blood poisoning, pneumonia, paralysis, and things of that sort; the accident pure and simple by itself kills him on the spot, or certainly within a good deal less time than three months, unless something is added thereto. It is plain, therefore, to my mind, that on the construction of the primary liability clause the deceased in the present case, in whom we are told that the onset of the pneumonia bacillus took place within an hour after the accident, and in whom pneumonia was fully developed within twenty-nine and a half hours after the accident, undoubtedly died from the direct cause of the fall. It is said that that is qualified by a proviso. When there is a perfectly clear undertaking in terms put forward in the forefront of the policy, and it is said to be cut down by a subsequent proviso, we are bound to see that the company have put that in unmistakably clear terms, and, on the best consideration I have been able to give to this case, it appears to me that, unless I adopt the construction put upon it by my brother CHANNELL and by VAUGHAN WILLIAMS, L.J., I am practically cutting out from the liability in cl. 1 everything except death from the accident pure and simple which it is almost impossible to suppose would take place within three months. I decline to put any such construction on a proviso like this, which it is for the company to make absolutely clear if they desire us to limit the rights of their assured. I say they must put it in such a way that they would probably deprive themselves of most of their business if they did it. D E F G H I

KENNEDY, L.J.—I have come to the same conclusion as VAUGHAN WILLIAMS, L.J., and FARWELL, L.J., but I desire to see exactly where we stand in dealing with the question. There is no doubt that in actions on policies where the nature of the policy is indeterminate, as in accident policies—and in sea policies, *prima facie* there is an undertaking upon the happening of a certain event to make good a loss, and in those cases, as it is immaterial, in the absence of express provision in the particular policy, whether or not the mischief, or the event, is produced by negligence or otherwise, the law has generally looked only to the *causa proxima*. It is different, for example, as WILLES, J., pointed out long ago in *Grill v. General Iron Screw Collier Co.* (4), in the case of a charterparty, because there the subject-matter brings in other considerations, such as the negligence of the shipowner. It is part of his contract, and, therefore, we may go to the *causa causans* without it being necessarily the *causa proxima* and see whether the *causa causans* does or does not involve a liability. In questions about accident policies, and, generally speaking, of marine policies, however, you do look at the *causa proxima*. In the accident case of *Fenton v. Thorley & Co., Ltd.* (5), recently decided in the House of Lords, LORD LINDLEY said ([1903] A.C., at p. 454):

“In an action on a policy the *causa proxima* is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of tort the *causa causans* is by no means disregarded.”

His Lordship, as well as the other learned Law Lords, point out that it would not do to go upon what is called, I think, by one of them the rigid application of insurance law to the words of an Act of Parliament, accident in that particular legislation being connected with compensation for injury. As a matter of fact, I do not see myself that in the present case we have got anything to do with general maxims, because here the difficulty is upon the particular wording. With great respect, I do not compliment the insurance company upon this form of policy in other respects, because, to my mind, it is not desirable, if you are going to rely upon the proximate cause, the word having attained a special and technical meaning in the view of lawyers, to vary it by calling it direct or proximate cause. If you mean the same thing “direct” is superfluous, and if you mean something different one wants to know what “direct” means, or shall be understood to mean, by itself, and certainly what it means when used as an alternative to proximate. It is made worse in the particular clause which we are construing here because in cl. A, the clause in which the positive undertaking of the insurance company is given, there is no word “proximate,” it says that such injury “directly” caused the death.

But, be it directly or proximately, the real difficulty here arises from the proviso to cl. 3 which qualifies the general liability by stating that there are certain cases in which that liability will not be recognised, whether treated as exceptions or as qualifying conditions. The words that cause the difficulty are those beginning with “but not where the direct or proximate cause thereof is disease or other intervening cause.” As has been pointed out here and in other cases, if documents are made in a form that is unreasonably ambiguous, they ought to be construed in the sense most against those who are the creators of the document. I am bound to say in the present case that when you have got the words “disease or other intervening cause” you have got words of real ambiguity. For the insurers it is said that “intervening” means practically supervening or following on. Counsel for the claimant, on the other hand, says that it does not mean that; he says it must be something which is wholly unconnected with what one may call the accident as it happened at the time; it must be something that interferes with, and, so far from forming part of the connection, interferes with the connection which began with the accident and ended with the death. If I were to endeavour to put my own view in the way that it presents itself to my mind as the most accurate, and not at all in competition with anyone else’s view, it would be to put it negatively and to say that what is meant to be covered by these words “disease or other

intervening cause" is something which is not what the doctors would describe as a natural sequela of the accident. We have had lately in another case to consider that expression where it arose in connection with the results of lead poisoning. The point was whether lead poisoning developing into disease of the liver was a sequela or not. It seems to me it was not intended here to exclude liability for death where you could not say that the matter is, as some have called it, "new" and others "unconnected with" and, as I should say, where it is (as it is said by the defendants to be here) not a sequela in any sense of the accident. It was put quite shortly by my brother FARWELL a moment or two ago when he pointed out that within a few hours of this accident happening (and nobody in his senses can call it not the result of the accident) there was set up a condition of things in the region of the lung which was the birth of pneumonia, and I should say that that was in the sequence of the accident so as not to be covered by the words "disease or other intervening cause." "Disease" there must mean an intervening disease—a disease which intervenes. If, instead of being an intervention it is a sequence of that which it is the object of the insurance to protect the assured, the policy insures the assured against it. So when you get the words "due to weakness or exhaustion consequent thereon" in the last limb of the sentence, one must give those words their fullest meaning. They mean to except a case in which something which is not a sequence, but a break in the sequence, has come upon the person by reason of the weakness or exhaustion consequent on the accident.

On the whole, while I quite agree it is a difficult matter, I think what was intended to be covered were those cases in which a man is weakened by accident and then a disease entirely unconnected with that accident comes upon him which produces death that otherwise would not have been produced had there been no weakness produced by the accident. The fair meaning to be given to the policy is that the insurance company meant to guard against such cases. I think that if there is an ambiguity—and I think there is, after the arguments we have heard—it ought to be solved in favour of there not being included in the exception that which is not independent, as VAUGHAN WILLIAMS, L.J., has called it, or unconnected with the accident, but, on the contrary, is brought into being almost immediately upon the accident happening, and would not have arisen but for that accident.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.; Whitehouse, Etherington & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

DENDY v. EVANS

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), December 8, 1909]

[Reported [1910] 1 K.B. 263; 79 L.J.K.B. 121; 102 L.T. 4; 54 Sol. Jo. 151]

Landlord and Tenant—Lease—Forfeiture—Relief—Effect on underlease—Continuance of liability to pay rent.

The effect of granting relief against forfeiture to a lessee is that the lease continues for all purposes, an underlease created out of it remains in force, and the rent continues to be payable in respect of it.

Notes. The Conveyancing Act, 1881, s. 14 (relating to relief against forfeiture for breach of covenants other than for the payment of rent) has been replaced by the Law of Property Act, 1925, s. 146.

Referred to: *Fairclough & Sons, Ltd. v. Berliner*, [1930] All E.R. Rep. 170; *Driscoll v. Church Comrs. for England*, [1956] 3 All E.R. 802.

As to relief against forfeiture, see 23 HALSBURY'S LAWS (3rd Edn.) 673 et seq., and for cases see 31 DIGEST (Repl.) 527 et seq. For the Law of Property Act, 1925, s. 146, see 20 HALSBURY'S STATUTES (2nd Edn.) 739.

Cases referred to:

- (1) *Bowser v. Colby* (1841), 1 Hare, 109; 11 L.J.Ch. 132; 5 Jur. 1178; 66 E.R. 969; 31 Digest (Repl.) 535, 6592.
- (2) *Hare v. Elms*, [1893] 1 Q.B. 604; 62 L.J.Q.B. 187; 68 L.T. 223; 57 J.P. 309; 41 W.R. 297; 37 Sol. Jo. 214; 5 R. 189, D.C.; 31 Digest (Repl.) 551, 6717.
- (3) *Doe d. Wyatt v. Byron* (1845), 1 C.B. 623; 3 Dow. & L. 31; 14 L.J.C.P. 207; 5 L.T.O.S. 128; 135 E.R. 685; 31 Digest (Repl.) 551, 6715.
- (4) *Nind v. Nineteenth Century Building Society*, [1894] 2 Q.B. 226; 63 L.J.Q.B. 636; 70 L.T. 831; 58 J.P. 732; 42 W.R. 481; 10 T.L.R. 449; 38 Sol. Jo. 436; 9 R. 468, C.A.; 31 Digest (Repl.) 554, 6735.
- (5) *Thompson v. Hudson* (1869), L.R. 4 H.L. 1; 38 L.J.Ch. 431, H.L.; 20 Digest 515, 2433.

Also referred to in argument:

- Scarfe v. Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 21 Digest 224, 577.
- Jones v. Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 530, 6527.
- Grimwood v. Moss* (1872), L.R. 7 C.P. 360; 41 L.J.C.P. 239; 27 L.T. 268; 36 J.P. 663; 20 W.R. 972; 31 Digest (Repl.) 528, 6513.
- Serjeant v. Nash, Field & Co.*, [1903] 2 K.B. 304; 72 L.J.K.B. 630; 89 L.T. 112; 19 T.L.R. 510, C.A.; 31 Digest (Repl.) 553, 6733.
- Ewart v. Fryer*, [1901] 1 Ch. 499; 70 L.J.Ch. 138; 83 L.T. 551; 49 W.R. 145; 17 T.L.R. 145; 45 Sol. Jo. 115, C.A.; affirmed sub nom. *Fryer v. Ewart*, [1902] A.C. 187; 71 L.J.Ch. 433; 9 Mans. 281; sub nom. *Watney, Combe, Reid & Co. v. Ewart*, 86 L.T. 242; 18 T.L.R. 426, H.L.; 31 Digest (Repl.) 552, 6724.

Appeal by the defendants from an order of DARLING, J., holding them liable as underlessees for arrears of rent.

By a lease dated April 24, 1891, Daniel Dendy demised certain premises to Walter Wallis for twenty-one years from Mar. 25, 1891, at a yearly rent. The lease contained a covenant by Wallis to keep the premises in repair, and a proviso for re-entry upon breach of any covenant in the lease. By an underlease dated Feb. 11, 1907, Wallis demised the premises to Alfred Evans for five and a quarter years from Dec. 25, 1906, the remainder of the term of twenty-one years less three days, at the yearly rent of £80 payable quarterly. This underlease contained a covenant by

the underlessee to keep the premises in repair similar to that contained in the lease, and there was a proviso for re-entry upon breach of any covenant in the underlease. Alfred Evans died on Nov. 29, 1907, and by his will appointed the defendants the trustees and executors thereof, and the premises above mentioned became vested in them subject to the trusts of the will. In 1908 Dendy considered the property was out of repair and served Wallis with the notice required by the Conveyancing Act, 1881, s. 14, and on Oct. 27 issued a writ in the King's Bench Division against him to recover possession by reason of a breach of the covenant to keep the premises in repair. Wallis gave notice of this action to the defendants, and served them with a notice requiring them to execute certain repairs to the premises. By an indenture of Feb. 16, 1909, Wallis as beneficial owner assigned to the plaintiff, Kate Dendy, the premises comprised in the lease of April 24, 1891, for the residue of the unexpired term granted by that deed, subject to the underlease of Feb. 11, 1907, with the benefit of the arrears of rent thereunder due from Alfred Evans or his executors from June 24, 1908. The plaintiff then applied in the action of *Dendy v. Wallis* for relief from forfeiture under the Conveyancing Act, 1881, s. 14, and on May 28, 1909, an order was made by the master by consent that

"all further proceedings in this action be stayed, and that the applicant be relieved from any forfeiture of the lease dated April 24, 1891, referred to in the indorsement of the writ on this action, and that she do hold the demised premises according to the said lease without any new lease."

This action was then brought by the plaintiff against the defendants as executors of Alfred Evans claiming the sum of £60, being three quarters' rent of the premises to Mar. 25, 1909, due under the underlease of Feb. 11, 1907.

The case was heard by DARLING, J., on July 24, 1909, when he held that the order giving relief from forfeiture continued the lease and also the underlease for all purposes, and the defendants were therefore liable on the covenants and the plaintiff was entitled to the rent. The defendants appealed.

J. A. Foote, K.C., and *Ward Coldridge* for the defendants.

E. M. Pollock, K.C., and *Schiller* for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This appeal has been very ably argued, but I am unable to doubt that the judgment of DARLING, J., was quite correct. The question which has been argued before us is this. It is said that the issue of the writ by the lessor was an irrevocable election by him to treat the lease as void; and not only so, but that it made the lease void, and necessarily put an end to the right of the lessee to maintain an action against the sublessee upon the underlease.

Is there any foundation for that proposition? I think that it is not unimportant to consider what was the old law on the subject of granting relief against forfeiture. I am quite aware that the old law prior to the Conveyancing Act, 1881, did not apply to forfeiture for breach of covenant to repair, but only of a covenant for the payment of rent; but what was the old law in that respect prior to the Landlord and Tenant Act, 1730? I think it is reasonably plain. The landlord commenced his action of ejectment under the proviso for re-entry for nonpayment of rent. Two things might happen: The action might not have proceeded to judgment or it might have proceeded to judgment with execution. What the defendant could do in the way of obtaining relief was to file his bill in Chancery, which would take varying forms according as the ejectment action had or had not proceeded to final delivery of possession. In the first case, where the bill was filed before judgment, the relief claimed would be to restrain further proceedings in the action at law on the terms of the lessee paying the arrears of rent. The effect of that was that no new lease was ordered to be granted by the Court of Chancery. The court simply issued an injunction to restrain the landlord from proceeding to enforce the right of entry which he said he had, and which the lessee by the necessity of the case

was bound to admit that he had. If, on the other hand, the ejectment action had proceeded to judgment, the lease was gone at law, and the Court of Chancery could not set it up again, though it could grant relief on similar terms, but it was necessary to make an order that the landlord should grant a new lease.

Under these circumstances it seems to me a mistake to say that the only thing which the Court of Chancery could do was to grant a new lease. I will only refer to the judgment of WIGRAM, V.-C., in *Bowser v. Colby* (1), where he said (1 Hare at p. 126):

"It is obvious that there were two distinct cases which might occur before the statute;—first, where the lessor having brought his ejectment, the tenant, before judgment or before execution, filed his bill for relief, and obtained an injunction to restrain the lessor from turning him out of possession. In that case, the tenant being enabled to continue in possession, and remaining in the meantime a debtor to the landlord for the amount of the rent, the latter, until the hearing of the cause, would have no security for his rent, unless the amount due were paid into court: secondly, there was the case where the lessor actually recovered possession in the ejectment; and the only relief which the tenant could have, was such as the court might give him at the hearing."

To my mind it is perfectly plain that the old rule of the Court of Chancery was inconsistent with the view which has been argued before us—viz., that the mere issue of the writ, without more, terminated the interest of the lessee. Then followed the statutory enactments on the subject, the first of which was the Landlord and Tenant Act, 1730, which by s. 3 recognises and confirms the long-established jurisdiction of the Court of Chancery in granting injunctions in cases like the present, but limited the jurisdiction by fixing a time within which the application must be made, and by certain other conditions, and then by s. 4 in terms granted a new power to a court of law, though it may be that, even before the statute, courts of law without any express authority did grant similar relief. Section 4, reading it shortly, says that if the tenant shall at any time before the trial in such ejectment pay all rent and arrears, then

"all further proceedings on the said ejectment shall cease and be discontinued, [and if such lessee] shall upon such bill filed as aforesaid be relieved in equity, he shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made to him."

That section was substantially re-enacted by the Common Law Procedure Act, 1852, s. 212; and, in my opinion, the reading of this enactment is that the property is held "according to the lease thereof made," not according to a new lease thereof made in similar terms; that is to say, the lease is treated as never having been forfeited. It is true that we are not called upon to decide this case upon the interpretation of either of these two Acts of Parliament or upon the old procedure, but it has been necessary at least to consider them, because it is of very great importance to arrive at a conclusion as to what is the effect of the mere issue of the writ not followed by judgment in the action. Counsel for the defendants has relied on the judgment of DAY, J., in *Hare v. Elms* (2), but that learned judge, after elaborately stating the history of the law, said ([1893] 1 Q.B. at p. 609):

"In *Doe d. Wyatt v. Byron* (3) there was no judgment in ejectment at all. The defendants, who were underlessees of the term less two days, appeared to the writ as soon as they heard of it, and before judgment, and asked the judge to exercise his jurisdiction by allowing them to pay the rent and costs into court at once. They asked to be allowed to pay the rent and costs into court before judgment and execution took place, and asked for a stay of proceedings upon payment of the rent and costs under the Landlord and Tenant Act, 1730. The judge allowed that to be done, and under his direction the rent and costs were paid to the lessor. Everybody therefore remained in the same position as they

always had been. The judge's decision was upheld by the court. That case, however, is no authority for the proposition that an underlessee has a right to deal with the matter in the absence of the original lessee. The lessees there were not necessary parties at all. The lease had never been determined; there had been no judgment or entry in ejectment."

I therefore think it is reasonably clear that there was nothing in the issue of the writ in the action of *Dendy v. Wallis* which put an end to the lease; and, further, that the mere issue of the writ in that action had no effect or operation upon the underlease.

Now comes the consideration of the section of the statute under which alone the proceedings in the present matter arise—viz., the Conveyancing Act, 1881, s. 14. After first providing that notice must be given, which was given here, before a right of entry or forfeiture arises, sub-s. 2 says this:

"Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, appeal to the court for relief, and the court may grant or refuse relief as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit, and in the case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit."

Here the learned judge thought fit to make an order, following the settled statutory form by which relief was given against forfeiture for nonpayment of rent, the language of the order being that proceedings were stayed upon terms of payment of the rent, and that the lessee "do hold the demised premises according to the said lease without any new lease." In my opinion, the meaning of that order is that the right of entry for forfeiture is got rid of, that the ground on which the plaintiff sought relief has been disposed of by the order made by the court under s. 14. and that for all purposes and as between all parties rights are absolutely unaffected by the circumstance that there was a breach of covenant and that a writ was issued not followed by judgment or entry; and I cannot accede to the suggestion that the effect of this order was merely to reinstate the old lease or grant a new lease from the date of the order leaving the underlease to perish, although the original cause of mischief—namely, the forfeiture by the lessee—has been absolutely and entirely got rid of. In my opinion, that would be an unreasonable and an unnatural construction, and I think DARLING, J., was quite right when he said that the lease continued for all purposes. It is the original lease which continues, not a new lease; and, that being so, the derivative lease which was created out of the original lease has not ceased to exist, but is still a valid lease in respect of which the defendants are liable to the plaintiffs on the covenants. For these reasons, which are substantially those given by DARLING, J., I think this appeal fails and must be dismissed with costs.

FLETCHER MOULTON, L.J.—I am of the same opinion.

FARWELL, L.J.—I agree. Relief against forfeiture is a very old head of equity, the basis being that the particular covenant or proviso for re-entry which enables the forfeiture was intended primarily as a security for the performance of some specific act; and when the court was satisfied that the act had been performed it gave relief against the forfeiture by directing there should be no forfeiture. I will refer to LORD DAVEY's definition in *Nind v. Nineteenth Century Building Society* (4) where, referring to this section, he said ([1894] 2 Q.B. at p. 233):

"The words 'relief' and 'relieve' are the appropriate terms to describe the remedial action of the court of equity in cases where a penalty or forfeiture

has been incurred, which the court thinks it equitable that the complainant should not lie under or suffer."

It is not the case of the lease having ceased to exist and a new lease being created. The court says: "The true meaning of the parties was that the right of re-entry was a security for the performance of the covenant; and, the lessee being prepared to do equity, the Act now enables the court to give him relief on the footing that there shall be no forfeiture at all." It is plain that that is so, not only from what LORD DAVEY said in the passage I have read, but from what LORD HATHERLEY said with reference to the forfeiture of a mortgage, which is on the same basis. In *Thompson v. Hudson* (5) he says (L.R. 4 H.L. at p. 15):

"Equity regards the security that has been given as a mere pledge for the debt, and it will not allow a forfeiture of the property pledged."

The forfeiture is stopped in limine, so that there is no question of any destruction of an estate which has to be called into existence again. I entirely agree with what the Master of the Rolls has said in his judgment.

Solicitors: *Upton, Britton & Lumb; Hare & Co.*, for *Cooper & Norgate*, East Dereham.

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

Re WINN. BROOK v. WHITTON

[CHANCERY DIVISION (Parker, J.), November 30, December 1, 1909]

[Reported [1910] 1 Ch. 278; 79 L.J.Ch. 165; 101 L.T. 737]

Will—Class gift—Ascertainment of class—Time—Testator's death—Trust for next of kin "whoever they may be, living at time of trusts failing as aforesaid."

Where a gift is made by will to the testator's "next of kin," or his "nearest relations," etc., subject to prior interests, *prima facie* the class is ascertainable at the testator's death. This presumption was not rebutted even though the gift in question was to "my next of kin, whoever they may be, living at the time of the failure of the trusts" mentioned in the will. It might well have been rebutted, however, if the gift had been to "my next of kin at the time of" the trust failing as aforesaid unless the next of kin were intended to be ascertained in accordance with the Statute of Distribution, 1670, in which case the class would be ascertained at the testator's death.

Notes. The Statute of Distribution, 1670, has been replaced by the Administration of Estates Act, 1925, so far as affects an intestacy arising on a death after 1925, and this has been amended by the Intestates' Estates Act, 1952, so far as affects an intestacy arising on a death after 1952. Any reference to statutory next of kin in an instrument *inter vivos* or in a will coming into operation after such dates shall be construed as referring, unless the context otherwise requires, to the persons who would take beneficially under an intestacy arising under these respective Acts. (Administration of Estates Act, 1925, s. 50 (1) and Intestates' Estates Act, 1952, s. 6 (2).)

Distinguished: *Re Bulcock, Ingham v. Ingham*, [1916] 2 Ch. 495. Referred to: *Re Hooper, Hooper v. Carpenter*, [1936] 1 All E.R. 277; *Re Krawitz's Will Trusts, Krawitz v. Crawford*, [1959] 3 All E.R. 793.

As to legacies to next of kin, see 34 HALSBURY'S LAWS (2nd Edn.) 317 et seq., and for cases see 44 DIGEST 875 et seq. For the Statute of Distribution, 1670, see

9 HALSBURY'S STATUTES (2nd Edn.) 658; for the Administration of Estates Act, 1925, s. 50 (1) see *ibid.* 758; for the Intestates' Estates Act, 1952, s. 6 (2), see 32 HALSBURY'S STATUTES (2nd Edn.) 122. A

Cases referred to :

(1) *Re Nash, Prall v. Bevan* (1894), 71 L.T. 5; 38 Sol. Jo. 513, C.A.; 44 Digest 884, 7408.

(2) *Bullock v. Downes* (1860), 9 H.L. Cas. 1; 3 L.T. 194; 11 E.R. 627, H.L.; 44 Digest 876, 7328. B

Also referred to in argument :

Lee v. Lee (1860), 1 Drew. & Sm. 85; 29 L.J.Ch. 788; 2 L.T. 532; 6 Jur. N.S. 621; 8 W.R. 443; 62 E.R. 310; 44 Digest 880, 7378.

Jones v. Colbeck (1802), 8 Ves. 38; 32 E.R. 264; 44 Digest 891, 7486.

Ware v. Rowland (1848), 2 Ph. 635; 17 L.J.Ch. 147; 11 L.T.O.S. 305; 12 Jur. 165; 41 E.R. 1089, L.C.; 44 Digest 880, 7372. C

Sturge and Great Western Rail. Co. (1881), 19 Ch.D. 444; 51 L.J.Ch. 185; 30 W.R. 456; sub nom. *Sturge v. Sturge, Sturge to Great Western Rail. Co.*, 45 L.T. 787; 44 Digest 881, 7383.

Clapton v. Bulmer (1840), 5 My. & Cr. 108; 9 L.J.Ch. 261; 5 Jur. 477; 41 E.R. 312, L.C.; 44 Digest 885, 7416. D

Wharton v. Barker (1858), 4 K. & J. 483; 4 Jur. N.S. 553; 6 W.R. 534; 70 E.R. 202; 44 Digest 883, 7397.

Originating Summons to determine the construction of a will.

The testator by his will gave a legacy subject to some preceding life interests, upon trust for "my next of kin, whoever they may be, living at the time of the failure of the trusts" mentioned in the will. E

F. L. Wright for the summons.

Romer, K.C., and *Northcote* for the legal personal representatives of the residuary legatee under the testator's will.

A. Grant, K.C., and *Tomlin* for the defendant, Fanny Musson.

Martelli, K.C., and *W. F. Webster* for the defendant, Edith Brook. F

PARKER, J.—Before considering the authorities in this case I propose to see what light the will itself, and the particular words of it, throw upon the question for decision. The gift I have to consider is a gift by reference to a former gift in the will, and I think it will be more simple to deal with the first gift before coming to the gift which is really in question. It is a gift of £15,000 to trustees, which they are to invest and hold upon trust to pay the income to the testator's niece, Elizabeth Brook, for her life, and after her death, in the event which happened, of her leaving no issue, to her husband for his life. If she did leave issue, her husband was to take a life interest in one moiety. Subject to those gifts, provision is made for any children or issue of the first tenant for life, Elizabeth Brook, and there are trusts during the minority of those children for their maintenance and otherwise. Then comes a proviso : G

"Provided always, and I do declare that in the event of the death of the said Elizabeth Brook without issue, [that is the event which happened,] or in the event of her having issue, and of such issue happening to die before becoming entitled to the whole of the said trust fund of £15,000 or the securities upon which the same shall be invested, my said trustees or trustee for the time being shall stand possessed of and interested in the same trust moneys and securities, or so much thereof as shall not have been applied under the trusts aforesaid." H

That is for the benefit of the children, if there were children, who died before obtaining a vested interest. Now come the material words : I

"Subject to the aforesaid provisions in favour of my said niece and her said

A husband, upon trust for my next of kin, whoever they may be, living at the time of the trusts failing as aforesaid;"

that is to say, living when she dies without issue, or living when, there being issue, those issue have died without obtaining a vested interest. Then comes an exception from the class :

B "Except the children or other descendants of my late nephew, Thomas Winn, deceased, whose children are hereinbefore, as well as by other means, amply provided for."

C If one looks at the gift alone, without reference to the surrounding circumstances, it appears to me that the testator is contemplating a class described as "my next of kin," some members of which may, and some members of which may not, survive a certain period, namely, the period that he refers to as "the time of the trusts failing as aforesaid." The words "whoever they may be" appear to me to indicate a doubt in the testator's mind, and that doubt is capable, in my opinion, of explanation in one or other of two possible ways. Of course, no man is aware who his next of kin may be at the date of his death. That is the first doubt. The second doubt is that it is "whoever they may be, living" at a future time; and though D grammatically "whoever they may be" refers to the next of kin, I think it is possible that the testator's doubt really was in reference to the words "living at the time of the trusts failing." It is not quite the grammatical way of expressing it, but it is a possible way in my opinion. Now we come to the exception: "Except the children or other descendants of my late nephew Thomas Winn deceased." It appears from the will itself that there were nephews of the testator living at the date of the will, and it also appears as a matter of law that unless all those nephews and nieces were to die before the date of the testator's death, the children or other E descendants of the late nephew Thomas could not come in as next of kin, whether "next of kin" refers to nearest in blood, which is really the natural meaning of the words, or whether it refers to the enlarged class of next of kin under the statute, because there are cases under the statute where children represent parents, but F there is no representation of parents by children in the case of a nephew and niece. Therefor, naturally, it would appear that the testator is contemplating the possibility of the next of kin—that is to say, the class who are to take when the time comes, as including somebody who will not be next of kin if the circumstances remain the same as at the date of death. It is possible he may have contemplated the death of his nephews and nieces before his own, though he was an old man, and it is possible also that he may have been contemplating a class to be ascertained at G those things appears to be possible.

Having said that about the form of the original gift, let me go on and see what the rest of the will says. It goes on to declare

H "that my said trustees or trustee for the time being do and shall stand and be possessed of and interested in the same sums respectively and the income thereof, upon and for such and the same trusts, ends, intents, and purposes, and with, under, and subject to all such and the same conditions, powers, provisos, declarations, and limitations as to each such remaining sums of £15,000 and the income thereof, for or in favour of each of my said nephews I the said Frederick Straw and Thomas Straw and their respective wives and issue as are hereinbefore stated with regard to the like sum and the income thereof in favour of my said niece Elizabeth Brook, her husband and issue, and with the like gift over in favour of my next of kin except as aforesaid for want of issue respectively as hereinbefore mentioned, and as if the names of my said nephews Frederick Straw and Thomas Straw respectively had been hereinbefore written in the place and stead of the name of my said niece and the names of their wives respectively in the place and stead of the name of the

said William Henry Brook (altering the gender and omitting the declaration as to coverture) in manner aforesaid."

He then says :

"As to each such remaining sums of £15,000 and the income thereof, for or in favour of each of my said nephews the said Frederick Straw and Thomas Straw and their respective wives and issue as are hereinbefore stated with regard to the like sum and the income thereof in favour of my said niece Elizabeth Brook, her husband and issue, and with the like gift over in favour of my next of kin except as aforesaid for want of issue respectively as hereinbefore mentioned, and as if the names of my said nephews Frederick Straw and Thomas Straw respectively had been hereinbefore written in the place and stead of the name of my said niece and the names of their wives respectively in the place and stead of the name of the said William Henry Brook (altering the gender and omitting the declaration as to coverture) in manner aforesaid."

It appears to me that the form of those gifts, and in particular the expression "with the like gift over in favour of my next of kin except as aforesaid," points to this, that the testator really contemplated that in respect of the final limitation of this sum of £15,000 the same class would take, subject, however, in each case to their surviving what I may call the period of distribution, namely, the failure of the preceding trusts, and it does not seem to me that the words are so appropriate if I am to assume that the testator meant that in each case there would be a different class to take under the ultimate limitation in favour of the next of kin. Passing on in the will I find that there is a gift to Thomas Tatton, and trusts in favour of his children and issue, with an ultimate gift in this form :

"In case of the death of the said Thomas Tatton without issue living to acquire a vested interest in the said last-mentioned trust fund, then I direct that the said sum of £5,000 and the securities upon which the same shall be invested shall be paid and applied by my said trustees or trustee for the time being to such person or persons upon such trusts and for such uses, intents, and purposes as the said Thomas Tatton shall by his last will and testament duly executed direct and appoint, and in default thereof to my next of kin except as aforesaid."

There is no limitation in that case making it necessary for those members of the class of next of kin who are to take to survive the period of distribution.

It seems to me, therefore, looking at the will alone, that except for any inference which is to be drawn there from the use of the words "whoever they may be," or from the exception of the children "or other descendants of my late nephew Thomas Winn," or from the condition of the family at the date of the death, and the fact which I have not mentioned at present, and which I do not think is very material, that the residuary gift is in favour of nephews and nieces whose position, had things remained at the date of the testator's death in the same position as they were at the date of his will, would have been ascertained—except from any inference from all those facts it appears to me that the natural construction of the words is that there is to be a class ascertained at the same time, and that the members of that class so ascertained at the period of distribution are to be entitled under the ultimate gift, and the question I have to decide is, when is that class to be ascertained? Of course, in every case of a gift "to my next of kin" or "my nearest relations," or any gift of that kind, *prima facie* the rule is, and I think, not only is it a rule of construction, but it is the natural meaning of the words, that the class is to be ascertained at the death of the testator. When the testator dies certain people answer the description of his relatives, or his next of kin, or his nearest in blood, or any of those expressions; and it is difficult to see in the present case if I am right in the construction I put on the words, namely, that he is contemplating a class some of whom may survive and some of whom may die before a certain period, what other time the class is to be ascertained at than at the date of the

A testator's death. Then it appears to me that the most natural construction, apart from authority and apart from those particular circumstances to which I have already referred, is that this is a gift to the next of kin to be ascertained at his death; but any one of the class so ascertained in order to take under the ultimate gift has to survive that period.

B I will consider the special circumstances of the case. It is said, having regard to the expression "whoever they may be," having regard to the doubt raised by that expression, having regard to the exception of children or other descendants of his nephew, such children or other descendants not being as a matter of fact within the class at the time of the death; having regard also to the state of the testator's family—namely, that at the time he had numerous nephews and nieces then living, and that he was an old man, and the nephews and the nieces are residuary legatees —
C I ought to draw the contrary inference, and say that the class in this case really is to be ascertained at the failure of the prior trust in respect of this legacy of £15,000. The first and initial difficulty in giving that construction to the words appears to me to be that it would be really striking out the word "living" altogether. I think if the words had been: "in trust for my next of kin at the time of the trust failing as aforesaid," there would have been very strong ground for saying
D that that class was to be ascertained on the failure of the trust; but it seems to me that the class which is to be ascertained is more numerous than the members who ultimately take, or may be more numerous because it is a class some members of which may, in the contemplation of the testator, live beyond the period of distribution, and some members may not. That is the first difficulty, to my mind, in that construction, and it appears to me really an insuperable difficulty. With
E regard to the other points which have been raised, as to the expression "whoever they may be," I have already in part dealt with that. It appears to me that those words may either mean the doubt in the testator's mind as to who will be his next of kin, which, after all, is a very reasonable doubt, and it may refer to what he is going to say, and mean that he is in doubt as to which of the next of kin might survive the period. With regard to the exception, I have come to the
F conclusion that no great weight ought to be attached to the exception. Supposing I assume the testator knew all the material facts, and was aware of all the legal principles which led up to that construction of his will, he clearly does contemplate a gift to the next of kin of the £5,000 which is a gift to Thomas Tatton. He does contemplate that in that case, where there is no question of ascertaining the class at any other period, there is a doubt whether that will include the children of the
G descendants of the nephew, if he was in doubt with regard to a gift which plainly must be a gift to the next of kin ascertained at the death. It does not appear to me that one can attach any very great importance to the fact that he has expressed a small doubt. I cannot attribute that to a doubt in his own mind that the class might include people who might not be in it at his death, because in the latter case it was perfectly clear that he has a doubt as to whether the class to be
H ascertained should not include these very members who are excepted. Lastly, there is the question of the residuary gift. Of course, in a sense, when a testator makes anybody his residuary legatee, and leaves his property to him, he does contemplate that the residuary gift shall take effect. I do not think I ought to say that the other gifts in the will, as to which alone a reasonable doubt does not arise, ought to be construed on the footing that the testator made them only on the footing
I that the residuary gift would take effect. It appears to me that it would be carrying the argument as to what the testator contemplates too far. Of course, he contemplates that everybody to whom he gives a gift will survive; but I do not think I ought to construe another clause in the will on the footing that he must have contemplated that they must survive, and that they must be the next of kin at a certain period, having regard to the uncertainty of human life. I come to the conclusion that, looking at the will, apart from authority, the class is to be ascertained at the death, only those members taking who survive the period of

distribution; and it seems to me that this decision is practically on all fours with the decision of the Court of Appeal, *Re Nash, Prall v. Bevan* (1) (71 L.T. at p. 5). In that case

"a testator gave his residuary estate to his wife for life, and after her death to 'the nearest relatives' then living (to be hereafter named in a codicil). He died without having executed any codicil. Held, that the class must be ascertained at the death of the testator—namely, his next of kin by blood at that date—but that only those members of the class could take who survived his wife."

That case is important having regard to the argument which has been put forward by counsel for the defendant: that it is much easier to construe a clause of this nature as having reference to an artificial class to be ascertained at a future period than it would be if that class were the next of kin according to statute. Of course, in this particular case of *Re Nash, Prall v. Bevan* (1) to which I am referring there were none of the circumstances in this case, which are said to be exceptional, to take the gift out of what I may call the general rule, but it does show that a gift to the nearest relatives then living after a gift to the tenant for life is *prima facie* to be construed as a gift to the nearest blood at the testator's death who survives the period of distribution, and, so far as that goes, it is on all fours with this case which I have to decide.

I, therefore, come to the conclusion that the exceptional circumstances to which I have been referred have not the weight which has been attached to them by counsel. It appears to me that the case really becomes one on all fours with the decision of the Court of Appeal. As I have said before, I am not prepared to attach the weight which counsel has asked me to attach to these exceptional circumstances. In *Re Nash* (1) in the Court of Appeal LORD DAVEY says (71 L.T. at p. 7), quoting from JARMAN ON WILLS (5th Edn.), vol. 2, p. 983:

"Where a testator directed personal estate and the produce of real estate to be laid out for accumulation for ten years, and then a certain part thereof divided among such of the testator's next of kin and personal representatives as should be then living, LORD THURLOW held that the next of kin at the testator's death surviving the specified period were entitled; for it was plain that the testator meant some class of persons of whom it was doubtful whether they would live ten years'."

Then Lord Davey says:

"This seems to me to be good sense, good logic, and good law";

and he therefore agrees with the decision of the other learned judges.

With regard to the other cases which have been called to my attention, I am not sure that it is necessary to deal with them, but as I understand the law as appearing from those cases it is as follows: Where there is a gift to next of kin, or nearest of blood, or any similar expression, the time at which the class is to be ascertained is the death of the testator. It is always possible for anybody to say that that class is to be ascertained at a future time, and if the testator makes a gift to the tenant for life, and then says: "After the death of the tenant for life to my aforesaid relations," or "my next of kin," or "to the persons who shall then be my next of kin," it is perfectly clear that, apart from reference to the Statute of Distributions, the class is to be ascertained at a future date in accordance with the express language of the testator; but where a testator, referring to his statutory next of kin, uses expressions such as "the persons who shall then be entitled by virtue of the Statute of Distributions" the ordinary rule which would have ascertained the class at the time the testator points to—namely, the period of time specified—is again rebutted, because of the necessity for any person who claims under the gift to prove his title by virtue of the Statute of Distributions; and *Bullock v. Downes* (2) and similar cases appear to me to be really exceptions based upon the necessity of proving a title by virtue of the statute. You therefore have

the general rule that, when nothing is said as to the time, the class is to be ascertained at the death of the testator, or at a certain time; but if he says that the persons entitled are those who can prove their title by virtue of the Statute of Distributions, then you go back to the original time, because nobody can prove that except those entitled at the death of the testator. It is always useful to bear in mind those general principles.

I hold, therefore, in the present case that the class is the class of next of kin at the death of the testator, and only those members of the class take who survive the period. The result is that the gift, which does not take effect in this case, falls into residue, and goes to the next of kin.

Solicitors: *Stileman & Neate*, for *Toynbee, Larken & Co.*, Lincoln; *Burton, Scorers & White*, Lincoln; *Collyer, Bristowe & Co.*, for *A. Trotter*, Lincoln.

[*Reported by R. C. CARTER, ESQ., Barrister-at-Law.*]

READ AND ANOTHER v. PRICE AND OTHERS

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), June 28, 29, 1909]

[Reported [1909] 2 K.B. 724; 78 L.J.K.B. 1137; 101 L.T. 60; 25 T.L.R. 701]

Limitation of Action—Acknowledgment—Loss of written acknowledgment—Proof of contents by oral evidence.

Obligors under a bond bound themselves jointly and severally for the repayment of a sum of money advanced with interest payable half-yearly. One of them died in 1905. The deceased co-obligor had been in the habit of sending, down to the year in which he died, the half-yearly interest by cheques inclosed in letters. The personal representative of the creditor who received these letters stated in evidence that the letters had been destroyed, but said that they contained, in addition to the cheques, acknowledgments of the existence of the bond.

Held: although s. 5 of the Civil Procedure Act, 1833, required an acknowledgment to be in writing, yet where the written document had been lost oral evidence of its loss and purport was admissible; in the present case the acknowledgments contained in the letters written by the co-obligor were sufficient to prevent the statute from being available as a defence to an action by the personal representatives of the creditor for principal and interest due on the bond.

Notes. Section 5 of the Civil Procedure Act, 1833, has been replaced by s. 24 (1) of the Limitation Act, 1939: 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Referred to: *Barbour v. Rowe*, [1948] 2 All E.R. 1050; *Jones v. Bellegrove Properties, Ltd.*, [1949] 1 All E.R. 498.

As to acknowledgments, see 24 HALSBURY'S LAWS (3rd Edn.) 299–304, 312–316, and for cases see 32 DIGEST 352 et seq.

Cases referred to:

- (1) *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154; 45 L.J.P. 49; 34 L.T. 372; 24 W.R. 860, C.A.; 22 Digest (Repl.) 215, 2035.
- (2) *Brown v. Brown* (1858), 8 E. & B. 876; 27 L.J.Q.B. 173; 30 L.T.O.S. 273; 4 Jur. N.S. 163; 120 E.R. 327; 44 Digest 343, 1724.
- (3) *Baillie v. Lord Inchiquin* (1796), 1 Esp. 435, N.P.; 32 Digest 377, 608.
- (4) *Haydon v. Williams* (1830), 7 Bing. 163; 4 Moo. & P. 811; 9 L.J.C.P. 16; 131 E.R. 63; 32 Digest 377, 608.

Also referred to in argument :

Spickernell v. Hotham (1854), Kay, 699; 2 Eq. Rep. 1103; 2 W.R. 638; 69 E.R. 285; 32 Digest 360, 435.

Re Dixon, Heynes v. Dixon, [1900] 2 Ch. 561; 69 L.J.Ch. 609; 83 L.T. 129; 48 W.R. 665; 44 Sol. Jo. 515, C.A.; 32 Digest 400, 799.

Routledge v. Ramsay (1838), 8 Ad. & El. 221; 3 Nev. & P.K.B. 319; 1 Will. Woll. & H. 232; 7 L.J.Q.B. 156; 2 Jur. 789; 112 E.R. 821; 32 Digest 359, 423.

Appeal from a decision of CHANNELL, J., reported [1907] 1 K.B. 577.

On Mar. 10, 1908, an action was commenced by the plaintiffs, Elizabeth Read and Edward Buchanan, claiming the sum of £1,240 17s. 8d., as executors of John Augustus Read, deceased, for principal and interest due upon the defendants' bond, dated June 28, 1879, given to John Augustus Read, conditioned for payment of £1,000 on June 27, 1881. The defendants, by their defence, pleaded that the cause of action arose more than twenty years before the issue of the writ, and that, therefore, the plaintiffs' claim was barred by s. 3 of the Civil Procedure Act, 1833. The plaintiffs, by their reply, alleged that within twenty years before the commencement of the action the late Vincent Bailey, who was a co-obligor with the defendants in respect of the bond and died in 1905, made acknowledgments in writing, signed by him, that the debt claimed by the plaintiffs remained unpaid and due to the plaintiffs, or one of them. Acknowledgments were, it was stated, also contained in (i) an affidavit sworn by Reginald Herbert Bailey, the executor of the co-obligor, Vincent Bailey, in the year 1906, on an application for probate of the will of the co-obligor, and (ii) an affidavit sworn by the same person on Dec. 13, 1906, in a certain action in the Chancery Division. The bond sued upon was as follows :

"Know all men by these presents that we, Vincent Bailey, of . . . Frederick G. H. Price, of . . . Sheldon D. Driver, of . . . John G. S. Sebright, of . . . and . . . are held and firmly bound unto John Augustus Read, of . . . in the sum of £2,000 to be paid to the said John Augustus Read, his executors, administrators, or assigns, for which payment to be well and truly made we bind ourselves and each of us, and the heirs, executors, and administrators of us and each of us, and of every of them jointly and severally by these presents. Now the condition of the above-written bond or obligation is such that if the said Vincent Bailey, his heirs, executors, or administrators, shall pay, or cause to be paid to the said John Augustus Read, his executors, administrators, or assigns, the sum of £1,000 on June 27, 1881, together with interest thereon in the meantime at the rate of £10 per cent. per annum by half-yearly payments on Dec. 27 and June 27 in each year, then the above-written bond or obligation shall be void, otherwise the same shall be and remain in full force and virtue. And it is hereby declared that each of the said obligors shall be held and deemed to be principals as regards the obligee, so that if time for payment of principal or interest shall be given to the principal by the obligee it shall not discharge them or either of them."

The action came on for trial before CHANNELL, J., sitting without a jury, and in the course of the trial it appeared that the payments of interest made to Elizabeth Read, one of the plaintiffs, by the co-obligor, Vincent Bailey, had always been made by cheques accompanied by letters. Elizabeth Read, in giving her evidence, said that interest was paid half-yearly on the bond from the year 1888 down to June, 1905, but that as Vincent Bailey did not pay punctually she generally had to write for the interest a second time; that he sent letters of excuse for non-payment of the interest, promising to pay in a week or two; and then she would receive a letter inclosing a cheque. She further stated that she had destroyed these letters, believing that it was sufficient if she kept the bond in her possession and the interest was paid. The plaintiffs obtained leave to amend their reply so

as to enable them to rely on these letters as being acknowledgments of the debt.

It was decided by CHANNELL, J., that the acknowledgments by Vincent Bailey in the letters containing the payments were sufficient acknowledgments of the existence of the bond as against the other co-obligors, and that, the letters having been destroyed by the recipient of them, parol evidence was admissible for the purpose of showing that there had been such acknowledgments in writing. From that decision the defendants appealed.

C. A. Russell, K.C., and Rayner Goddard for the defendants.

Boxall, K.C., and E. E. Humphreys for the plaintiffs.

SIR HERBERT COZENS-HARDY, M.R.—This is an appeal from a decision of CHANNELL, J., who held that the defendants are liable to pay the plaintiffs on a bond given jointly and severally by the defendants and certain other persons conditioned for the payment of a principal debt and interest.

The first point raised was that any acknowledgment to take the case out of the statute of limitations applicable to the bond must be in writing, and no writing was produced. We did not call upon counsel for the plaintiffs to deal with that, because it seemed to me and to my brothers quite clear that although the statute says that the acknowledgment must be in writing, you may prove the writing in any way. You may prove the existence of the writing by the ordinary law of evidence. When the writing is lost and the proof of the loss is satisfactory to the court, you may give secondary evidence of the contents of the lost document just as in the case where writing is required under the Statute of Frauds you can always prove the existence of the writing by parol evidence if proof is given of the loss of the written document. So here the learned judge in the court below decided that parol evidence was admissible. He then heard the evidence of the plaintiff Mrs. Read, who deposed to letters which she had received from time to time from Reginald Herbert Bailey, one of the obligors, who in answer to her periodical requests wrote letters to her and acknowledged the existence of the debt by what is a highly satisfactory way—that is, sending a cheque for interest. The learned judge was satisfied of the credibility of the plaintiff, Mrs. Read, and there is no suggestion whatever impeaching her testimony in any way. I think that there was ample evidence to justify the learned judge in coming to the conclusion at which he arrived, that, although the letters were not forthcoming, there was sufficient secondary evidence of the contents of the letters given by the lady who had received them [HIS LORDSHIP then dealt with a point which the repeal of s. 5 of the Civil Procedure Act, 1833, and its replacement by s. 25 (5) (6) of the Limitation Act, 1939, has rendered it unnecessary to report].

FARWELL, L.J., dealt with the point under the Civil Procedure Act, 1833, and continued: I would only add this as counsel for the defendants thought it worth while to take the point as to the admissibility of the secondary evidence that that question is really concluded by the authority of the well-known case relating to Lord St. Leonards' will of *Sugden v. Lord St. Leonards* (1), which is certainly a very much stronger interference with the statute than any other document. COCKBURN, C.J., says this (1 P.D. at p. 220):

"When the idea of Lord St. Leonards having himself destroyed the will is disposed of, the next question which presents itself is whether, the will having been lost, secondary evidence can be given of its contents. Now, that matter is disposed of by the authority of *Brown v. Brown* (2), which, I think, has been recognised as perfectly sound. There LORD CAMPBELL says: 'Parol evidence of the contents of the lost instrument may be received as much when it is a will as if it were any other document'; and in that I, for one, most entirely concur."

All the other members of a very strong Court of Appeal took the same view. I think, therefore, that it was hardly worth while taking that point.

The only other point is whether the secondary evidence, being admissible, is it sufficient? I only desire to add one word upon that, because again an authority was cited to us which, I think, has been overruled—that is, *Baillie v. Lord Inchiquin* (3). I do not, speaking for myself, think that there is any general rule that the onus is on one side or the other. I think that the true view is this. You get knowledge of the contents of the document of which you have received parol evidence as you cannot get the document itself, and it is on the construction of that document that it depends whether you have sufficiently identified the debt to which reference is made in the document. I do not myself think that there can be said to be any particular onus on one side or the other to prove the existence or non-existence of any other debt; it is a circumstance to be considered. It may be that in all the circumstances of the case and on reading the document you find it sufficiently shown that that is the only possible debt; and that is the case here. It was not suggested in the court below that there was any other debt, nor was any doubt suggested that the cheque which was sent as payment of interest was the interest on any other debt. That being so, I see no reason whatever why the judge should not have believed the witness, accepted her testimony, and given full effect to it as he has done. I agree that the appeal fails.

KENNEDY, L.J.—I am of the same opinion. With regard to the two points that have been raised besides the effect of the Civil Procedure Act, 1833, I desire to add very little. **FARWELL, L.J.**, has referred to *Sugden v. Lord St. Leonards* (1). But it is quite clear, apart from any decision upon the question of the contents of a lost will, that the court must be able to admit parol evidence of the contents of a document which is materially necessary for the case before the court if it be shown that that document has in fact been lost. In *Haydon v. Williams* (4) one of the points raised before **TINDAL, C.J.**, at nisi prius—and decided apparently to be not worth arguing when it came before the court in banc—was that it was necessary for the plaintiff to show a written promise to pay a debt barred by the relevant statute of limitations. On the facts which were proved at the trial, it was held that, as that document on which the party had to rely had been lost, oral evidence of the contents of the writing might be given. That was practically this case in its material circumstances. There, before **TINDAL, C.J.**, the party who was insisting on the acknowledgment stated that he had received a letter from the defendant which he had since lost, in which letter the defendant referred to the demand for payment of his debt and said that he was incapable then of paying the money, but would do so as soon as he had it in his power, and begged that the instructions given for suing might be countermanded. It was objected on the part of the defendant that oral evidence or acknowledgment of the debt ought not to have been received. That point was overruled by the learned Chief Justice, and it is treated in the headnote as one of the points there decided.

Upon the second question, namely, what I may call the identification of the acknowledgment of the particular specialty debt in the present case, speaking for myself, I think that the correct statement of the law (without any distinction as regards the question upon which party the burden of proof lies) would be that it must sufficiently appear in the circumstances of the case or be expressly proved that the acknowledgment related to the debt in question, and that the law ought to be stated in that general form. In the present case **CHANNELL, J.**, held on the evidence, and I think rightly held, that the acknowledgment in question was sufficiently shown before him upon the evidence to be an acknowledgment relating to this particular specialty debt.

Appeal dismissed.

Solicitors: *Peacock & Goddard; C. R. Sawyer & Co., for J. C. Buckwell & Co., Brighton.*

[Reported by **E. A. SCRATCHLEY, Esq., Barrister-at-Law.**]

R. v. GOVERNOR OF BRIXTON PRISON. Ex parte SAVARKAR

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Buckley, L.JJ.),
June 17, 20, 21, 1910]

[Reported [1910] 2 K.B. 1056; 80 L.J.K.B. 57; 103 L.T. 473;
26 T.L.R. 561; 54 Sol. Jo. 635]

Fugitive Offender—Discharge—Trivial offence—Return unjust—Application at same time as application for habeas corpus—Jurisdiction of Court of Appeal—Original jurisdiction concurrent with High Court—Place of trial—Place where crime charged committed—Residence of majority of witnesses—Fugitive in England for several years before charge brought—Fugitive Offenders Act, 1881 (44 & 45 Vict., c. 69), ss. 10, 35, 39.

By s. 10 of the Fugitive Offenders Act, 1881: "Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would . . . be unjust or oppressive . . . to return the fugitive . . . such court may discharge the fugitive . . . or may make such other order . . . as to the court seems just." By s. 35: "Where a person accused of an offence is in custody in some part of Her Majesty's Dominions, and the offence is one for or in respect of which . . . a person may . . . be tried in some other part of Her Majesty's Dominions . . . a superior court may . . . direct the removal of such offender to some other part of Her Majesty's Dominions in which he can be tried . . ." By s. 39: "The expression 'superior court' means (1) In England, Her Majesty's Court of Appeal and High Court of Justice . . ."

Held: (i) the jurisdiction to hear applications under s. 10 and s. 35 of the Act given to the Court of Appeal by s. 39 is not an appellate jurisdiction; it is concurrent with that of the High Court of Justice, and the Court of Appeal deals with such applications as an original court of first instance.

(ii) applications under s. 10 or s. 35 can be made at the same time as an application by the fugitive for a writ of habeas corpus or at some other time.

(iii) *prima facie* a fugitive should be tried in that part of Her Majesty's Dominions where the crime charged against him is alleged to have been committed and the majority of the witnesses are, but where a person has been resident in England for several years before a charge is brought against him *prima facie* he should be tried in England.

Notes. Considered: *R. v. Garrett, Ex parte Sharf*, [1917] 2 K.B. 99; *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government*, [1942] 2 All E.R. 381. Approved: *De Demko v. Home Secretary*, [1959] 1 All E.R. 341. Referred to: *Ex parte Le Gros* (1914), 30 T.L.R. 249; *Home Secretary v. O'Brien*, [1923] All E.R. Rep. 442.

As to surrender of fugitive offenders see 16 HALSBURY'S LAWS (3rd Edn.) 583 et seq., and for cases see 24 DIGEST (Repl.) 1010 et seq. For Fugitive Offenders Act, 1881, see 9 HALSBURY'S STATUTES (2nd Edn.) 896.

Cases referred to:

- (1) *R. v. Vyner* (1903), 68 J.P. 142, D.C.; 24 Digest (Repl.) 1012, 162.
- (2) *R. v. Spilsbury*, [1898] 2 Q.B. 615; 67 L.J.Q.B. 938; 79 L.T. 211; 62 J.P. 600; 14 T.L.R. 579; 42 Sol. Jo. 717; 19 Cox, C.C. 160, D.C.; 24 Digest (Repl.) 1012, 166.
- (3) *R. v. Ganz* (1882), 9 Q.B.D. 93; 51 L.J.Q.B. 419; 46 L.T. 592, D.C.; 24 Digest (Repl.) 989, 12.

Appeal from a decision of the Divisional Court (LORD ALVERSTONE, C.J., PICKFORD, and LORD COLERIDGE, JJ.) discharging a rule nisi calling upon the

governor of Brixton Prison to show cause why a writ of habeas corpus should not issue directed to him to have the body of Vinayak Damodar Savarkar before the court.

On May 12, 1910, Savarkar was committed by Sir Albert De Rutzen, the chief metropolitan magistrate, at Bow Street Police Court, to the custody of the governor of Brixton Prison for removal to India at the expiration of fifteen days from the date of committal under ss. 2 and 5 of the Fugitive Offenders Act, 1881. The committal was made on an Indian warrant dated Feb. 8, 1910, which charged the applicant with having committed the following offences: (i) Waging and abetting the waging of war against the King (Indian Penal Code, s. 121). (ii) Conspiring to wage war against the King (Indian Penal Code, s. 121A). (iii) Collecting arms with intent to wage war against the King (Indian Penal Code, s. 122). (iv) Sedition (Indian Penal Code, s. 124A). (v) Abetment of murder (Indian Penal Code, ss. 302, 109). The alleged acts constituting these offences, as shown by the evidence of the Crown, were substantially the following: (a) that from January to the end of May, 1906, in India the applicant uttered seditious speeches; (b) that in 1908 and 1909 in England the applicant uttered seditious speeches, circulated seditious literature, wrote letters inciting to sedition, procured arms to be taken to India for use against the Government, and abetted murder.

The Court of Appeal having upheld a preliminary objection by the Crown that no appeal lay from the decision of the Divisional Court refusing a writ of habeas corpus in any criminal cause or matter*, which the present case was, *Powell, K.C.* (*Parikh* with him), on behalf of the applicant, then made an original motion for the exercise by the Court of Appeal of its powers as a superior court under s. 7 of the Fugitive Offenders Act, 1881, to order the applicant to be discharged from custody.

The Solicitor-General (*Sir Rufus Isaacs, K.C.*) (*Bodkin* and *Rowlatt* with him), for the Crown, took the preliminary objection that the court had no jurisdiction to hear an original motion. An application under s. 10 or under s. 35 of the Fugitive Offenders Act, 1881, could be made either to the Court of Appeal or to the High Court, but, having once been made, as in this case to the King's Bench Division, there cannot be a further application. The matter is *res judicata*, and the applicant is estopped from making a further application to this court. [He referred to *R. v. Viner* (1); *R. v. Spilsbury* (2).]

VAUGHAN WILLIAMS, L.J.—In my judgment, the preliminary objection fails. I think the Fugitive Offenders Act, 1881, does give a concurrent jurisdiction to every court coming under the statutory category of "superior court" to deal with these questions, and that we have power to deal with this motion as an original court of first instance. I do not think I need go in detail into the reasons for my conclusion. It is a sufficient reason for me to state what the fact is—namely, that by s. 7 the statute gives power to any "superior court" to entertain this application. In the definition clause s. 39, the definition section, of the Act, you find that "superior court" means in England the Court of Appeal and the High Court of Justice. The Act gives to such superior court jurisdiction to deal with matters on the same basis and not as a court of first instance and a Court of Appeal.

It has been suggested that there was a request by the applicant to have the question as to certain rights which he claimed to have under the Fugitive Offenders Act disposed of, and that that question was heard and disposed of by the Divisional Court so that the matter has become *res judicata*, and he is estopped from making an application on a matter which has already been disposed of. It is impossible

*But see now Administration of Justice Act, 1960, s. 15 (1) which provides that an appeal shall lie, in any proceedings for habeas corpus, whether civil or criminal, against an order for habeas corpus as well as against the refusal of such an order. By s. 1 in criminal cases an appeal will lie from a Divisional Court to the House of Lords.

for us to say that he asked for and did in fact obtain a decision on the matter before us. He had obtained a rule nisi for a writ of habeas corpus, and the only question before the King's Bench Division was whether the rule should be made absolute or whether it should be discharged. When I look at the judgment of the court as drawn up, I find that it deals with that and nothing else. Then it is said that, looking at the arguments of counsel and the affidavits and at the judgments, we shall find that these other questions were raised and disposed of by the words spoken by the judges. I can only say that for this purpose we can only look at the matters discussed and dealt with in the judgments. I will not stop to discuss the question whether the motion or an application to obtain the benefits of s. 10 or s. 35 of the Fugitive Offenders Act can be made at other times than the time when the argument takes place on a rule nisi for a writ of habeas corpus, because in the course of the discussion we formed the opinion that such an application could be made at other times, and that for this reason, among others, that the grounds on which the application was made might arise after the question of making the rule nisi absolute had been disposed of. I mention this because the Solicitor-General said that he could not abandon the point, because, according to the view of the Colonial Office, the hearing of the argument of the rule nisi was the only occasion on which an application under this Act could and must be made.

The conclusion I have come to is that the question whether or not the applicant is entitled to make this motion is disposed of on two grounds: First, because I am of opinion that the application can be made to any court being a superior court; and, secondly, because, even if no second application can be made after the matter has once been disposed of, the adjudication of the matter must be found in the record of the court, and that record shows here that there was no application by the applicant for relief under the Act, and that there was no order of the court adjudicating upon the matter at all.

FLETCHER MOULTON, L.J.—I am of the same opinion. The preliminary objection has been taken that this court is not competent to hear this motion under the Fugitive Offenders Act. I have come to the conclusion that it is competent, and I wish to say how I arrive at this conclusion.

In the first place, I am quite satisfied, and indeed it has not been contested, that a jurisdiction has been given to this court by ss. 10, 35 and 39 of that Act to hear motions of this kind, and that it is concurrent with that of the High Court of Justice as coming under the definition of "superior court." That being so, the objection is taken that this motion has already been heard and disposed of by the High Court of Justice, and that this court has no power to entertain it. The Solicitor-General says that a rule nisi for a writ of habeas corpus was obtained by the applicant and that that rule was argued before the High Court and was discharged, and he contends that the judgment of the High Court when the rule was discharged decided against the applicant all the points raised on this motion, and that, therefore, the matter is *res judicata* between the Crown and the applicant. I do not base the conclusion at which I have arrived that in spite of the proceedings in the King's Bench Division this court has jurisdiction to hear this motion on any determination of the question, and it is open to an applicant in a case like the present to apply to one court after another as it used at one time to be open to an applicant for habeas corpus to apply to one judge after another. I express no opinion on that point; but I decide as to the competency of this court on the ground that this motion has not been adjudicated upon.

I think it is necessary that I should say a few words on the practice governing habeas corpus. This writ used originally to be a writ of right, and after the issue of the writ the question whether the custody in which the applicant was being detained was legal or not was discussed and adjudicated on. This practice was found to be inconvenient, and about 1820 or later the judges required facts to be

stated before a writ of habeas corpus was granted. For some time nothing more was necessary than a statement of facts or an affidavit. Subsequently in the fifties it was considered advisable to take still more care as to the issue of writs of habeas corpus, and the practice arose of granting a rule nisi only in the first instance. It was, however, always open to the party who was called on to show cause against the rule not to appear to show cause, and in that case the rule was made absolute and the writ was issued, and the party could then make answer on the return of the writ. When the Extradition Act, 1870, was passed a change was made in the practice for the sake of convenience. This was shown in *R. v. Ganz* (3) where a rule absolute for a writ of habeas corpus was granted in the first instance, and the writ was issued, and the prisoner was brought up in custody on the return. SIR HENRY JAMES, the Attorney-General, pointed out that the practice in matters of this sort since 1873 had been to obtain a rule nisi for a habeas corpus and to have the case argued on the hearing of the application to make the rule absolute, and he said that that was the better and more convenient course. The case was accordingly argued as if that course had been followed, and the court subsequently adopted that practice and made it a condition that the argument should be heard at full length. Then the practice was changed again, and a practice has arisen, for which I can find no justification, under which matters quite independent of habeas corpus are argued on the hearing of the rule nisi. It is clear that that has been done in the present case, and it is clear that it was also done in *R. v. Spilsbury* (2). There the court discharged the rule nisi for a writ of habeas corpus, but without any specific application they granted certain relief under the powers of the Extradition Act. I do not know whether this was done by consent.

I am satisfied that, so far as a rule nisi for a writ of habeas corpus is concerned, the only question before the court is whether the rule should be made absolute or be discharged. Anything beyond that must be brought in by consent. In my opinion, applications under s. 10 or s. 35 of the Fugitive Offenders Act need not be, and would not ordinarily be, made by way of proceedings in habeas corpus, or in connection with habeas corpus. Relief under those sections has nothing to do with habeas corpus. Such relief can be asked for on application to the court, and I think it is the intention of the statute that it should be so made. In the present case a number of points arising under the Fugitive Offenders Act were argued in the King's Bench Division, but, looking at the records of the court, I cannot find out anything except the rule nisi for a writ of habeas corpus and the judgment that it should be discharged, and there is nothing to be found which touches on the relief claimed by this motion. I am bound to take it that what is now before us has not been adjudicated on in any proceedings before any court of competent jurisdiction, and, therefore, there is nothing to preclude us from entertaining it. I do not decide the question whether if the King's Bench Division had heard and determined the matter, that would have precluded us.

BUCKLEY, L.J.—Sections 10 and 35 of the Fugitive Offenders Act, 1881, confer upon a superior court under certain circumstances certain powers. They are sections addressed to the case in which the detention or imprisonment of the fugitive offender is legal, and under which, if a rule nisi for a writ of habeas corpus has been obtained, the rule must be discharged. It by no means follows, in my opinion, that applications under these two sections cannot be adjudicated upon, and ought not to be adjudicated upon, on the habeas corpus application; on the contrary, I think that they both can be and ought to be so adjudicated upon. The order of the magistrate under the Act of Parliament in fact has a double operation. One is that it commits the applicant into the custody of a prison. The other is that as the result of that, by operation of the statute, the man is deported and returned to another place. That which is raised upon the application for habeas corpus is whether he is validly imprisoned or detained, and that which is raised under ss. 10 and 35 is whether, it having been found that he is lawfully detained,

something further ought to be done. Under s. 10 the application, so far as I see, would always be made by the prisoner—it is an application which is for his benefit. The application under s. 35 might, I think, be made either by the prisoner or by the Crown. I do not suggest that it would often be made by the Crown, because the Crown has it in its power to give effect to the section without application to any court, for the order may be made by a Secretary of State, and it might very well be that upon the application for habeas corpus the Crown would say that it would be more convenient that the prisoner should be tried in one place or in another; but in any case it seems to me that the question whether those sections should be applied and how they should be applied can very well be adjudicated upon in habeas corpus proceedings.

I have been looking to see how I can best ascertain what is the application which the prisoner in this case has made. The materials seem to be these. When an application is made for a rule nisi there is no notice of motion; it is *ex parte*. When the rule nisi is obtained it is in a certain form, and it is returnable as a matter of course, and there is no notice of motion upon the return, so that there are no materials for ascertaining what the applicant has asked for other than that which is contained in the rule nisi. I think one is entitled to read the rule nisi as in fact showing what the applicant has asked for and the court has thought proper to grant. Beyond that, one is entitled, in order to see what the applicant has asked for, to ascertain what he said at the Bar when his rule came on for hearing. In order to see what the court has done, I am, of course, entitled to read the judgments of the judges to see what they have accepted, and in respect to what subject-matters they have given reasons. But, after all, the order which is drawn up is an order which does nothing whatever beyond discharging the rule nisi, and that is the whole order of the court. So that, whatever the judges may have said, there has been no adjudication except upon that particular matter. Under those circumstances it seems to me that the application, although it was made to the court, as I think it could be made to the court, upon the habeas corpus, has unfortunately not resulted in an order of which the Solicitor-General can avail himself. I do not know that the difficulty is one which need arise in every case. It seems to me that this order ought to have been drawn up in a different form, and if the parties were, as I believe they were not, before the official in the King's Bench Division when the order was drawn up, it seems to be that the Solicitor-General or his clients would have been entitled to have an adjudication upon the question inserted in the order, and in that way in future cases it seems to me the difficulty may be avoided, but it is not in the order here, and under those circumstances there is no order of any court, as far as I can see, adjudicating upon this matter.

There is only one other point on which I wish to say a word, and that is this. It would be another possible objection to the original motion which we are going to hear as the result of this decision that where this Act of 1881 refers to "Court of Appeal" as being a superior court, it might have meant this court sitting as the Court of Appeal. The learned Solicitor-General has not thought fit to argue that point. I agree with what VAUGHAN WILLIAMS, L.J., has said in effect that we must for ourselves determine that in order to hear the motion. I only wish to say for myself that, inasmuch as my two brothers think that point is to be resolved in favour of our hearing the motion, of course that decides the matter. For my own part, I have not heard the matter argued, and it does seem to me that the prisoner did apply to the court to consider what ought to be done in his relief under s. 10 of the Fugitive Offenders Act. Part of the materials is his own affidavit, and his affidavit says:

"I now apply to this honourable court for an order nisi that a statutory writ of habeas corpus ad subjiciendum be directed to issue to the said governor of the said prison that this court in accordance with ss. 10 and 39 (1) of the said

Fugitive Offenders Act may consider the injustice of the committal and may make an order for my release or such other order as to this court may seem proper."

I am also entitled to see, so far as I can see from the arguments which were addressed to the King's Bench Division and the judgments of the learned judges in that court, what order he asked for and what matters they considered. The judgments of the learned judges have not been read, but I have had an opportunity of glancing through them, and I cannot doubt myself that he did invite the King's Bench Division to consider what in his relief should be done under s. 10. I regret very much that under those circumstances I do not find myself in a position to say that they adjudicated upon this question; that is simply because, when all is said and done, the conclusion of the whole thing is the order which they have made, and the only matter which has been adjudicated upon that I can see is that which is contained in the order. I think it is a question of very considerable difficulty whether when s. 39 of the Act says "Court of Appeal" it does not mean the Court of Appeal sitting as the Court of Appeal. It is unnecessary to say any more about it, because the other members of the court think it is not so used. Under these circumstance I think this preliminary objection cannot be upheld.

Preliminary objection overruled.

The court then proceeded to hear the original motion under the Fugitive Offenders Act.

Powell, K.C., and Parikh for the applicant.

The Solicitor-General (Sir Rufus Isaacs, K.C.), Bodkin and Rowlatt for the Crown.

June 21, 1910. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—In this case we are not sitting as a Court of Appeal. We are sitting to hear a motion made on behalf of Vinayak Damodar Savarkar for the purpose of obtaining for him some of the benefit given by s. 10 of the Fugitive Offenders Act, 1881. We are hearing this motion because s. 10 provides that where certain things are made to appear to a "superior court" certain orders may be made by such a court, and, according to the definition contained in s. 39 of the Act, the expression "superior court" means in England His Majesty's Court of Appeal and High Court of Justice. We have come to the conclusion that, although this definition speaks of the Court of Appeal by a name which indicates its appellate jurisdiction, yet it cannot be that the Court of Appeal, having regard to the provisions of s. 47 of the Judicature Act, 1873, was intended to exercise appellate jurisdiction in respect of proceedings under an Act of Parliament which deals entirely with procedure in a certain class or certain classes of criminal prosecutions [see footnote p. 604, ante]. The Court of King's Bench as a Division of the High Court was, of course, a superior court having jurisdiction to make orders under s. 10 of the Fugitive Offenders Act, 1881, and would exercise precisely the same jurisdiction which we in the Court of Appeal are exercising in hearing this motion. In fact the matters which have been discussed before us were discussed before the Lord Chief Justice and the judges of the King's Bench Division who composed the court on the occasion of the motion in the King's Bench Division to make absolute the rule nisi for a habeas corpus in favour of Savarkar; but the only motion which was before the court was a motion on which the court could make absolute or discharge the rule nisi, and the only matter which was adjudicated upon by the order of the King's Bench Division was the order refusing to make absolute and discharging the rule nisi. We, having as a Court of Appeal discharged an appeal against the order of the King's Bench Division on the ground raised by way of preliminary objection by the SOLICITOR-GENERAL that this was an appeal in a criminal cause or matter, in which by the words of s. 47 no appeal shall lie from any judgment of the High Court in any

criminal cause or matter, allowed this motion to be made to us despite the discussion in the King's Bench Division, because there was no adjudication by the King's Bench Division in respect of the matters dealt with by s. 10. We have, however, I think, a right and duty to avail ourselves of the observations of the Lord Chief Justice and his brethren as obiter dicta.

On the motion before us counsel for the applicant, Savarkar, was bound, as it seems to me, to assume that Savarkar was a prisoner under the provisions of the Fugitive Offenders Act, 1881, but he was not bound to assume that Savarkar was a fugitive within the meaning of s. 2 of that Act, which section runs thus:

"Where a person accused of having committed an offence (to which this Part of this Act applies) in one part of Her Majesty's Dominions has left that part, such person (in this Act referred to as a fugitive from that part), if found in another part of Her Majesty's Dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive."

Savarkar was dealt with by the King's Bench Division, when they discharged the rule for a habeas corpus, as a person apprehended under s. 33, which applies to persons other than fugitives within the meaning of s. 2 of the Fugitive Offenders Act—deals, that is, with the case of a man who has committed an offence for which he can be tried in more than one part of His Majesty's Dominions, who is found in one of those parts, and then is sought to be taken to be tried in another part. Such a man need not be, to fall within the operation of the sections, a fugitive who, having committed a crime, has fled from the Dominion where the offence was committed liable to be apprehended and returned to such dominion within the meaning of s. 2. The word "return" under s. 33, in my opinion, cannot apply to many of the persons coming within the operation of that section, and, therefore, cannot be read in the sense in which it is used in s. 2. The object with which counsel for the applicant discussed the meaning of the word "return" in s. 33, as distinguished from s. 2, and the question whether the Act applied to persons other than fugitives who have been charged with an offence in one Dominion of His Majesty and fled to another was not for the purpose of proving that Savarkar was not properly arrested and detained under the Fugitive Offenders Act, 1881, but to prove that he was arrested and detained under s. 33, a section to which s. 10 clearly applies, and to argue that the relief obtainable by a prisoner arrested and detained under the one section might depend on very different considerations according as he was arrested under the one section or the other.

Having made these preliminary observations, I will now read s. 10 of the Fugitive Offenders Act, 1881, and then deal with the grounds of the motion before us. The section is as follows:

"Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

It is plain that a charge of collecting arms and conspiracy to murder is not trivial, and, in my opinion, inasmuch as the alleged seditious speeches incited, or are said to incite, Indians of British India to make war on the King and to violent resistance of authority, and such speeches are alleged to have been followed by a conspiracy to murder, which is not an unnatural or improbable sequence of such speeches, I cannot say that the case against the prisoner, even in respect

of the speeches made so long ago, is trivial, and especially I cannot say so in a case where it is alleged, not without evidence, that the spirit of rebellion and sedition said to be contained in the speeches of Savarkar has been continuously fostered among persons with whom Savarkar has been associating. I confess that I should have been glad if this charge, based on the seditious speeches of 1906, had not had to be made, but, having regard to the fact that there has been continuous agitation since 1906, and that the proper construction of s. 33 refutes the suggestion that the executive have included the charge based on the seditious speeches as essential and necessary for the purpose of bringing Savarkar within the operation of the Fugitive Offenders Act, 1881, I cannot regard any part of the charges as trivial. It is obviously not a sufficient ground for refusing relief under s. 10 that the executive have thought it right to include a charge or that the executive have thought it just to oppose this or that application for relief. Section 10 is obviously futile and useless unless the "superior court" is to review the conclusions of the executive. In my opinion, the connection of the charges with seditious acts in India and the fact that nearly all the witnesses to be called are in India is *prima facie* a sufficient ground for sending the prisoner to India to be tried. I do not think that the statement that witnesses on behalf of the prisoner state that they would be ready to give evidence in England, but will not go to India to give evidence is, having regard to the attitude said to be assumed by those witnesses, a sufficient ground for not having the trial in India. In fact, I doubt whether they would be ready and willing to give evidence in England unless they got an assurance of indemnity, which they clearly ought not to receive. As to the mode of trial being before three judges and not before a jury, I agree that *prima facie* a man who has been for several years before the bringing of these charges resident in England ought to be tried in England with all the advantages of a jury trial and the English law of evidence. But in a case connected so much with India as this is, the *prima facie* right to trial in England is overridden by the facts of this case, which show that India is the locality of the seditious conspiracy which resulted in murder. I decline entirely to hold that Savarkar is likely to get an unfair trial before the special court of three judges.

FLETCHER MOULTON, L.J.—In this case a rule nisi was obtained for a writ of habeas corpus for the purpose of determining the validity of the applicant's detention. The question of its validity came before the King's Bench Division, which heard the application and discharged the rule. On the arguments matters were gone into which were proper to an application under ss. 10 and 35 of the Fugitive Offenders Act. For the reasons given in our previous judgments I do not think we can say it is *res judicata*. We have already held that we are bound to hear this application. But the application is to our original jurisdiction under the Fugitive Offenders Act. It is only as a person committed under the Fugitive Offenders Act, and not challenging the decision of the King's Bench Division, that the applicant can be heard.

To my mind, in considering ss. 10 and 35 there seems to be the widest distinction possible between the scope and functions of the two sections. Section 10, so far as material, runs thus :

"Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise . . ."

If I stop there, I find that it is not limited by the doctrine of *ejusdem generis* to reasons of a trivial nature. To my mind it is impossible to suggest that this is a trivial case. We have nothing to do with the truth of the charges that have been put forward, but to say that what the applicant is accused of is a trivial offence is impossible. It is, in my judgment, a serious one. It is not suggested that the application for his return is not made in good faith. The guiding directions given by the section—namely, triviality and want of good faith—are, therefore, not

applicable. The acts of 1908, it is true, were committed in England, but sending out arms and ammunition to India coupled with the inflammatory speeches which were delivered constitute a crime committed in India. No consideration leads me to think that this is a proper case for the court to exercise the powers conferred on it by s. 10. For these reasons I think the facts give us ground for adjudicating this matter under s. 10.

Turning now to s. 35, I cannot help thinking that there has been a misunderstanding as to the operation of this section. It is an enabling section; it gives us power to send the prisoner for trial in circumstances in which we should not but for that section have had the power so to do. He is not applying to us to exercise this enabling power, and I fail to see why s. 35 is referred to on his behalf. In my judgment, this application fails and must be dismissed.

BUCKLEY, L.J.—This is an original motion made to this court as a superior court within the definition of the Fugitive Offenders Act, 1881. The larger part of the argument which we have heard from counsel for the applicant has been addressed to show that his client is not within that Act of Parliament. I confess I take some blame to myself for not seeing at an earlier stage that that was a perfectly suicidal argument. It was an argument that the original motion should not be made to this court, and on that ground it ought to have been dismissed. I, therefore, say nothing about that part of the argument, and I will assume in the applicant's favour that the case does fall within the Act of Parliament. It being within the Act of Parliament, the matter stands thus. As I have said in my judgment upon one of the preliminary applications, I think the prisoner has, in point of fact, had the advantage of the discussion of this question before in the King's Bench Division. They also were a superior court within the definition of the Act of 1881, and competent to deal with the matter. I do not pretend to regret that, under the circumstances, the applicant should have had an opportunity of a second discussion, and happily it was open to us to hear it. The case, no doubt, is one of great importance; the prisoner has had the advantage of it being discussed before us, and it has been argued whether we ought or ought not to give effect to those provisions of the Act of Parliament which would enable us to keep him here for trial instead of his going to India for trial. This is not in any way an appeal from the decision of the King's Bench Division, but it is an original hearing before us; at the same time I think that the reasons which were advanced by the learned judges in the King's Bench Division are reasons which we may very well regard and consider and see whether we agree with them or not in the exercise of our original jurisdiction. I do not propose to go through the matter again in detail, for VAUGHAN WILLIAMS, L.J., has stated reasons with which I entirely agree. In my opinion, the case is one in which we, as a superior court, ought not to interfere with the operation of the Act of Parliament, and, therefore, this application ought to be dismissed.

Application dismissed.

Solicitors : *Director of Public Prosecutions; Reginald Vaughan.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

ELLISTON v. REACHER

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.J.J.), October 14, 1908]

[Reported [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701]

Sale of Land—Restrictive covenants—Building scheme—Reservation of dispensing power to vendors—Non-execution of deed of covenant—Rights of purchasers inter se.

In 1860 part of an estate which had been purchased by a society was proposed to be sold in numbered lots as shown on the sale plan, which contained also the conditions of sale. In January, 1861, the estate was vested in the trustees of the society, and an engrossment was prepared of an indenture between the persons whose names and seals were stated to be, but, as the indenture was never executed, were not, subscribed in the second schedule to the indenture and the trustees of the society. A plan was annexed to the indenture identical with that originally prepared, and conditions were scheduled to the indenture which were the same as those contained in the sale plan, except that it was stated that certain restrictive covenants which were required to be entered into were to be between each of the persons who subscribed the indenture and the others of them and separately with the trustees of the society. Among the restrictive covenants was one that on no lot was any hotel, tavern, public-house, beer-house, or manufactory to be built, or any house used as such, without the vendors' consent. The trustees of the society conveyed two of the lots to predecessors in title of the defendants by deeds dated in 1861 and 1866, and other lots to predecessors in title of the plaintiffs by deeds dated in 1861. Each of the conveyances contained a covenant by the grantees to observe the restrictions contained in the indenture of January, 1861. The lessees of one of the defendants used a building on one of the lots as an hotel. In 1880 one of the trustees of the society was party to a conveyance whereby part of the land on which the hotel was built was conveyed to a predecessor in title of the plaintiffs other than the plaintiff E. The conveyance contained restrictive covenants not extending to the building of an hotel.

Held: there was a general building scheme for the benefit of purchasers inter se as well as for that of the vendors, and the plaintiff E. was entitled to an injunction to enforce the restrictive covenant preventing the building of an hotel.

Osborne v. Bradley (1), [1903] 2 Ch. 446, distinguished.

Notes. Considered: *Willé v. St. John*, [1910] 1 Ch. 84; *Sharp v. Harrison*, [1922] 1 Ch. 502. Applied: *Kelly v. Barrett*, [1924] All E.R. Rep. 503. Considered: *Chatsworth Estates Co. v. Fewell*, [1930] All E.R. Rep. 142; *Lawrence v. South County Freeholds, Ltd.*, [1939] 2 All E.R. 503; *Newman v. Real Estate Debenture Corp., Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131; *Kelly v. Battershell*, [1949] 2 All E.R. 830. Applied: *Halsall v. Brizell*, [1957] 1 All E.R. 371. Considered: *Re Pinewood Estate, Farnborough, New Ideal Home-steads, Ltd. v. Levack*, [1957] 2 All E.R. 517. Referred to: *Reid v. Bickerstaff*, ante p. 299; *Wilkes v. Spooner*, [1911] 2 K.B. 473; *Westhoughton U.D.C. v. Wigan Coal and Iron Co.*, [1919] 1 Ch. 159; *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225; *Ridley v. Lee*, [1935] All E.R. Rep. 526; *White v. Bijou Mansions, Ltd.*, [1938] 1 All E.R. 546.

As to restrictive covenants in building schemes, see 14 HALSBURY'S LAWS (3rd Edn.) 565-568, and for cases see 40 DIGEST (Repl.) 333-336.

Case referred to:

(1) *Osborne v. Bradley*, [1903] 2 Ch. 446; 73 L.J.Ch. 49; 89 L.T. 11; 40 Digest (Repl.) 362, 2897.

Also referred to in argument :

Sayers v. Collyer (1884), 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244; 33 W.R. 91; 1 T.L.R. 45, C.A.; 40 Digest (Repl.) 361, 2893.

Shelfer v. City of London Electric Light Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; 43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; 28 Digest (Repl.) 792, 418.

Colls v. Home and Colonial Stores, Ltd., [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest (Repl.) 135, 872.

Nottingham Patent Brick and Tile Co. v. Butler (1886), 16 Q.B.D. 778; 55 L.J.Q.B. 280; 54 L.T. 444; 34 W.R. 405; 2 T.L.R. 391, C.A.; 40 Digest (Repl.) 343, 2781.

Re Birmingham and District Land Co. and Allday, [1893] 1 Ch. 342; 62 L.J.Ch. 90; 67 L.T. 850; 41 W.R. 189; 9 T.L.R. 31; 3 R. 84; 40 Digest (Repl.) 334, 2732.

Tucker v. Vowles, [1893] 1 Ch. 195; 62 L.J.Ch. 172; 67 L.T. 763; 41 W.R. 156; 3 R. 107; 40 Digest (Repl.) 334, 2734.

Sidney v. Clarkson (1865), 35 Beav. 118; 14 W.R. 157; 55 E.R. 839; sub nom. *Sydney v. Clarkson*, 13 L.T. 659; 40 Digest (Repl.) 310, 2554.

Appeal by the defendants, one Reacher, the owner of the land on which the hotel was built, and one Quilter, the lessee of the hotel in question, from a decision of PARKER, J., reported [1908] 2 Ch. 374, in favour of the plaintiff, Dr. Elliston, the owner of another plot of land forming part of the same estate, which was known as the Felixstowe estate.

Levett, K.C., and *Whinney*, for the defendants.

Buckmaster, K.C., and *Tomlin* for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This is an appeal from the judgment of PARKER, J., who has dismissed the action so far as two out of three plaintiffs were concerned, and has granted an injunction at the suit of the plaintiff, Dr. Elliston, restraining the defendants from using part of the Felixstowe estate as an hotel. As there is no appeal from that part of the judgment which dismissed the action, so far as the other two plaintiffs were concerned, it is not necessary for me to say more than that I desire not to be taken as either differing from, or assenting to, that view. If a similar point ever comes up again, I should desire to have an entirely open mind upon the point.

But as to the case as between the plaintiff Dr. Elliston and the defendants, I have very great difficulty in doing more than saying that I so entirely agree with the careful and, I think, accurate judgment of PARKER, J., that I do not think I should be justified in occupying more than a few minutes in endeavouring to put, in words not so good as his, the conclusion at which I have arrived in confirmation of his view. The plaintiff Dr. Elliston's case is shortly this. He says that there was a building scheme affecting this estate, which was divided up into lots. The defendants and Dr. Elliston, the plaintiff, claim under common vendors, and it was part of the scheme that there should be covenants for the mutual benefit of all parties, including the restriction about building an hotel without the consent of the vendors, and the benefit of those covenants should be not merely as between the vendors and the several purchaser, but as between the several purchasers inter se. He, therefore, says that he is now entitled to relief against the defendants, who are admittedly using this property as an hotel without the consent of the vendors. The peculiarity of the case, so far as it differs from an ordinary case, is this. In the first place, I never saw a case in which there was so clear a manifestation of an original intention to have a building scheme. I hold in my hand a plan prepared by the Conservative Building Society, which bought the

estate of forty acres, I think it is, more or less, laid out in roads and plots, and on the side of the plan there are terms and conditions of sale, one of which is condition 3. [His LORDSHIP read the condition, and continued:] Then occur a number of provisions about roads, and so on, including condition 5. On no lot offered for sale shall any hotel, reading it shortly, or house be used as such without the consent of the vendors, their heirs and assigns. Lest it should be supposed that I have forgotten it, I will say that there is also added at the end a provision that the vendors reserve a right to deal with any part of the estate not disposed of without reference to these conditions.

What happened? The property was copyhold; it had been enfranchised, and, having been enfranchised, it was conveyed to trustees who ultimately conveyed to the plaintiff Dr. Elliston's predecessor and the defendants' predecessor, and a document was prepared which bears date a week after in the same month. The conveyance of the property is dated Jan. 16, 1861, and it contains a plan identical with that which I have referred to. It is engrossed, it is stamped, and it contains all the material covenants and conditions which are found on the plan, and on the face of that deed it is expressed—not by implication, but it is expressed—that each purchaser covenants, not merely with the vendors, but with the other purchasers, that the obligations of this condition shall be fulfilled. That engrossment is not executed by anyone. It remained in the safe of the Conservative Building Society, and nothing more was done with it in the shape of execution. But printed copies of that deed were prepared, and were shown to the purchasers, who also had copies of this plan with the conditions thereon. And, so far as the evidence goes, the inference to my mind is irresistible that there has not been a single purchaser of any of the lots of this first portion, of which alone we have heard, who has not completed his purchase on the faith, and on the footing, that he was bound, and that the other parties were bound by the stipulations of this engrossment.

But we have had a very learned and interesting argument from counsel for the defendants that all that is pure waste, and that, although in the conveyances, all of which, so far as we know, are in common form, and all of which contain an express reference to this which they call a deed of covenant as to the occupation of the plots of land on the Felixstowe estate, it is a mere waste bit of parchment containing a stamp for the benefit of the government, and it is not a deed because it is not executed by anyone. I entirely decline to accept that view, and I desire to accept to the full what PARKER, J., has stated. If this document referred to in the conveyance can be identified, the mere fact that it was wrongly described as an indenture is, in my judgment, immaterial, and on this question of identity the nature and contents of the document are of the utmost importance. I, therefore hold, without any doubt or difficulty, that these various lots were subject, as part of the building scheme, to the terms and conditions found annexed to the plan and which are found in the engrossment.

Arriving at that conclusion, it is difficult to see what more there is left. It was said that you must infer from the fact that that engrossment was never turned into a deed, was never executed, that the whole building scheme was abandoned. That is an inference of fact, and I must say I never saw a case in which it was, to my mind, more manifest than it is in this that the deliberate continued intention of all parties from 1860 onwards was that this building scheme should continue in force and be operative on all parties. But then it is said that the whole scheme is inconsistent and cannot have been intended because there was power in the vendors to deal with property undisposed of without reference to this deed. This is an argument which has not been brought forward for the first time here. So far as I am aware, it is an argument that has never prevailed. I do not deny that the insertion of such a power is an element to be considered. But, out of many building schemes which I have seen, I think I am right in this remark,

A that it is altogether exceptional not to see some power reserved to the vendors to abstract certain property from the scheme. On the face of the scheme, which all the parties were content with, they were told that they entered into this building scheme with the knowledge that the vendors might, if they were so advised, on the one hand, give consent to the erection of a public-house next door to the person who bought a lot, and, on the other hand, they might take it subject to the reservation that the vendors might release any unsold property from the covenants. I cannot see that that has any real importance in the case. Then it was argued, somewhat boldly, that the whole scheme was at an end, if I follow the argument rightly, because of the four lots which were purchased by Mr. H. C. Cobbold. So far as appears, he was the only purchaser of the property. The other deeds were not produced, and it was unreasonable to suppose that there was any contract entered into between Mr. Cobbold as purchaser of lot 26 and Mr. Cobbold as purchaser of lot 27. I cannot assent to that. I do not think that that is the true way to look at it. The very essence of every scheme of this kind is that it does not depend on the fact of there being separate purchasers of each lot, but it means that each lot, into whosoever hands its comes, whether into the hands of the man who has bought half a dozen lots or originally to a man who has bought from a vendor, in either case each lot shall be subject to the burden and to the benefit of the restrictive covenant. I do not think that in the few words I have uttered I have added anything to the judgment of PARKER, J. I only desire to say that I entirely adopt and entirely agree with it, and I think that this appeal fails and must be dismissed with costs.

E **FLETCHER MOULTON, L.J.**—I am of the same opinion.

FARWELL, L.J.—I am of the same opinion. I only wish to add something with reference to a decision of my own. It appears to me that it has no bearing at all on the present case, and I do not desire to withdraw anything that I said in that case. The question appears to be one of fact—was there in fact a building scheme, or was there not? In *Osborne v. Bradley* (1) I held that there was a deed between A. and B., and I held that there were covenants for the benefit of A., and the fact that he dealt with the land did not operate as a release, because there was no building scheme at all. The present is quite a different case. It is admitted—and, if not, it appears to be clear—that the case would be unarguable if the deed of covenant of 1861 had been executed, and I cannot see that its non-execution makes any difference to the question of liability, as the conveyance in 1861 to the defendants' predecessor in title is not merely made subject to the covenant referred to in the deed, but contains an actual covenant by the purchaser to observe and fulfil all those covenants. It might very well be that the property was conveyed merely subject to the covenants in a deed which had never been executed. But where a man covenants that he will abide by the covenants set out in the deed, then it becomes a mere question of reference; and, although the document is called a covenant in a deed, it means, when once identified, that it is a document by reference to which, and by reading which into the actual deed of covenant, the covenant in the deed of conveyance has to be considered. Therefore there is no difficulty in the present case in finding, as the Master of the Rolls has said, that there was a perfectly clear original intention to have a building scheme.

I There is no sort of doubt that I can see that the defendants' predecessor in title, and all the subsequent purchasers who have since bought, bought subject to the scheme, and covenanted that they would abide by these covenants in the deed. I entirely agree with what the Master of the Rolls has said with regard to the argument as to the subsequent deed of 1880, which appears to be an argument put forward on misconception. With reference to the power of the vendor to vary the conditions, in *Osborne v. Bradley* (1) I pointed out it was one element to consider and assist the court in arriving at the conclusion of fact whether there

was or was not a building scheme, and nothing more than that. I never intended to suggest that that was fatal to the existence of a building scheme.

Appeal dismissed.

Solicitors: *Turner & Co.; Sharpe, Pritchard & Co.*, agents for *Cobbold, Sons & Co.*, Ipswich.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

SYDNEY MUNICIPAL COUNCIL v. BULL

[KING'S BENCH DIVISION (Grantham, J.), October 15, 1908]

[Reported [1909] 1 K.B. 7; 78 L.J.K.B. 45; 99 L.T. 805; 25 T.L.R. 6]

Conflict of Laws—Foreign law—Enforcement—Claim under local improvement Act—Reference to land.

An action was brought in this country by a colonial municipal corporation to recover contributions for street improvements carried out in that municipality.

Held: on its true construction the statute under which the action was brought was of a purely local character; the claim, which was with regard to a matter relating to land, arose out of a municipal transaction; further, the action was for the recovery of a penalty, or a rate, or a tax—for something in reference to land—and was in a like position to an action brought in one country to enforce the revenue laws of another, which would not lie; and, therefore, the action could not be maintained.

Notes. Applied: *Re Visser, Queen of Holland v. Drukker*, [1928] All E.R. Rep. 305. Considered: *The Tolten*, [1946] 2 All E.R. 372; *Re Delhi Electric Supply and Traction Co.*, [1953] 2 All E.R. 1452. Referred to: *Government of India v. Taylor*, [1955] 1 All E.R. 292.

As to the application of foreign laws, see 7 HALSBURY'S LAWS (3rd Edn.) 8-11, and for cases see 11 DIGEST (Repl.) 322-323.

Cases referred to in argument:

Whitaker v. Forbes (1875), 1 C.P.D. 51; 45 L.J.Q.B. 140; 33 L.T. 582; 40 J.P. 436; 24 W.R. 241, C.A.; 11 Digest (Repl.) 370, 370.

Mostyn v. Fabrigas (1775), 1 Cowp. 161; 98 E.R. 1021, Ex.Ch.; 11 Digest (Repl.) 450, 886.

Sydney Municipal Council v. Terry, [1907] A.C. 308; 76 L.J.P.C. 68; 97 L.T. 146, P.C.; 38 Digest (Repl.) 606, *710.

Buenos Ayres and Ensenada Port Rail. Co. v. Northern Rail. Co. of Buenos Ayres (1877), 2 Q.B.D. 210; 46 L.J.Q.B. 224; 36 L.T. 148; 25 W.R. 367; 11 Digest (Repl.) 371, 377.

British South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602; 63 L.J.Q.B. 70; 69 L.T. 604; 10 T.L.R. 7; 37 Sol. Jo. 756; 6 R. 1, H.L.; 11 Digest (Repl.) 371, 374.

Huntington v. Attrill, [1893] A.C. 150; 62 L.J.P.C. 44; 68 L.T. 326; 57 J.P. 404; 41 W.R. 574; 8 T.L.R. 341, P.C.; 11 Digest (Repl.) 515, 1293.

Henry v. Sargeant (1843); 13 New Hamp. 321.

Action brought by the plaintiffs, the Municipal Council of Sydney, to recover the sum of £3,919 4s. 3d. for rates or contributions payable by Sir Frederick Cook, in respect of property owned by him in Moore Street, Sydney, from 1898 to 1904.

By an indenture dated May 16, 1905, Henry Bull, hereinafter called the defendant, covenanted with Sir Frederick Cook to indemnify him against the claim

A arising in this action, and, in answer to a third party notice served on him, admitted his liability and obtained leave to defend the action.

B By the Moore Street Improvement Act, 1890 (54 Vict. New South Wales, No. 30), the plaintiffs were authorised and empowered to carry out certain improvements in Moore street, Sydney, New South Wales. To carry out such improvements the plaintiffs borrowed money, to be repaid with interest over a period not exceeding 100 and not less than fifty years. Half the cost of the improvements was to be borne by owners of property within the improvement area, and paid by yearly instalments. From 1898 to 1904 inclusive Sir F. Cook was owner of property situate within the improvement area, and the amount of contributions payable by him in respect of his said property for the cost of the improvements and interest for the years 1898 to 1904 amounted to £3,919 4s. 3d. The improvements were C duly carried out by the plaintiffs in accordance with the statutes. It was contended that by the combined effect of s. 26 of the Moore Street Improvement Act, 1890, s. 238 of the Sydney Corporation Act, 1879, repealed and re-enacted by s. 211 of the Sydney Corporation Act, 1902, and amended by s. 13 of the Sydney Corporation Amendment Act, 1905, the plaintiffs were empowered to recover the sum in question by action.

D By s. 26 of the Moore Street Improvement Act, 1890 :

"All powers and provisions for enforcing the payment of rates and other sums of money due to the council contained in the Sydney Corporation Act of 1879, or in any other Act relating to the said corporation, shall be applicable and may be exercised and carried out by the council . . . for the purpose of enforcing payment of any sum payable by way of contribution from any owner of property within an improvement area under this Act."

E The Sydney Corporation Act, 1879, gave the council alternative remedies—namely, distress, and a right of action. The right of action was given by s. 238, which was re-enacted by s. 211 of the Act of 1902 and amended by s. 13 of the Sydney Corporation Amendment Act, 1905, and it provided as follows :

F "In addition to the mode of enforcing payment of any sum due and recoverable in respect of any rate, or of any part thereof, and any other amount otherwise payable by any person under the provisions of this Act by the means hereinbefore mentioned, the council may recover any such sum by action or suit against any person liable under the provisions of this Act to pay such sum, and may in any such proceeding recover the arrears of any rates."

G *Foote, K.C.*, and *Ringwood* for the plaintiffs.
Simon, K.C., and *Gwyer* for the defendant.

GRANTHAM, J.—The point raised here is a new and interesting one, and not free from difficulty, but I am of opinion the action cannot be maintained by the plaintiffs in this country.

H When one looks at the headings of the various statutes that have been referred to, one sees that they are Acts of a purely local character, and this action is of a local description. In the first place, the Sydney Corporation Act, 1879, is entitled "An Act to consolidate and amend the laws relating to the corporation of the city of Sydney," and it goes on to recite that it is expedient to consolidate and amend the law relating to the corporation of the city of Sydney, and to make provision I in other respects for the better government thereof, as well as for other purposes. That statute is divided into thirteen parts, which deal with the constitution of the council, the municipal officers and the rates and revenues, and generally with the management of the town of Sydney. The next statute to be looked at, following up the line of argument, is the Moore Street Improvement Act, 1890, and that statute is entitled

"An Act to authorise and enable the Municipal Council of Sydney to carry out the improvement of Moore Street within the said city upon an equitable

system; to acquire lands and to raise money for carrying out such improvement; to provide for the repayment of the cost of such improvement, and the exchange and sale of superfluous lands in connection with the said improvement; and for other purposes."

Following that comes the Moore Street Improvement Act Amendment Act, 1892, which is entitled "An Act to amend the Moore Street Improvement Act, 1890," and following that Act we have the Sydney Corporation Act, 1902, entitled "An Act to consolidate the statutes relating to the corporation of the City of Sydney." It will thus be seen that all these statutes are of a purely local character, and the statute on which the present question arises is a statute dealing with the improvement of a street in Sydney. Unless it had been for s. 238 of the Sydney Corporation Act, 1879, which was repealed by the Sydney Corporation Act, 1902, but was re-enacted by s. 211 of the statute of 1902 and amended by the Sydney Corporation Amendment Act, 1905, the only remedy to recover these amounts would have been by distress. That section provided: [His LORDSHIP read the section, and continued:] It will, therefore, be seen that if that section had not been passed, an action for this amount would not have been maintainable even in New South Wales.

It is said, however, that that section not only gives a right to recover the sum by action in New South Wales, but also allows an action to be brought in the courts of this country, but I do not think that it was intended to give such a power, even if the legislature of New South Wales had a right to give it. In my opinion, that section was only intended to apply in Sydney, and only confers a right to bring an action within the area where these sums might be recovered by distress. It has been said that this is a transitory action, but I do not think that it is. If the argument of the plaintiffs is right, it is difficult to see what limit there is to the enforcement by foreign State of their laws enacted for their own purely local or municipal purposes. It is true that here the statutes require a payment of money, but they might quite well have required property owners to plant or lay drains or sink wells, and perhaps such provisions might be more equitable and more easily carried out than the payment of money. But, if that were so, could it be contended that such obligations could be enforced by the courts of this country? Certainly they could not, and the fact that the claim is merely for money can make no difference. Really this action is for the recovery of a penalty, or a rate, or a tax—for something in reference to land—and it is in a like position to an action brought in one country to enforce the revenue laws of another, and in those cases it has been held that such actions will not lie. In *STORY ON THE CONFLICT OF LAWS*, s. 554, it is stated:

"It has been already stated that, by the common law, personal actions, being transitory, may be brought in any place where the party defendant can be found, that real actions must be brought in the *forum rei sitæ* and that mixed actions are properly referable to the same jurisdiction."

In my opinion this is a mixed action to which that rule applies, for the claim is with regard to a matter relating to land, and, if it had not been for the section of the colonial statute, distress would have been the only remedy. This claim arises out of a purely municipal transaction, and it might just as well be said that a legislature imposing personal liability for municipal purposes could impose on the courts of another country the duty of adjudicating thereon, or, in other words, that the London County Council could sue in another country for a breach of their byelaws with regard to municipal work here. Under those circumstances, in my judgment this action cannot be maintained.

Judgment for the defendant.

Solicitors: *Light & Fulton; Crawford, Chester & Slade.*

[Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.]

GENERAL BILLPOSTING CO., LTD. v. ATKINSON

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.J.J.), January 31, February 1, 1908]

[Reported [1908] 1 Ch. 537; 77 L.J.Ch. 411; 98 L.T. 482; 24 T.L.R. 285]

[HOUSE OF LORDS (Lord Loreburn, L.C., the Earl of Halsbury, Lord Robertson and Lord Collins), October 27, December 14, 1908]

[Reported [1909] A.C. 118; 78 L.J.Ch. 77; 99 L.T. 943; 25 T.L.R. 178]

Master and Servant—Contract of service—Covenant restraining freedom of servant—Restriction on servant's right to trade after termination of employment—Wrongful dismissal of servant—Release from obligation under contract.

A contract of service, dated Feb. 28, 1901, contained a clause restricting the servant's right to trade within a specified area after the termination of his engagement. In March, 1906, the employers terminated the engagement by wrongfully dismissing the servant from the employment. The servant then began to trade within the prohibited area. In an action against him by the employers for an injunction and damages,

Held: by their conduct the employers had repudiated the contract and the servant was entitled to accept that repudiation and to be absolved from the further performance by him of any part of the contract; therefore, the action failed.

Notes. Applied: *Measures v. Measures*, [1910] 2 Ch. 248. Considered: *W. Dennis & Sons, Ltd. v. Tunnard Bros. and Moore* (1911), 56 Sol. Jo. 162. Distinguished: *Konski v. Peet*, [1915] 1 Ch. 530. Referred to: *Re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315; *Martin v. Stout*, [1925] A.C. 359; *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528; *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337.

As to the effect of wrongful dismissal on a contract of service, see 25 HALSBURY'S LAWS (3rd Edn.) 519–524, and for cases see 34 DIGEST 101 et seq.

Cases referred to:

- (1) *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch.D. 339; 59 L.T. 345, C.A.; 34 Digest 73, 502.
- (2) *Proctor v. Sargent* (1840), 2 Man. & G. 20; Drinkwater, 56; 2 Scott, N.R. 289; 10 L.J.C.P. 34; 133 E.R. 647; 43 Digest 25, 172.
- (3) *Norman v. Willetts* (1897), 13 T.L.R. 264; 12 Digest (Repl.) 166, 1073.
- (4) *Johnstone v. Milling* (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162; 54 L.T. 629; 50 J.P. 694; 34 W.R. 238; 2 T.L.R. 249, C.A.; 12 Digest (Repl.) 377, 2961.
- (5) *Pordage v. Cole* (1669), 1 Wms. Saund. 319; 1 Lev. 274; 2 Keb. 542; T. Raym. 183; 1 Sid. 423; 85 E.R. 449; 12 Digest (Repl.) 472, 3520.
- (6) *Boone v. Eyre* (1779), 1 Hy. Bl. 273, n; 1 Wms. Saund. 320 c; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, 3526.
- (7) *Ellen v. Topp* (1851), 6 Exch. 424; 20 L.J.Ex. 241; 17 L.T.O.S. 52; 15 Jur. 451; 155 E.R. 609; 12 Digest (Repl.) 473, 3530.
- (8) *White v. Beeton* (1861), 7 H. & N. 42; 30 L.J.Ex. 373; 4 L.T. 474; 7 Jur. N.S. 735; 9 W.R. 751; 158 E.R. 385; 12 Digest (Repl.) 494, 3713.
- (9) *Campbell v. Jones* (1796), 6 Term. Rep. 570; 101 E.R. 708; 12 Digest (Repl.) 482, 3589.
- (10) *Freeth v. Burr* (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 22 W.R. 370; 12 Digest (Repl.) 378, 2970.
- (11) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, 2966.

Also referred to in argument :

General Accident Assurance Corpn. v. Noel, [1902] 1 K.B. 377; 71 L.J.K.B. 236; 86 L.T. 555; 50 W.R. 381; 18 T.L.R. 164; 1 Digest (Repl.) 525, 1568.

Franklin v. Miller (1836), 4 Ad. & El. 599; 111 E.R. 912; 12 Digest (Repl.) 384, 3003.

Appeal from a decision of the Court of Appeal (see *infra*).

By an agreement dated Feb. 28, 1901, and made between the Newcastle and District Billposting, &c., Co., Ltd., of the one part, and the defendant, of the other part, it was agreed that the defendant should be secretary and manager of the company, and it was further provided :

"Clause 2. The said Thomas Anthony Atkinson shall hold the said office subject to termination at twelve months' notice in writing given by either party to the other. . . . Clause 9. The said Thomas Anthony Atkinson shall not while in the engagement, or within two years after his engagement with the said company terminates, commence the same or a similar business or accept a situation as manager or assistant to any person or company in a similar business to the company within a radius of fifty miles from the registered office of the company unless he receive written permission from the company to do so, and if he does so without such permission as aforesaid he hereby agrees to pay to the company the sum of £250 as and for liquidated damages, and not by way of penalty, without the company proving or being required to prove any special or other damage, and shall be restrained from so doing by an injunction of any court having jurisdiction."

The defendant continued in the engagement of the company until Mar. 28, 1906, when he was dismissed by that company without notice. On May 14, 1906, he commenced an action for wrongful dismissal against the company which was tried before MR. COMMISSIONER PICKFORD and a jury, and resulted in a verdict in his favour for £350 damages. By an indenture dated Oct. 31, 1906, and made between the Newcastle, &c., Co., of the one part, and the plaintiffs, the General Billposting Co., Ltd., a registered company carrying on the business of billposters and advertising contractors at Newcastle-upon-Tyne and the adjoining district and elsewhere, of the other part, the Newcastle, &c., Co., assigned to the plaintiffs (inter alia) the business of billposters and advertising contractors, carried on by the Newcastle, &c., Co. at Newcastle-upon-Tyne and district and the goodwill thereof and the benefits and obligations of all contracts and engagements. The Newcastle, &c., Co. went into liquidation, and the plaintiffs had since the date of the assignment carried on and were still carrying on the business of billposters and advertising contractors at Newcastle-upon-Tyne and in the adjoining district theretofor carried on by the Newcastle, &c., Co. In October, 1906, the defendant, without the knowledge or permission of the plaintiffs, or the Newcastle, &c., Co., commenced carrying on business in Newcastle-upon-Tyne in his own name and on his own behalf as an advertising agent and continued so to carry on that business until June, 1907, when he sold it to a company incorporated under the name of Thomas Atkinson, Ltd., and having its registered office at Newcastle-upon-Tyne. since when the business had been carried on by the company under the management of the defendant as managing director thereof. Thereupon the plaintiffs commenced this action against the defendant claiming (i) an injunction restraining him for two years after the termination of his engagement with the Newcastle, &c., Co., from acting as managing director of or otherwise managing or assisting Thomas Atkinson, Ltd., in the business of billposting and advertising contractors or commencing the same or a similar business to that lately carried on by the Newcastle, &c., Co., and assigned by that company to the plaintiffs, the General, &c., Co., or accepting a situation as manager or assistant to any person or company in a similar business within a radius of fifty miles from the registered office of the former company in Newcastle-upon-Tyne; (ii) in the alternative, or in addition

A to such injunction, damages. By his defence the defendant contended that upon the true construction of the agreement the obligation of the defendant under cl. 9 thereof was conditional upon the due performance by the Newcastle, &c., Co., of their part of the agreement; that that company having wrongfully dismissed the defendant without such notice as was required by cl. 2 of the agreement failed in such due performance; and that the defendant was, therefore, not under any of the obligations imposed by cl. 9. The action came on for trial on Dec. 3, 1907, before NEVILLE, J., who held that the contract was not too wide and was a good contract. It was said that the employers, having broken the contract by a wrongful dismissal of the servant, were not entitled to sue, but he thought that both on principle and on the authorities the point was bad. He gave judgment for the plaintiffs for £250 damages and the defendant appealed to the Court of Appeal.

C *Manisty, K.C. (Peterson, K.C., with him) and Dighton Pollock* for the defendant. *Bramwell Davis, K.C., and Hildyard* for the plaintiffs.

SIR HERBERT COZENS-HARDY, M.R., stated the facts and continued: In view of the verdict in favour of the present defendant in the wrongful dismissal action the plaintiffs are now bound by estoppel to admit that they wrongfully dismissed the defendant. They entirely refused from March, 1906, when they dismissed him, to perform any part of the obligations resting upon them by virtue of the contract. That having been the case, this action was brought last September claiming an injunction and damages. I say nothing about the injunction, because the claim for an injunction was obviously hopeless, but it is said that the plaintiffs can claim damages because the defendant committed a breach of cl. 9 of the agreement. The learned judge in the court below had held that, although the plaintiffs said, as long ago as March, 1906: "We absolutely decline to perform our part of this contract; we will not employ you any further," and, although the plaintiffs did that wrongfully, they are still entitled to claim damages for breach of cl. 9 of the agreement.

F With great respect to the learned judge in the court below, I am entirely unable to accept that view. It seems to me that it is impossible for me to put the case more accurately, or in better language, than it is put in a passage in the judgment of BOWEN, L.J., in *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1) in which he made certain observations upon what is the true result where the relation between master and servant is put an end to. The passage is as follows (39 Ch.D. at p. 365):

G "Some confusion always arises, as it seems to me, from treating these cases between master and servant as instances of a rescission of the original contract. It is not a rescission of the contract in the sense in which the term ordinarily is used—namely, that you relegate the parties to the original position they were in before the contract was made. That cannot be, because half the contract has been performed. It really is only a rescission in this sense, that an act occurs which determines the relation of master and servant for the future, and you may regard that determination in two ways; it is either a determination in conformity with the rights of the master which arise under the contract itself, there being, as I have said, in every contract of service an implied condition that if faithful service is not rendered the master may elect to determine the contract, and the determination takes place on that implied condition;"

I that is to say, that the act which is done is within the contract. Then comes this statement:

"or you may regard it under the more general law, which is not applicable to contracts of service alone—you may treat it as the wrongful repudiation of the contract by one party, being accepted by the other, and operating as a determination of the contract from that time—that is, from the time the party

who is sinned against elects to treat the wrongful act of the other as a breach of the contract, which election on his part emancipates the injured party from continuing it further."

Is it possible to have a more complete case illustrating that proposition than that which is brought before us today? The contract, putting the matter shortly, was this: On the part of the master: "I will employ you at a certain salary with certain duties until I give you twelve months' notice or you give me twelve months' notice." The contract on the part of the servant was this: "I will serve you diligently and properly and obey your orders, and when the service under the contract comes to an end I will not carry on business within a certain area, and for a certain period as stipulated in cl. 9 of the contract." But when once you get a complete and total repudiation by the employer—not merely a breach of some of the obligations on his part, but a complete and total repudiation of everything that was to be done by him—surely that is a wrongful repudiation of the contract which the servant is entitled to accept, and from thenceforward he is free from every part of the contract, whether it be the contract to obey the master's orders, and to do his duty under the contract, or the subsequent part which involves the consideration of cl. 9. On principle, therefore, it does seem to me that this is a case in which it is impossible for the plaintiffs to get either any relief of an equitable nature, or to have any claim for damages because the contract has been repudiated by one party, and the repudiation has been accepted by the other party as long ago as March, 1906.

But then it is said that there is authority contrary to that view, and reference is made to *Proctor v. Sargent* (2). When you look at *Proctor v. Sargent* (2) it is quite clear that it is not any authority upon this point at all, because the declaration which was before the court there (it was heard on demurrer to a declaration) was that the plaintiff had always performed and fulfilled the agreement, and all things therein contained on his part to be performed. So that there was an allegation, which for the purposes of the demurrer must be taken to be true that there was no breach, and no repudiation of the contract on the part of the plaintiff, the employer. TINDAL, C.J., after dealing with the facts, says this (2 Man. & G. at p. 32):

"The breach alleges that the defendant within twenty-four calendar months 'after his quitting and being discharged did commence,' &c. I should rather say from those words that the contract was regularly determined."

That is to say, not wrongfully determined. Then he goes on to say:

"But if it was otherwise, and the defendant was discharged without a month's notice, he should have brought a cross-action, and not have relied upon that as a defence to the present suit."

That, of course, even giving it the full effect which we are asked to do by the plaintiffs was, at the utmost, a mere dictum not in any way necessary for the decision of the case and not in any way supported by the other members of the court, and it seems to me the opinions of the other learned judges, so far as there are any dicta on the point, are distinctly the other way. BOSANQUET, J., says (*ibid.* at pp. 33, 34):

"The first point for our consideration is mere matter of form—whether it was incumbent on the plaintiff to show in the declaration that the defendant was discharged in the way contemplated by the agreement. The objection is, that it does not appear that the plaintiff gave any notice in writing to the defendant to determine the service. If it was the intention of the plaintiff to put an end to the service against the will of the defendant, he was to give the latter a month's notice, but there might be other grounds which would justify the plaintiff in determining the contract besides those specified. . . . It appears to me that the meaning to be attached to these words is, that the service was

A put an end to by the mutual consent of both parties, and that this brings the case within the terms of the agreement."

MAULE, J., puts the matter very plainly, and in a manner which is entirely favourable to the present defendant. He says (*ibid.* at p. 36):

B "The question before us is whether the declaration is sufficient. It is said that the consideration for the agreement on the part of the defendant is not duly alleged to have been performed by the plaintiff. The consideration for the promise by the defendant is the promise of the plaintiff to fulfil the agreement on his part. Now, the plaintiff has in general terms stated that he has performed the agreement which is sufficient on general demurrer."

C It seems to me, even assuming that according to the true reading of the one passage to which I have referred in *TINDAL, C.J.*'s, judgment, it is a dictum in favour of the plaintiffs' view, it is a dictum not concurred in by his colleagues, not supported by any other authority, and certainly not consistent with the observations of *BOWEN, L.J.*, in *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1).

D We were also referred to the case before *STIRLING, J.*, of *Norman v. Willetts* (3). But that case does not lend any support whatever to the contention in the present case. There the plaintiff, seeking an injunction to restrain a nurse from committing a breach of a clause of the same nature as cl. 9 here, said that she had dismissed the nurse, the defendant, properly for misconduct. The nurse denied it, and said that there was no justification. The application before *STIRLING, J.*, was on an interlocutory motion, and under those circumstances he did what—if I might say so with great respect—was obviously and manifestly just. He said, in effect, that

E he must grant an injunction until the trial with an undertaking as to damages, and if at the trial the defendant proved that the dismissal had been wrongful, damages would have to be paid by the plaintiff to the defendant upon the undertaking. There is, in my view, no authority whatever to support the claim of the plaintiffs in the present matter. There is, in my view, no principle upon which it can be justified. This appeal must be allowed, and the plaintiffs must pay the costs

F here and below.

FLETCHER MOULTON, L.J.—I am of the same opinion.

BUCKLEY, L.J.—We are differing from the learned judge in the court below, and for that reason only I will say a few words, showing the grounds of my judgment. There existed between the plaintiffs and the defendant a contract of

G service, and it included a clause restrictive of the defendant's right to trade after the determination of his engagement. I may take it that that clause would have had effect if his engagement had been terminated in any way consistent with the agreement. It has been determined in litigation between the parties, and by the verdict of a jury, the plaintiffs dismissed the defendant wrongfully. They refused

H to employ him further, and had no just cause to do so, and brought entirely to an end all their obligations under the contract. The present application is one in which they seek to say that, notwithstanding that, he remains liable to his obligations under the agreement, namely, the restrictive clause under art. 9 and the obligation to pay damages, which have been assessed at £250. In my opinion, that cannot be maintained. When the defendant brought his action for wrongful dismissal, he was in no way setting up the contract. When the plaintiffs refused

I to perform the agreement—as *LORD ESHER* says in *Johnstone v. Milling* (4)—the defendant was entitled if he pleased to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. He had a perfect right to sue for damages, although he was going to say that the contract was entirely at an end. It seems to me that what has taken place here is that the plaintiffs elected not to perform the agreement on their part, and that it was competent to the defendant to say: "I take you at your word; the agreement shall be put an end to altogether, I retaining my

right to sue you for breach," which he has done. It seems to me that the result of what has been done, is that cl. 9 fell to the ground directly the plaintiffs committed a complete breach of all their obligations under the agreement by refusing to be further bound by it. I think, therefore, that this appeal should be allowed, and the action dismissed with costs.

The plaintiffs appealed to the House of Lords.

C. A. Russell, K.C., and *Hildyard* for the appellants.

Manisty, K.C., and *Dighton Pollock* for the respondent.

Their Lordships took time for consideration.

Dec. 14, 1908. **THE EARL OF HALSBURY**.—I have had the advantage of reading the opinion which is about to be delivered by LORD COLLINS, and I concur in it.

The following opinions were then read.

LORD COLLINS.—I am of opinion that the unanimous decision of the Court of Appeal in this case should be affirmed. The rule pressed upon us by counsel for the appellants from the notes to *Pordage v. Cole* (5)

"cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if in *Boone v. Eyre* (6) two or three negroes had been accepted and the equity of the redemption not conveyed, I do not apprehend that the plaintiff could have recovered the whole stipulated price and left the defendant to recover damage for the non-conveyance":

see per POLLOCK, C.B., delivering the judgment of the court in *Ellen v. Topp* (7) (6 Exch. at p. 442). Further, in *White v. Beeton* (8) BRAMWELL, B., quotes with approval the remark of LORD KENYON, C.J., in *Campbell v. Jones* (9) (6 T.L.R. 570):

"Whether these kinds of covenants be or be not independent of each other, must certainly depend on the good sense of the case."

The reason for the rule itself is said by SERJEANT WILLIAMS to be that

"where a person has received a part of the consideration for which he entered into the agreement it would be unjust that because he has not had the whole he should be permitted to enjoy that part without either paying or doing anything for it."

But in this case the defendant has given an equivalent in service for the remuneration he has received in salary. He stands, therefore, outside the reason of the rule. But I think that this case may be, and in fact has been, decided on broader lines than those laid down in the notes to *Pordage v. Cole* (5), as to mutual and independent covenants. I think that the true test applicable to the facts of this case is that which was laid down by LORD COLERIDGE, C.J., in *Freeth v. Burr* (10), and approved in *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (11):

"That the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

I think that the Court of Appeal had ample ground for drawing this inference from the conduct of the employers here in dismissing the defendant in deliberate disregard of the terms of the contract, and that the latter was thereupon justified in rescinding the contract and treating himself as absolved from the further performance of it on his part. I think that the appeal should be dismissed.

LORD ROBERTSON (read by LORD LOREBURN, L.C.).—If this case be considered for a moment on its own merits and substance (apart, in the meantime, from authority), it is extremely difficult to be reconciled to the appellant's

A contention. The respondent's position in entering into the contract is a very intelligible one. He says: "I am a billposter, and I desire occupation, either on my own account or in the service of others. If I enter the employment of others, I am willing to give up the right to trade on my own account to the extent specified in this agreement. I do not desire to have it both ways." The claim of the appellants, on the other hand, as now put forward, is that taking him at his word, as expressed in the contract, and getting his services, they are to be entitled both to deprive him (against the contract) of the right to serve them and also of the right to serve himself. It seems to me that the covenant not to set up business is not only germane to but ancillary to the contract of service, and that, once the contract of service is rescinded, the other falls with it. I have only to add that the suggestion that the respondent has already received his quid pro quo, in that he has had the appellants' wages for a considerable time, ignores the equally important fact that they have had his services for the same period.

LORD LOREBURN, L.C., concurred.

Appeal dismissed.

D Solicitors: *Robinson & Bradley*, for *Lundi, Shortt & Fenwicke*, Newcastle-upon-Tyne; *Rawle, Johnstone & Co.*, for *Cooper & Goodger*, Newcastle-upon-Tyne. [Reported by E. A. SCRATCHLEY, Esq., and C. E. MALDEN, Esq., *Barristers-at-Law*.]

E

Re ENOCH AND ZARETZKY. BOCK & CO.'S ARBITRATION

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.J.J.), November 26, 29, December 15, 1909]

F

[Reported [1910] 1 K.B. 327; 79 L.J.K.B. 363; 101 L.T. 801]

Arbitration—Misconduct of arbitrator—Removal from office—Witnesses called against will of parties.

G

An umpire or single arbitrator occupies a judicial position and exercises judicial powers and is bound, so far as is practicable, to follow legal rules. He has no power, therefore, to call witnesses to fact in a civil dispute against the will of either of the parties to the arbitration. If this is done, he is guilty of legal misconduct justifying his removal from office.

Dictum of LORD ESHER, M.R., in *Coulson v. Disborough* (1), [1894] 2 Q.B. at p. 318, considered.

H

Notes. The Arbitration Act, 1889, has been repealed. Sections 23 (1), and 23 (2) of the Arbitration Act, 1950, reproduce s. 11 of the 1889 Act.

Referred to: *Shea v. Wilson & Co., Barnsley, Ltd.* (1916), 9 B.W.C.C. 633; *R. v. Sullivan*, [1923] 1 K.B. 47; *R. v. Harris*, [1927] All E.R. Rep. 473; *Jones v. National Coal Board*, [1957] 2 All E.R. 155; *Fallon v. Calvert*, [1960] 1 All E.R. 281.

I

As to removal of arbitrator or umpire, see 2 HALSBURY'S LAWS (3rd Edn.) 33 et seq., and for cases see 2 DIGEST (Repl.) 555–556; as to the Arbitration Act, 1950, s. 23, see 29 HALSBURY'S STATUTES (2nd Edn.) 108.

Cases referred to:

(1) *Coulson v. Disborough*, [1894] 2 Q.B. 316; 70 L.T. 617; 58 J.P. 784; 42 W.R. 449; 10 T.L.R. 429; 38 Sol. Jo. 416; 9 R. 390, C.A.; 22 Digest (Repl.) 454, 4969.

(2) *Andrews v. Mitchell*, [1905] A.C. 78; 74 L.J.K.B. 333; 91 L.T. 537, H.L.; 25 Digest 325, 266.

- (3) *A.-G. v. Davison* (1825), M'Cle. & Yo. 160; 148 E.R. 366, Ex.Ch.; 2 Digest (Repl.) 556, 907. A
- (4) *Re Keighley, Maxted & Co. and Bryan Durant & Co.*, [1893] 1 Q.B. 405; 62 L.J.Q.B. 105; 41 W.R. 437; 9 T.L.R. 107; 37 Sol. Jo. 99; 7 Asp. M.L.C. 268; 4 R. 136; sub nom. *Re Maxted, Keighley & Co. and Bryan Durant & Co.*, 68 L.T. 61, C.A.; 2 Digest (Repl.) 695, 2089.

Appeal from a decision of a Divisional Court dismissing a motion by the sellers of goods for an order that an umpire should be removed. B

Simon, K.C., and *Maurice Hill* for the sellers.

Atkin, K.C., and *Leck* for the buyers.

F. D. MacKinnon and *Rankin* for the buyer's arbitrator.

SIR HERBERT COZENS-HARDY, M.R.—This is a case which has given some anxiety, because it compels me to say something about a gentleman who is not directly a party to the litigation, and that is always an unpleasant position for a judge to find himself in. But having very carefully considered the whole case, and having had the benefit of very full arguments by counsel on both sides, I feel reasonably satisfied that this appeal must be allowed. C

There was a dispute as to whether certain rice, or rice bran, which was shipped from Rangoon was, or was not, in accordance with the terms of the contract. An arbitration was agreed upon. The sellers appointed one arbitrator, and the buyers appointed another, and then there was an umpire appointed. One of the original arbitrators died, and a new one was appointed, but that is an irrelevant matter. The umpire who was appointed was a Mr. Von Limburg. The arbitration went on for a very long time; it has not yet reached the stage of an award, and Zaretsky, Bock & Co., the sellers, applied to the Divisional Court that Mr. Von Limburg, the umpire, should be removed and the matter be remitted to the arbitrators, Mr. Norton and Mr. Milner Brown, to be heard by them with a new umpire appointed by them; or that leave should be given to revoke the submission to the arbitrators. D

The jurisdiction of the court to remove an umpire for misconduct is, of course, quite plain. It is given in express terms by s. 11 of the Arbitration Act, 1889. There are at least four transactions in the present case which constrain me, taking them altogether, to conclude that there has been here such misconduct on the part of the umpire, Mr. Von Limburg, as not only justifies, but really compels, us in the exercise of our duties to remove Mr. Von Limburg. Now, the first point—and one to which I personally attach very considerable importance—is an unfortunate transaction about the sum of £150. There was a question, I should say, as to the construction of the contract—admittedly a serious question. I express no opinion upon the true view of the contract, because it is not before us. But a request was made in July, 1908, that the umpire should state a special case, and this is his reply, dated July 18, 1908: E

"In reply to your favour of the 15th inst. calling upon me to state certain specific questions of law for the opinion of the court, I beg to state that I am quite willing to comply with your request, but I must ask you to hand me first a cheque for £150 on account of legal expenses, etc." F

Was that proper? Of course I have not heard any explanation, and counsel could not possibly suggest anything to justify such a statement as that. That was not a casual thing because the matter was going on until October, and on Oct. 8 the arbitrator appointed by the sellers, Mr. Milner Brown, wrote to Mr. Von Limburg: G

"I gather that you desire to impose a condition that a sum of £150 shall be deposited to cover the costs of the special case. This seems to me to be an improper as well as an exorbitant demand." H

Was there any withdrawal of that letter? None whatever. I have looked through the correspondence from the beginning to the end and there is nothing of the kind. On Oct. 15 there is a letter from Mr. Von Limburg in which he simply says: I

A "Your last letter of the 8th inst. was read and dealt with at our last meeting. It is incorporated in the dossier of the case."

So that we have this umpire making that highly improper demand for £150, making it in writing, and not withdrawing it for months afterwards, when his attention is called to it and when it is described as "improper and exorbitant"; and that does seem to me to give colour to the case which one cannot possibly put aside.

B Another point which impresses me very much is this, that the umpire thought fit formally to rule that one of the parties to the arbitration, Mr. Zaretsky—a gentleman who was not personally acquainted with the matter, and who had not been concerned with it—must attend and give evidence. What possible authority an umpire has to do that, I do not know. Mr. Zaretsky was then in London; but my remark is still not without weight. The umpire took upon himself to rule C that one of the parties to the arbitration, who was not really concerned and had no personal intimate knowledge of the matter, must come and give evidence. The next thing was this. The umpire took upon himself to call a gentleman whose name is Mr. Kolway, a gentleman living in London, representing a company carrying on business at Burmah. What right the umpire had to call a witness, I D confess I do not understand. But that was not all. When this gentleman was called he then produced copies of certain documents which it is really ludicrous to call evidence at all. He produced copies of certain documents which were said to show that certain parcels of rice had been purchased at Rangoon from certain people at certain prices, and of certain qualities. That being so, the vendors said that this was entirely a new point resulting from the witness whom the umpire E had thought fit to call, and that they must have permission to send out to Rangoon, where they could get something deserving the name of evidence as to the place from which and the terms on which the parcels of rice which were in the cargo in question were obtained. The umpire would not allow the adjournment, and he actually proposed to make his award and deal with the matter, preventing the vendors from adducing evidence most obviously relevant in order to deal with a matter which, to my mind, it was equally obvious was not evidence, and which F the umpire had no right to admit.

Then I am impressed with this, that the umpire has thought fit in this dispute to make a very long affidavit which is, to my mind, coloured throughout by an obvious bias in favour of the buyers and against the sellers. I wish to make it clear that I am not suggesting fraud on the part of Mr. Von Limburg. But I G do say that his conduct as umpire was such, as manifested by the particulars which I have given, that it would not be satisfactory, it would not be fair, it would not be just, to leave the rights of the parties, as they necessarily would be, in his sole hands to make the award unless we interfered. I, therefore, think that this appeal must be allowed.

H **FLETCHER MOULTON, L.J.**—I am of the same opinion and for the same reasons. So far as they deal with the facts of the case other than one particular point to which I will presently refer, the same have been so admirably stated by the Master of the Rolls that I do not intend to refer to them. The point to which I wish to allude is the question of the umpire procuring evidence in the arbitration himself. It is quite clear, both from his conduct and from the line that has been taken up by counsel for the buyers and their arbitrator on this appeal, that there I is an idea that an umpire, a person in a judicial position, has the power, and, I suppose, the duty, to call witnesses in a civil dispute which the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case. The argument is based on the case in the Court of Appeal of *Coulson v. Disborough* (1), in which certainly there are dicta that require to be carefully examined. The case itself presents no difficulty; nor does the decision. That was a case where, after both the counsel had spoken, the jury intimated to the judge that there was a person there to whom frequent

reference had been made and they would like him to be called as a witness. The learned judge (BRUCE, J.) called him as a witness, but obviously without any objection being raised by either party. He asked him one or two questions, the answers to which were wholly immaterial to the question, and then counsel for one of the parties asked leave to cross-examine, and the learned judge would not give him leave. When that was brought before the Court of Appeal, all the learned judges held that the answers were quite immaterial, and they said that under those circumstances there was no right whatever to cross-examine. Only one of the learned judges, LORD ESHER, M.R., does give a dictum to which I wish to refer particularly. But it is quite evident that nothing was said throughout the argument as to this witness being called in *invitos* so far as the parties were concerned. LORD ESHER, M.R., said ([1894] 2 Q.B. at p. 318):

“If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him.”

If that means to call him when either side objects, I am satisfied that there is no basis for that dictum. It certainly was not necessary for the decision; and the consequences to which it would lead if so interpreted are such that I am satisfied that the Court of Appeal would never have made a decision so wide-reaching and so destructive of the fundamental principles of our laws of procedure without either authority or reasoning. It is not based on any course of reasoning, and no authority is cited for it. I say that it would be destructive of the fundamental principles of our law of procedure because of this. According to such dictum, if supposed to apply to witnesses called against the will of one of the parties, the civil rights of a man might be decided by evidence given by a person whose personal credibility and the accuracy of whose statements he would have no right to test by cross-examination, because the Court of Appeal laid down that if a judge does call a witness then neither party can cross-examine him as of right. That may be most reasonable if the calling has been with the assent of both parties, because he cannot be regarded as a witness of the other party. But it would lead to consequences which I do not even like to contemplate if it were supposed to apply to cases where a judge calls a witness to facts of the case and then refuses, or has the power to refuse, that there shall be any cross-examination. Therefore I think that that dictum refers only to cases where a judge has called a witness without protest; that is to say, with practically the acquiescence of both parties, and has done so in order to get over the difficulty that if either party calls a witness, he is supposed to be responsible for his personal credibility, though not for the accuracy of his statements. It is well known that if a party calls a witness he may not then attack his general credibility. There may be a person whom it would be desirable to have before the court. Neither party wishes to take the responsibility of first vouching his personal credibility, or that he is a witness fit to be called, and the judge may relieve the parties in this way, by letting him go into the box as a witness of neither party, and of course, if the answers are immaterial, he may refuse to allow cross-examination. But the dictum certainly does not justify in my opinion, and it is certainly not the law, that a judge, or any person such as an arbitrator in a judicial position, has any power to call witnesses to fact himself against the will of either of the parties.

FARWELL, L.J.—I am of the same opinion, and, as I have taken the opportunity during the adjournment to look into one or two of the cases, I will state my views on one or two of the points that have been argued. Where a case is referred to two arbitrators and an umpire, I think it is well understood that the arbitrators act as counsel who try and settle the case without going to court. But the umpire or a single arbitrator occupies a judicial position and exercises judicial powers, and is bound, as far as practicable, to follow legal rules, although, as

A LORD HALSBURY says in *Andrews v. Mitchell* (2) ([1905] A.C. at p. 80):

"We must not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities, cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. I should be anxious myself, as I have no doubt all your Lordship would be, to give every effect to their decisions; on the other hand, there are some principles of justice which it is impossible to disregard, and, giving every credit to the desire on the part of this arbitration court to do justice, I think it is manifest that they proceeded far too hastily in this case, and, apart from imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole thing arose and was disposed of was so slipshod and irregular that it might lead to injustice."

There are several matters which have arisen in the present case the cumulative effect of which is very strong. To take one or two of them—I do not propose to go through all the facts—there is the question as to the reception by the umpire of a copy of an award between different persons as evidence without all the facts stated in it being known. It is clear that in no court of justice would that copy award be any evidence at all. But it is said, and certain statements of LORD ESHER, M.R., were referred to in support of it, that an umpire is not bound by the rules of evidence. With the greatest respect, I think that that is not correct. It is stated in *A.-G. v. Davison* (3) by the learned judges there as follows. ALEXANDER, L.C.B., says (M'Cle. & Yo. at pp. 166, 167):

"It has been contended that, in the present case, they [that is, the commissioners] are in the situation of arbitrators, and, as such, may do so. But I have always understood that arbitrators are bound by the same rules of evidence as the courts of law."

Then GRAHAM, B., says (*ibid.* at p. 167):

"A general statement has been made that arbitrators may proceed in receiving evidence, without reference to principles of law or equity. Now we know that position to be contrary to law, and the practice of the courts."

I think GARROW, B., does not refer to it. But HULLOCK, B., says (*ibid.* at p. 171):

"I never understood, that arbitrators were at liberty to deviate from those rules which govern the superior courts. It is true, that at nisi prius on orders of reference, and where, generally speaking, all matters in dispute are referred, the arbitrator is usually authorised to examine the parties, or either of them, if he thinks proper, but this depends on the previous agreement of the parties, who by consent introduce it into the order of reference. I agree in opinion with the rest of the court, that this is not legal evidence, and, if it is not legal evidence, that it ought not to be received by the commissioners."

In the Court of Appeal in *Re Keighley, Maxsted & Co. and Bryan Durant & Co.* (4), which was a case before them on an application to remit an award because fresh evidence had been discovered since it was made, the objection was taken that it ought not to be done, because the fresh evidence would not be good evidence if the case were tried in a court of law. LORD ESHER, M.R., says ([1893] 1 Q.B. at p. 411):

"The parties have agreed to go before an umpire, who is not bound by the strict rules of evidence enforced in a court, and to be bound by his decision; and in my judgment the court ought not to fetter the arbitrator or the parties by its own rules of evidence, but should consider whether something has been discovered since the award which the arbitrator might think material, and which might alter his decision."

LOPES, L.J., says (*ibid.* at p. 413):

"I am not prepared to say that the evidence in this case might not be receivable as legal evidence."

He also appears to agree, to some extent at any rate, with LORD ESHER's dictum or decision if it be so. KAY, L.J., says (*ibid.* at p. 415):

"In the present case I agree with LOPES, L.J., and am not satisfied that the evidence would be inadmissible in a court of law; and, therefore, I think that the court may,"

and so on. I think, therefore, it rests on LORD ESHER, M.R., and it is no doubt, so far as he is concerned, a decision. But with regard to the other two members of the court it is a dictum only that arbitrators are not bound by the ordinary rules of evidence. If it be taken literally, I can only say, with the greatest possible respect, that I think it is contrary to what was said in the Court of Exchequer, and contrary to what is the rule of law in our courts. If they meant—and I think they can have only meant this—that the court will not be extreme to mark anything done amiss in respect of the reception of evidence unless substantial injustice results, and that they were really applying to umpires the principle that underlies Ord. 39, r. 6, then I should agree with them. It is plain that the courts do allow considerable latitude in practice, at any rate as to the reception of evidence by umpires, but to say as a general proposition that they are not bound by the rules of evidence appears to me to be entirely misleading and likely to produce very great injustice in this arbitration. The courts also, no doubt, very readily treat any objection which would have been open to the reception of the evidence as waived, and I think in the present case, if it were not for what I am bound to add, I should have thought the objection here was waived.

The next objection is this. The witness who produced the copy award was found to be called by the umpire. The statement in the affidavit is:

"When Mr. Zaretsky had finished, the umpire said, 'Now I have a witness to call,' and then began to examine Mr. Kolway, an assistant of the Burmah Rice and Trading Co., Ltd., who had been present during the proceedings. Mr. Kolway produced an award, of which a copy is included in the bundle forming the exhibit to this affidavit. This award was read out, and it was evident that the umpire attributed the greatest importance to it. The umpire then proceeded to examine this witness with a view to showing"

certain things. This is in my opinion highly objectionable. If an umpire knows of a witness who can give evidence, he should inform both of the parties and invite them to call him. It puts the parties, against whom the witness gives evidence, in a very difficult position when the umpire has made him his own witness by calling him and by examining him. How can he effectually object to the umpire's questions? How can he ask him to reject a document which the witness produced, on which the umpire relies? It is said that a judge of the High Court has the power to do this on the authority of *Coulson v. Disborough* (1). I am far from suggesting there is not the power, qualified in the way my brother FLETCHER MOULTON, L.J., has stated. I think there is such a power, if LORD ESHER, M.R., meant to say, which is in accord with the facts of the case then before the court, and therefore I think one may fairly presume he did mean to say, "if there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth and neither party objects the judge, in my opinion, is himself entitled to call him." In that particular case there was a man in court who apparently was supposed by the jury to know certain material facts, and they desired to have him called. No one objected, and the judge called him. To that I see no objection whatever. I confess that I feel some difficulty in assenting to the proposition that a judge

A ought ever to refuse cross-examination, but the learned judge says ([1894] 2 Q.B. at p. 318):

"If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted."

B To that I have no objection to offer at all, but I think, taking the facts of that case, what was meant was this. The jury thought that the man could give relevant testimony. He gave evidence which was not relevant, and then the judge said, "We will treat him as not called," and he would not allow any general fishing cross-examination. To that I see no objection whatever. I would venture with
C respect to criticise what SMITH, L.J., says that a witness called in this way is a witness of the judge and not of the parties. I venture to think it is not accurate to say a judge ever has a witness of his own. He is there to determine on the evidence called, and, in the case put, the witness, although called, would be a witness to be dealt with as an ordinary witness, the learned judge's qualification being true to this extent that it is not open to the counsel on either side to comment on the evidence given and to say he is either the plaintiff's witness or the defendant's witness. If he meant no more than that, then I agree, but, whatever power
D a judge of the High Court has to call such a witness, an umpire has no such power. He has not got all the power of a judge, but only such power as the Arbitration Act, 1889, and Ord. 36, rr. 48 and 55, give him in any case to which those rules are applicable. In my opinion the conduct of the umpire in calling
E this witness and examining him and admitting the copy award as evidence is legal misconduct; and I cannot see that the objection to the admission of the document is waived because it was produced by the umpire's witness, and it would have been useless to object. Then he actually refused to allow an adjournment in order to enable the sellers to give evidence to test the testimony of the witness whom he had himself called. These facts appear to me to be amply
F sufficient even without the other matters which the Master of the Rolls has mentioned, to which I entirely agree. The £150 claimed was a most improper demand, and, taking the whole of the circumstances together as appearing from this voluminous affidavit, I think that it is obvious that justice would not be done if the arbitration were sent back to the same umpire for his award, the umpire having in my judgment been guilty of legal misconduct.

Appeal allowed.

Solicitors: *Stibbard, Gibson & Co.; Walton & Co.; W. G. Glover.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

BAKER v. ADAM

[KING'S BENCH DIVISION (Hamilton, J.), January 13, 1910]

[Reported 102 L.T. 248; 11 Asp. M.L.C. 368; 15 Com. Cas. 227]

Insurance — Marine insurance — Total loss — Claim — Claim for unliquidated damages in nature of indemnity.

A claim for a total loss upon a policy of marine insurance is a claim for unliquidated damages in the nature of an indemnity.

Insurance—Marine insurance—Policy—Assignment—Action by assignee—Right of insurer to set off claims against assignor on other policies.

In an action by the assignee of a policy, claims by the insurer against the assignor for losses on other policies cannot be set off, as the right of set-off by way of defence to the assignee's claim is limited to defences arising out of the contract contained in the policy assigned.

Pellas v. Neptune Marine Insurance Co. (1) (1879), 5 C.P.D. 34, applied.

Per HAMILTON, J.: I am not satisfied that it is now, within the words of the Marine Insurance Act, 1906, a customary manner of assigning a marine policy simply by handing it over.

Bankruptcy—Deed of arrangement—Plaintiff to collect debtor's debts etc. and hold proceeds of sale on trust to apply them "according to the law of bankruptcy" to paying debtor's creditors—Right of set-off.

By a deed of arrangement made in favour of the plaintiff for the benefit of creditors specifically defined in a policy of re-insurance who had signified their assent in writing, the plaintiff undertook to call in, collect, sue for, and institute and prosecute proceedings for the recovery of the whole or any part of the book debts and other credit claims and assets forming part of the property of the debtor and to stand possessed of the net proceeds of sale on trust to apply them in paying and discharging rateably "according to the law of bankruptcy and without prejudice or priority and by such dividends as [he] should think fit, the debts due or to become due from the debtor to the creditors."

Held: the words "according to the law of bankruptcy" were only descriptive of a rateable payment without prejudice or priority and by a series of instalments or dividends and were not sufficient to import into the distribution of the money an obligation to allow a set-off to a person who had not signified his assent to the deed.

Notes. Referred to: *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145.

As to set-off of premiums and losses, see 22 HALSBURY'S LAWS (3rd Edn.) 42-43, and for cases see 29 DIGEST 76-77. For the Marine Insurance Act, 1906, s. 50, see 13 HALSBURY'S STATUTES (2nd Edn.) 38.

Cases referred to:

- (1) *Pellas v. Neptune Marine Insurance Co.* (1879), 5 C.P.D. 34; 49 L.J.Q.B. 153; 42 L.T. 35; 28 W.R. 405; 4 Asp. M.L.C. 213, C.A.; 29 Digest 295, 2407.
- (2) *Luckie v. Bushby* (1853), 13 C.B. 864; 1 C.L.R. 685; 22 L.J.C.P. 220; 21 L.T.O.S. 186; 17 Jur. 625; 1 W.R. 455; 138 E.R. 1443; 29 Digest 76, 353.
- (3) *Newfoundland Government v. Newfoundland Rail. Co.* (1888), 13 App. Cas. 199; 57 L.J.P.C. 35; sub nom. *A.-G. for Newfoundland v. Newfoundland Rail. Co.*, 58 L.T. 285; 4 T.L.R. 292, P.C.; 40 Digest (Repl.) 417, 117.
- (4) *Smith v. Parkes* (1852), 16 Beav. 115; 51 E.R. 720; 40 Digest (Repl.) 425, 183.
- (5) *Bankes v. Jarvis*, [1903] 1 K.B. 549; 72 L.J.K.B. 267; 88 L.T. 20; 51 W.R. 412; 19 T.L.R. 190, D.C.; 40 Digest (Repl.) 456, 417.

Action tried by HAMILTON, J., sitting in the Commercial Court without a jury.

The plaintiff claimed as assignee by indorsement of a marine insurance policy, or, alternatively, as the assignee under three deeds of assignment, to recover £269 4s. 10d. losses and premiums payable under the policy. The defendant, while denying liability, claimed to set off £240 11s. 9d., amounts due to him from the assignors of the policy.

Scrutton, K.C., and *Dawson Miller* appeared for the plaintiff.

Bailhache, K.C., and *Leck* appeared for the defendant.

HAMILTON, J.—This action is brought to recover a total loss under a policy of re-insurance against the defendant, Mr. Walter Adam, one of the signatories to that policy, and it is brought, not by the original re-insured, who were three gentlemen named Green and a Mr. Churchill, but by the plaintiff, a Mr. Baker, who claims in respect of the three Messrs. Green, whose interest amounted to four-fifths of the whole collectively, as their assignee, and in respect of Mr. Churchill he brings the action, as it is said, on behalf of that gentleman.

The three Messrs. Green and Mr. Churchill had been underwriters carrying on business at Lloyd's. They were four names for whom I suppose some gentleman regularly wrote risks, and they had brought their business to an end under circumstances that led to the intervention of the plaintiff, an accountant. It is pointed out with regard to Mr. Churchill that the only right which the plaintiff claims for suing on his behalf is, as he says in his evidence, that under some arrangement which is in writing, but not produced to me, he had authority from Mr. Churchill's solicitors to include his claim in this action, and to bring this action as to one-fifth of the interest on his behalf. The retainer of a solicitor does not in itself include authority to request somebody else to sue on the client's behalf, and, as all I know about Mr. Churchill's claim, which may otherwise be a perfectly good one, is summed up in that, I think it is clear that this action is not properly brought on his behalf. Probably that affects nothing but costs, and those only to a very small extent, if at all.

As regards the three Messrs. Green, the title which is made by the plaintiff is that he is assignee from them in three different ways. First, under deeds which I understand to be all in the same form, and by the one executed by Mr. Walter Davis Green, which is dated May 17, 1909, he was constituted assignee of the policy in question and Mr. Green's rights under it, and as trustee for Mr. Green and a particular class of Mr. Green's creditors; and it is said, therefore, that as assignee under that deed he is entitled to bring this action. Secondly, it is said that he becomes assignee of the rights of each Mr. Green in the policy in question by virtue of an assignment to him by delivery which took place some time in August, 1909. Thirdly, it is said that he becomes entitled as assignee of the policy, which was made by brokers effecting the policy, who were described in it as so effecting it, but the indorsement on the face of the policy was not made until after the issue of the writ. I think it is quite clear that whatever be the effect of the brokers, Chandler, Hargreaves & Co., writing their names on the margin of the policy, it cannot affect the plaintiff's rights in this action, seeing that it took place after the action was begun, and he must sue upon the title which is complete at the time he begins to sue; and therefore I need not consider at all whether Chandler, Hargreaves and Co. were the parties to indorse, and what the effect of their names in the margin would be.

Then with regard to the assignment, which is said to have taken place by the mere delivery of the policy by Chandler, Hargreaves & Co., the facts appear to be these. The solicitors who were acting for the plaintiff (I take this from his evidence, which I accept) having received the policy from him, which he had received from Chandler, Hargreaves & Co., pointed out to him that it had not been indorsed as was customary, and asked him to return it to Chandler, Hargreaves & Co. to be indorsed, which was done after the commencement of the action.

Then the plaintiff says that it was a mere oversight that it was not indorsed when first handed over. Having regard to the nature of the business, I do not entertain any doubt that Chandler, Hargreaves & Co. handed over the policy with the assent and concurrence of the assured, the Messrs. Green, who had been their principals, and I think it is clear also that they handed it over with the intention, whether it was an effectual intention or not, to assign such interest in the policy as could be assigned. Section 50 of the Marine Insurance Act, 1906, provides that

"a marine policy may be assigned by indorsement thereon, or in other customary manner,"

and it is suggested that what Chandler, Hargreaves & Co. did amounted to an assignment in a customary manner—namely, by delivery. In any case I think it is clear that the delivery, to satisfy those words, must be one with the intention of assigning, and in fact I think there is sufficient evidence to show that there was such an intention to assign, but I do not think that, so far as the Marine Insurance Act, 1906, is concerned, that mode of dealing with the policy constituted any sufficient assignment.

What is the customary manner of assigning a marine policy appears to me to be essentially a question of evidence. It is pointed out that in the last edition of ARNOULD ON MARINE INSURANCE, published in SIR JOSEPH ARNOULD's lifetime, it is stated in vol. 1, at p. 211 that

"an assignment may be either in writing or by simple delivery of the policy : it is frequently effected by indorsement on the back of the instrument."

That statement persisted down to the sixth edition of ARNOULD (1887) and McARTHUR in his very valuable book on MARINE INSURANCE (2nd Edn.) makes a similar statement also, adding, however, at p. 57 :

"It is usually made by the indorsee in writing upon the body, margin, or back of the policy,"

but he only cites as an authority for the delivery of the instrument with the intention to assign it as a customary mode of assignment the passage in ARNOULD's sixth edition; and when ARNOULD's book fell into the hands of the present editors, and received a really thorough revision, it was pointed out at once in the seventh edition, s. 177, in a note, that

"the statement that it may be assigned by simple delivery of the policy is retained on ARNOULD's authority, but the editors have been informed that the present practice is to indorse the assignment on the policy."

I have no doubt at all that policies are very often handed over to persons who, not being persons who could be proved to be the original assured, because they were intended to be covered are entitled, if at all, as assignees, and they thereupon recover on the policy without question raised, but that is because the percentage of cases in which marine insurance results is so very small. In the ordinary case, however, where a policy is handed over, it is handed over either by way of passing a special property and security, or by way of assurance to a buyer who gets the general property, and has been effected with the intention of conveying such an interest so that the recipient of the policy could have sued on it altogether independently of an assignment; and, as I have never seen or heard of a case where a new title by way of assignment was obtained merely by delivery of the policy itself, I am not satisfied in the present case, in the absence of evidence, that it is now, within the words of the Marine Insurance Act, 1906, a customary manner of assigning a marine policy simply by handing it over. If there was evidence on the subject of course it would have to be dealt with; but the only evidence that there is is that the plaintiff was advised by his solicitors, who are very experienced gentlemen, that it had not been indorsed as was customary. It appears to me, therefore, that if it was necessary for the plaintiff to rely upon some assignment

A other than that contained in the deed of May, 1909, he would have to do so in another action, setting up the assignment by indorsement in an action commenced after it took place; or setting up the assignment by simple delivery after calling some evidence, if it was procurable, that such a mode of assignment is now part of the custom of underwriters and merchants. It appears to me, however, that B to sue, nor, indeed, do I understand that that is now disputed, the point that it was bad for want of registration under the Deeds of Arrangement Act, 1887, [repealed] having been persisted in until the trial and then at once abandoned on the opening of the case by the defendant.

C The defendant's case is that the assignment upon which the plaintiff must rely being the deed of May, 1909, he is entitled to say that he in his turn, being also an underwriter at Lloyd's had effected a policy of re-insurance with the Messrs. Green and Mr. Churchill, that he has claims arising out of that policy of re-insurance which are recoverable from them, and that to the extent of £240 11s. 9d. he is entitled to avail himself of them as an answer to the present claim, because he can set them off, and so far establish a defence which extinguishes the claim. D Some money has been paid on account, and some further moneys have been paid into court, and the issue therefore turns upon the £240 11s. 9d. which is purported to be set off. As to this, the great majority of claims in money are for total losses on different vessels. Others ranging, I gather, from 32s. down to 1d. are claims which I presume are either for the return of premiums or fractions of salvages or what not; but, at any rate, one thing is quite clear, and, as I understand, E uncontested, that no one of these items of set-off has any more to do with the policy which is assigned to the plaintiff, and which the plaintiff puts in suit, than is derived from the fact that it is a cross-insurance effected between two sets of gentlemen who carry on business at Lloyd's. It has long been decided, certainly as long ago as *Luckie v. Bushby* (2), that a claim for a total loss upon a policy of insurance is a claim for unliquidated damages in the nature of an indemnity. F It is obvious, and it is not disputed, that that is not such a claim as falls within the old statutes of set-off, and I understand it to be conceded by counsel for the defendant that if the assignment to the plaintiff of the policy he puts in suit is to be deemed to be an assignment to which s. 50 of the Marine Insurance Act, 1906, applies, then, subject to a point arising upon the mutual credit section of the Bankruptcy Act, 1883, it would not be practicable for the defendant to set up these items on cross-claim or set-off at all, the reason being that in the words of G s. 50 (2) of the Marine Insurance Act, 1906, which I take to be exhaustive of what the defendant is entitled to do by way of defence to the assignee's suit,

"the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected."

H That clearly has the same effect as it was decided the Policies of Marine Assurance Act, 1868, had in *Pellas v. Neptune Insurance Co.* (1), of limiting the right of set-off by way of defence to an assignee's claim on a policy to defences arising out of a contract contained in the policy assigned and put in suit. It is, however, said, first of all, that the assignment by the deed of May, 1909, is not an assignment to which the Marine Insurance Act, 1906, applies; and, secondly, it is said that if I it is, there is a term in that assignment which imposes such a limitation upon the assignee's rights as compels him to submit to a defence which, under the Marine Insurance Act, 1906, alone would not be open to the defendant.

The first point in that argument depends upon the assumption that this assignment by the deed is one to which the Marine Insurance Act, 1906, does not apply, and I have not been able to follow, still less to be convinced by, that argument. It clearly does assign stocks, shares, and moneys, and all moneys due to the assignor in respect of the underwriting business, together with all books of account,

papers, policies, and writings relating to the said underwriting business hereinafter called the trust property, nor is it disputed that such assignment of this policy as takes place under these words makes the trustee, the plaintiff, the beneficial owner. I is said that the principal object of this assignment is to assign moneys due, and that the policy is only assigned, as books of account and letters are assigned, for the purpose of facilitating the collection of moneys due. The object of the whole assignment is to enable an insolvent person to make terms with a particular class of his creditors, and is, therefore, of a kind quite familiar outside the region of marine insurance. If the defendant's counsel went on to say that this was not an assignment of the policy at all, but only a piece of paper upon which the policy is written; if he were prepared to say that it is an assignment only of moneys due—that is to say, debts, and not of claims for marine losses, which are unliquidated damages—the argument would have been easier to follow, but he does not raise, as I understand, either of these contentions. What he says is that the Marine Insurance Act, 1906, does not prescribe in a mandatory way the form in which a marine policy is to be assigned. It may be assigned in a customary manner, but it does not say that it shall be assigned in no other manner, and, therefore, it is open to the assignor to assign, as he can assign any other of his contracts or rights, taking advantage of the Judicature Act, 1873, s. 25 (6) [see now the Law of Property Act, 1925, s. 136]. I understand it to be said that I ought to infer from the fact that this is not an incident in the ordinary course of dealing with marine policies, but is an incident in the ordinary course of making a composition with creditors, that the intention of this deed was that the parties should avail themselves of the right of assignment given by the old equitable rules, and the remedies further given by the Judicature Act, 1873 [repealed] and that they did not intend to avail themselves of the Marine Insurance Act, 1906. I can see no ground for any such intention, and I do not think that even if they had been entirely ignorant of the provisions of the Marine Insurance Act, 1906, and had had the deliberate intention of utilising the Judicature Act, 1873, that would have prevented the plaintiff from obtaining any rights which are given to him by the Marine Insurance Act, 1906, because it is quite clear that this case falls within sub-s. 2 of s. 50 of that Act. There is a marine policy. It has been assigned. It has been assigned so as to pass the beneficial interest to the plaintiff (it is true upon trust) and thereupon the assignee of the policy, the plaintiff, becomes entitled to sue thereon in his own name, notice or no notice, although in fact he has given notice to the defendants. It appears to me, therefore, that the plain words of the Marine Insurance Act, 1906 entitle him to sue and to take the special benefits which were given by statute to assignees of marine insurance policies before any special statute was passed to facilitate suits by the assignees of other choses in action in their own names.

If, however, the argument had been established that the deed in question is a deed which I must deem to be independent of the Marine Insurance Act, 1906. I am still unable to fall in with the argument which is advanced to show that the present set-off can be availed of by way of defence. The argument is one which, first of all, requires that I should assume that a portion at least of what was said in a considered judgment of the Court of Appeal in *Pellas v. Neptune Insurance Co.* (1) is wrong, although that case has never, so far as I know, been so much as questioned, and it is certainly binding upon me. It then involves that I should assume that a portion of the judgment of the Privy Council in *Newfoundland Government v. Newfoundland Rail. Co.* (3), which, I believe, is technically not binding upon me, is insufficiently expressed, and expressed in a somewhat misleading way; and then it assumes that I shall be able to find, as a matter of fact, that there is such a unity between the two transactions which are the subjects of the policy sued on and the policy set up in defence, or such a connection as will establish such an equity arising out of the latter and attaching to the former, as would enable me to say that prior to the Judicature Act, 1873, a set-off of this

A sort would have been available to the defendant. I do not think that any of these arguments avail. The proposition in the Privy Council, which, of course, I unhesitatingly accept, states quite clearly (13 App. Cas. at p. 213) that

“unliquidated damages may now be set off against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment.”

B Those words appear to me to have been used advisedly, and all the more so because they follow on a quotation from LORD ROMILLY in *Smith v. Parkes* (4), which, isolated from its context, might have seemed to show that it was enough that they should flow out of previous dealings and transactions between the same parties, and, therefore, the addition of the words “which also give rise to the subject of the assignment” is a deliberate and intentional addition.

C When the judgment of LORD ROMILLY in *Smith v. Parkes* (4) is looked at, it appears to me to be only an illustration of the cases, of which, of course, there are plenty, where the transactions the subject of the claim and the set-off were so closely and inseparably connected together that the transactions set off would constitute equities attaching to the transaction out of which the claim arose, D because there was a retiring partner who had assigned a sum of money which was to represent his interest in the firm and was also indebted to the firm for money lent to him, and it was held that the assignee could not recover the amount of the sum representing the retiring partner's interest in the firm without submitting to have set off against that the sum which the retiring partner owed to the firm for money lent to him. That appears to me to be a tolerably plain case of E a debt, not merely inseparably connected with his previous dealings and transactions with the firm, but also such as would constitute an equity attaching to the transaction, which always binds the assignee because it has attached to the transaction and to the assignor.

The other case which was quoted by counsel for the defendant is *Bankes v. Jarvis* (5), a case where it appears to me to be assumed throughout that except F for the question that the claim was damages, and not debt, the set-off could have been availed of before the Judicature Act, 1873, in proceedings in equity against the plaintiff, because the plaintiff was nothing but a bare trustee for the debtor.

The contention that I ought to hold that Ord. 19, r. 3, has given fresh rights as well as altered procedure does not appear to me in any case to apply to the set-off in the present case, because that is, after all, a provision for the purpose G of enabling the sections of the Judicature Act, 1873, giving effect in the same proceedings to equitable as well as legal rights to have their proper effect, and it only enables the defendant to set off by way of counter-claim or pro tanto by way of defence any right or claim which he would have had independently of the rule itself, and it is clearly stated in *Pellas v. Neptune Marine Insurance Co.* (1) H by COTTON, L.J. (5 C.P.D. at p. 36), in the course of the argument, and referred to in the judgment delivered by BRAMWELL, L.J. (ibid. at p. 40) as an accurate statement of the law, that equity never would have recognised in favour of a defendant to a claim by an assignee of a policy, a set-off of another claim for what are really unliquidated damages—namely, a claim for loss on another policy. It appears to me, therefore, that the contention that, assuming the Marine Insurance Act, I 1906, does not apply, the defendant has the right to set up as an answer or set-off claims on another policy is one which is not sustainable.

Then the matter is put in another way. It is said that by virtue of the very terms of the assignment, whatever the Marine Insurance Act, 1906, may say, there is given to the defendant the right to have the set-off recognised because the trustee is trustee only, and the plaintiff has merely to deal with the funds he collects according to the law of bankruptcy in favour of the creditors for whom he is a trustee, and therefore, as the “mutual dealing” section of the Act would undoubtedly in bankruptcy entitle the defendant to set-off these sums of money,

the plaintiff might submit to the same set-off. I think that argument is fallacious. A
It may be that if the assignor has so limited, by the terms of his deed of assignment, the interest that he transfers to the assignee, then the assignee has not got B
the right to claim any more than the assignor has given to him, and cannot, therefore, resist the defence of the defendant, which, had it been a set-off against an unrestricted assignee, would have been unavailable to him under s. 50 of the Act, but when one comes to look at the terms of this deed I think an important distinction C
arises. First, the plaintiff has trusts declared, the first of which is that he is to call in, collect, sue for, and institute and prosecute proceedings for the recovery of the whole or any part of the book debts and other credit claims and assets forming part of the property of the debtor, and he therefore has a full assignment of the claims under his policy upon trust to get in those claims. It is only after that that he is to stand possessed of the net proceeds of the sale, calling in, D
collection, and conversion of the trust property in trust, among other things, to apply them in paying and discharging rateably, according to the law of bankruptcy and without prejudice or priority, and by such dividends as the trustee shall think fit, the debts due or to become due from the debtor to the creditors. The assignment is, none the less, a complete and unrestricted assignment, because there is a trust in favour of certain persons, obliging the trustees to make a particular appropriation of the fruits which he derives from the assignment, and, therefore, I do not think that in the first instance it can be said that the assignment is a restricted assignment. E
If it were, however, I think there would be a serious difficulty in the defendant's way, which is that if the full benefit has not been assigned by the original assignment, then there would remain in the assignor something further which he could assign, and then when he came to assign that by delivery or indorsement he would come within the words of the Act, because he would be then assigning so as to pass the residue of the beneficial interest in the policy, and therefore, on the defendant's own showing, he would have got outside the operation of the deed altogether; but even if the trust contained in the words about paying and discharging according to the law of bankruptcy is a trust available F
in favour of the defendant, the assignment is, in the first instance, in any view, entirely unrestricted. I do not think the trust is available to the defendant, even though he may claim to have it enforced by proper pleadings in this action, for two reasons. First of all, it is a limited trust, and in favour only of the creditors who are specifically defined in the policy. There are persons who have signified their assent to these presents in writing, whose names are affixed to the second schedule, and they are alone to be entitled to the benefit of these presents. G
For some reason which would be mysterious were it not that both parties agree that it is so, it is not the practice to carry out the words of this recital by inserting anything in the schedule at all. The schedule is a blank. I do not think, however, that it is necessary to rely upon that. I think it is clear that a person cannot be a creditor having the benefit of these presents unless he has at least signified in writing his assent to them, and all that I know about the defendant is that he has signed a cheque for a sum of money which is not the full amount of the claim, H
that he contested his liability to pay any more up to a certain point, and contested his liability to pay the bulk of it up to the present moment, and that until yesterday, instead of assenting in any manner to these presents, he was contending that they were entirely void.

I
It appears to me, therefore, that he is not a creditor within the meaning of this clause. Furthermore, I cannot read the words "according to the law of bankruptcy" as necessarily bringing into this deed any obligation to regard the mutual credit section in favour of a person in the situation of the defendant. This deed is not to be carried out strictly according to the law of bankruptcy, because it is essentially a deed for the benefit of a limited number and not of all the creditors. Therefore I think the words "according to the law of bankruptcy" are only descriptive of a rateable payment without prejudice or priority, and by

A a series of instalments or dividends, and it does not appear to me that those words are sufficient to import into the distribution of the money an obligation to allow a set-off which, in the first instance, according to the terms of the deed is not to be allowed, because the trust is to collect and get in the proceeds of all these claims in full and then proceed to pay and apply them as follows.

B The result, therefore, is that it seems to me that the defendant is not entitled to make the set-off or defence which he raises in this action. I understand that there is no dispute as to figures. The plaintiff recovers judgment for the amount represented by the interests which have been assigned to him—that is, the three Messrs. Green—and he gets his costs of the suit. I do not suppose it will be necessary to bring another suit in respect of Mr. Churchill's claim.

C Solicitors: *William A. Crump & Son; Ballantyne, McNair & Clifford.*

[Reported by L. C. THOMAS, Esq., Barrister-at-Law.]

D WILLIAM WHITELEY, LTD. v. REGEM

[KING'S BENCH DIVISION (Walton, J.), October 19, 20, 1909]

[Reported 101 L.T. 741; 26 T.L.R. 19]

E *Mistake—Mistake of law—Payment of duties to Inland Revenue—No coercion or duress—Opinion expressed by Revenue that duties payable and penalties possible if not paid.*

F The suppliants carried on a business in which they employed a number of assistants who had their meals on the premises, and for the service of these meals the suppliants employed men as cooks, waiters and porters. The Inland Revenue authorities expressed the view that these men were "male servants" in respect of whom duties were payable under the Revenue Act, 1869 [repealed], and in an interview in the year 1900 the supervisor of taxes told the secretary of the suppliant company that, in his opinion, the men were "male servants" and that the duties were payable, and that, if they were not paid, the suppliants would incur penalties. On that the duties were paid by the suppliants in each year in the belief that they had no option except to do so. From 1903 onwards the duties were paid with a protest that the men were not "male servants" within the meaning of the Act and that the duties were not payable, but the Commissioners of Inland Revenue gave their opinion that the men were "male servants" and that the duties were payable. In 1906 the suppliants refused to pay, and upon proceedings being taken for penalties, the Divisional Court held that the men were not "male servants" and that the duties were not payable. On a petition of right by the suppliants to recover back the moneys which they had paid,

H **Held:** as the suppliants could always have challenged the opinion of the Revenue authorities by taking appropriate legal action, the money they paid before 1906 could not be said to be paid under compulsion, nor was there any evidence of such duress as would bring the case within the principle that money extorted by a person for doing what he was legally bound to do without payment or on payment of a lesser sum was recoverable; the money had been paid under a mistake of law; and, therefore, the suppliants were not entitled to recover it.

I **Notes.** The Revenue Act, 1869, was repealed by the Customs and Excise Act, 1952, Sched. 12 (32 HALSBURY'S STATUTES (2nd Edn.) 925), the relevant sections of the Act of 1869 not being reproduced. The case is reported on the general principles applicable to the recovery of money paid under a mistake of law.

Referred to: *Brocklebank v. R.*, [1924] 1 K.B. 647; *Sebel Products, Ltd. v. Customs and Excise Comrs.*, [1949] 1 All E.R. 729; *Kiriri Cotton Co., Ltd. v. Dewani*, [1960] 1 All E.R. 177.

As to recovery of money paid under mistake of law, see 26 HALSBURY'S LAWS (3rd Edn.) 924-927, and for cases see 35 DIGEST 158.

Cases referred to in argument :

Steele v. Williams (1853), 8 Exch. 625; 22 L.J.Ex. 225; 21 L.T.O.S. 106; 17 J.P. 378; 17 Jur. 464; 1 C.L.R. 258; 155 E.R. 1502; 12 Digest (Repl.) 628, 4851.

Hooper v. Exeter Corpn. (1887), 56 L.J.Q.B. 457, D.C.; 35 Digest 151, 482.

Morgan v. Palmer (1824), 2 B. & C. 729; 4 Dow. & Ry. K.B. 283; 2 Dow. & Ry. M.C. 232; 2 L.J.O.S.K.B. 145; 107 E.R. 554; 12 Digest (Repl.) 627, 4847.

Dickson v. R. (1865), 11 H.L. Cas. 175; 12 L.T. 405, H.L.; 42 Digest 735, 1586.

Malkin v. R., [1906] 2 K.B. 886; 75 L.J.K.B. 884; 95 L.T. 448; 70 J.P. 506;

22 T.L.R. 807; 50 Sol. Jo. 683; 30 Digest (Repl.) 57, 430.

Slater v. Burnley Corpn. (1888), 59 L.T. 636; 53 J.P. 70; 36 W.R. 831; 4 T.L.R.

642, D.C.; 35 Digest 159, 553.

Moore v. Fulham Vestry, [1895] 1 Q.B. 399; 64 L.J.Q.B. 226; 71 L.T. 862; 59

J.P. 596; 43 W.R. 277; 11 T.L.R. 122; 39 Sol. Jo. 133; 14 R. 343, C.A.; 12

Digest (Repl.) 631, 4871.

Petition of Right by which the suppliants (*William Whiteley, Ltd.*) claimed the return of money paid by them for licences in respect of certain of their employees as being "male servants."

Austen-Cartmell for the suppliant.

The Solicitor-General (Sir Samuel Evans, K.C.) and *F. F. Daldy* for the Crown.

WALTON, J.—In this petition of right the suppliants are *William Whiteley, Ltd.*, and they seek to recover back certain moneys which they paid under the belief that they were bound to pay them under the Revenue Act, 1869, as duties upon male servants who were in their employment. The duties so paid were for the years 1900, 1901, 1902, 1903, 1904 and 1905. Under the Act of 1869 duties are payable upon male servants, and by s. 19 (3) the words "male servants" are defined. By s. 22 every person employing a male servant is required to make a declaration stating the number of male servants employed by him, and in what capacity, and by the same section he is required to pay the duties to which he shall by such declaration appear to be liable. By s. 25 a penalty is imposed for neglecting to deliver such declaration or for delivering a declaration in which the particulars required by the Act are not fully and truly stated. By s. 26 licences are to be granted for the duties paid in respect, among other things, of male servants. By s. 27 a penalty is imposed upon any person who employs a male servant without having taken out a licence. I may add that by s. 30 it is provided that if any person who shall have delivered a declaration shall not within the time prescribed pay the duties appearing by that declaration to be payable by him, the appropriate officer of the Inland Revenue may distrain for the duties upon his property.

The facts of this case are not in dispute. In 1906, when the duties, if they were payable, became payable, the question was raised and Messrs. *Whiteley, Ltd.*, did not pay. Then proceedings were taken before the magistrate for penalties, and a case was stated by the magistrate which came on for argument in the Divisional Court, and is reported under the name of *William Whiteley, Ltd. v. Burns* ([1908] 1 K.B. 705). It was there decided that upon this class of servants the duties were not payable. So far as the present case is concerned and for the purposes of this judgment, I shall consider myself bound by that decision and take it that the law now stands as it was decided in that case with regard to servants of the description in question in this case. There is no dispute about

A the character or description of the servants, or what their duties were, and it is admitted that they were practically the same kind of servants as those in respect of whom the question arose before the Divisional Court. I assume, therefore, that the duties which were paid during these years, 1900 to 1905 both inclusive, were not payable, and Messrs. Whiteley, Ltd., could not have been compelled by legal process to pay them.

B Those being the facts, I have to decide whether under those circumstances the duties so paid during those six years can be recovered back. Undoubtedly the moneys were paid under a mistaken belief on the part of Messrs. Whiteley, Ltd., that they were bound to pay them; but there is no general rule that if duties are paid to the Inland Revenue by mistake as to liability—by mistake as to law—they can be recovered back. In fact the general rule is the other way—namely, that C if money has been voluntarily paid under a mistake, a mistake not of fact but a mistake of law, then it cannot be recovered back. It is not suggested in this case that there was any mistake in fact, and as I understand the position taken by the suppliants, they admit that if these duties had been paid, without any communication with the officials of Inland Revenue and merely by mistake on D the part of the suppliants as to their liability, they could not be recovered back. Therefore, the question is whether, having regard to what did take place between the suppliants and the officers of Inland Revenue, the suppliants can recover these moneys back.

There is no doubt as to the general rule stated in LEAKE ON CONTRACTS (5th Edn.), pp. 622, 623, to which I have already referred, that money paid voluntarily—that E is to say, without compulsion or extortion or undue influence, and, of course, I may add without any fraud on the part of the person to whom it is paid, and with knowledge of all the facts, though paid without any consideration, or in discharge of a claim not due, or a claim which might have been successfully resisted, cannot be recovered back. There is no doubt, and no question raised, that that F is an accurate statement of the general rule. But, on the other hand, if the payment is not voluntary a different rule applies which may be stated, perhaps, as it is put in LEAKE ON CONTRACTS (5th Edn.), p. 61, that money extorted by a person for doing what he is legally bound to do without payment, or for a duty which he fails to perform, may be recovered back, as in the cases of illegal or excessive fees and payments extorted in the discharge of an office, and money paid under duress G either of the person or of goods may be recovered back (pp. 58, 59). In all those cases the payment is not voluntary. The question which I have to decide here is whether the payments made during the years which I have mentioned—from 1900 to 1905—were or were not voluntary payments. Was there any duress here? I cannot find any evidence of duress or compulsion beyond this, that the officer of Inland Revenue, told Messrs. Whiteley, Ltd., that in the opinion of the Commissioners of Inland Revenue the duties were payable, and that, if they were H not paid, proceedings would be taken for penalties. That is the only evidence of anything which could be called duress or compulsion. The suppliants knew all the facts. They had present to their minds plainly, when these payments were made, that there was a question whether upon such servants as those in question duty was payable. They themselves raised that question and they paid the duties. They could have resisted payment. They must have known that if proceedings I were taken for penalties it would be open to them in such proceedings to raise the question whether the duties were payable or not, as they did, in fact, in 1906. They must have known and must have had present to their minds all that. When the officer of Inland Revenue told the suppliants that in his opinion and in the opinion of the Commissioners of Inland Revenue the duties were payable, the suppliants knew that that was only an expression of opinion. They knew that the Commissioners of Inland Revenue could not determine whether the duties were payable or not. They could take no action if the duties were not paid except

by legal proceedings. They could not distrain if the suppliants did not make a declaration in respect of these servants. A

I have come to the conclusion that there was nothing in this case which amounted to compulsion. But it was suggested that the case came within that class of cases in which money has been held to be recoverable if it has been paid in discharge of a demand illegally made under colour of an office. Those cases are referred to in BULLEN AND LEAKE (3rd Edn., 1868), p. 50, in the notes to the counts for money received. The rule as to money paid in discharge of a demand and made under colour of an office is, I think, very clearly explained by the paragraph in the notes which says (p. 50): B

"This count will lie for money paid by the plaintiff in discharge of a demand illegally made under colour of an office; as excessive fees paid to the steward of a manor for admission to copyholds; excessive fees paid to a broker under a distress; overcharges paid to a carrier to induce him to carry goods; an excessive charge paid to an arbitrator to take up an award; money improperly exacted as a toll at a turnpike." C

Those seem to me all to come within that class of cases to which I have just referred, which is described in LEAKE ON CONTRACTS (5th Edn.), p. 61, in these words: D

"Money extorted by a person for doing what he is legally bound to do without payment, or for a duty which he fails to perform, may be recovered back."

In all those cases in order to have that done which the person making the payment was entitled to have done without a payment, he had to make the payment, and someone who was bound to do something which the person paying the money desired to have done, refused to do his duty unless he was paid the money. If in those circumstances money is paid, then it can be recovered back. There is there an element of duress. I need not go through the cases or refer to them in detail. I am satisfied that this case does not fall within that class of cases, and that neither on that ground nor on the ground that this was a compulsory payment are the suppliants entitled to recover back the moneys which they paid in the circumstances which I have described. I think, therefore, that this petition must be dismissed and there must be judgment for the Crown. E

Judgment for Crown. F

Solicitors: *Roche, Son & Neale; Sir N. J. Highmore*, Solicitor for Customs and Excise. G

[*Reported by W. W. ORR, ESQ., Barrister-at-Law.*]

A MOZLEY-STARK v. MOZLEY-STARK AND HITCHINS

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), December 14, 15, and 17, 1909]

[Reported [1910] P. 190; 79 L.J.P. 98; 101 L.T. 770; 26 T.L.R. 194]

B *Divorce—Custody—Child—Right of guilty spouse to custody—Exercise by court of powers according to circumstances of case—Paramount consideration benefit of child, not punishment of guilty spouse—Consideration by court of effect on child's mind of change of custody or liberty of access.*

C The guilty spouse in divorce proceedings ought not, merely because of the matrimonial offence justifying the divorce, to be disentitled for all time and under all circumstances to access to the child of the marriage or even to custody assuming the child is under sixteen, but the statutory power of the court to grant custody or access should be exercised according to the particular circumstances of the case, always bearing in mind that the paramount consideration is the benefit and interest of the child, not the punishment of the guilty spouse. The fact that change of custody or of liberty of access might unsettle the child's mind is a circumstance to be considered by the court, but ought not to be regarded as a complete bar to any such change.

D Dictum of Lopes, L.J., in *Thomasset v. Thomasset* (1), [1894] P., at p. 307 applied.

E The husband obtained a decree of divorce on the ground of the wife's adultery with the co-respondent who was ordered to pay substantial damages. Custody of the only child of the marriage, a daughter, was granted to the husband but the wife was given limited access. Shortly after decree absolute the wife married the co-respondent. In pursuance of her right of access the wife on a certain occasion visited the daughter at school. At the visit no suggestion or arrangement was made for the daughter to join the wife, but later the same day the daughter, having heard that the husband was to re-marry in two day's time and that she was to join him in London the following day, wrote an urgent letter to the wife saying that she, the daughter, would leave the train to London at an intermediate station and stop there penniless, and imploring the wife to meet her at the station otherwise she would be in difficulties. The wife met the daughter at the station. The husband applied to commit the wife for contempt. The wife applied for custody of the child, who had attained sixteen and desired to live with the wife and was fond of the co-respondent (the wife's present husband), who was willing and able to maintain and educate the child. The husband also desired to maintain and educate the child. The wife appealed from orders committing her to prison for one week, refusing to change the custody of the child and condemning her present husband in costs. The daughter meanwhile had been returned to the custody of the husband.

H **Held:** (i) though the court should not hesitate to send to prison a party to a divorce who deliberately defied the court, yet in the circumstances of the present case, that the station meeting was not arranged by the wife and the child might have been in danger unless the wife had gone to meet her, the court would not hold the wife guilty of contempt deserving imprisonment and would discharge the order for committal, and since there was no evidence implicating the wife's present husband the order for costs against him would be discharged; I (ii) since the child was not a party to the divorce or a ward of court and bearing in mind that she had attained sixteen, the court was not entitled to order her into the custody of a parent against her wishes, and as the court did not think it desirable to make the child a ward of court because of the small amount of her property, the proper order would be to discharge the order for custody and leave the parties to their common law rights.

Thomasset v. Thomasset (1), [1894] P. 295, considered.

Notes. As to the jurisdiction of the High Court over custody and maintenance of children in matrimonial proceedings see now s. 26 of the Matrimonial Causes Act, 1950, and see also the Matrimonial Proceedings (Children) Act, 1958 (38 HALSBURY'S STATUTES (2nd Edn.) 476). Under ss. 26 (1) and 26 (2) of the Act of 1950 the High Court can direct proceedings to be taken for placing children of parents whose marriage is the subject of matrimonial proceedings under the protection of the Chancery Division.

Considered: *B. v. B.*, [1924] P. 176; *Hall v. Hall* (1945), 175 L.T. 355. Referred to: *Clarke v. Clarke and Lindsay (No. 1)* (1913), 57 Sol. Jo. 644.

As to custody and maintenance of children in divorce proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 354; as to the principles on which the court makes orders for custody after decree, see *ibid.*, p. 392. For cases on the subject see 27 DIGEST (Repl.) 554 et seq. For the Matrimonial Causes Act, 1950, s. 26, see 29 HALSBURY'S STATUTES (2nd Edn.) 413.

Case referred to:

- (1) *Thomasset v. Thomasset*, [1894] P. 295; 63 L.J.P. 140; 71 L.T. 148; 42 W.R. 658; 10 T.L.R. 591; 38 Sol. Jo. 630, C.A.; 27 Digest (Repl.) 664, 6283.

Appeal from a decision of BARGRAVE DEANE, J.

Barnard, K.C., and *Bayford* for the wife.

Priestley, K.C., and *Allan Macpherson* for the husband.

The arguments were heard in camera.

Cur. adv. vult.

Dec. 17, 1909. **SIR HERBERT COZENS-HARDY, M.R.**, read the following judgment of the court.—This appeal raises an important question as to the powers of the Divorce Court and as to the mode of exercising those powers. The husband in 1906 obtained a decree against his wife on the ground of her adultery with the co-respondent, with substantial damages against the co-respondent. A few days after the decree was made absolute the wife was married to the co-respondent. There was only one child of the marriage, a girl who was born in September, 1893, By the decree the custody of the child was given to the father, and by consent a limited access was given to the mother. The child has been sent by her father to a school in the country, and the cost of her maintenance and education has been substantially provided for out of the damages paid by the co-respondent, which were settled upon trusts which permitted this. This fund is now reduced to about £150. On Dec. 1, 1909, the mother, in pursuance of the order giving access, visited the daughter at the school. No suggestion or arrangement for the daughter joining her mother was then made. Later in the same day, after the mother had left, the daughter heard that her father was to be married on Dec. 3, and that she was to go up to London on the next day, Dec. 2. She thereupon wrote an urgent letter to the mother saying that she (the daughter) should leave the train by which she was to travel at an intermediate station and stop there penniless, and imploring the mother to meet her on the platform, and pointing out the difficulty in which she would be placed if her mother failed her. One can hardly be surprised that the mother acceded to the daughter's prayer, and met her. If there had been any such arrangement as BARGRAVE DEANE, J., thought between mother and daughter the matter would have been very different. But although the mother's conduct was technically contempt of court, it was not such a contempt as the court should visit with imprisonment.

This led to—(i) an application by the father to commit the mother for contempt; and (ii) an application by the mother for the custody of the child. BARGRAVE DEANE, J., committed the mother to prison for a week, and refused to change the custody. From this order an appeal is presented. Now, we desire to state emphatically that the court ought not to hesitate to send to prison one of the parties to a divorce suit

A who deliberately defies the court and takes the law into her own hands. The learned judge thought that the mother was guilty of conduct of this nature. We have had the advantage of hearing the mother subjected to cross-examination and of seeing the child in our private room, and we cannot regard the incident at the railway station as the result of a scheme concocted by the mother. We are satisfied that the girl has for a considerable time believed that as soon as she attained sixteen she was entitled to go where she pleased, and that she was eager to join her mother. And we are not prepared to hold that the mother was guilty of a contempt deserving of imprisonment for meeting her daughter at the station, where she might have been wholly unprotected and in grave danger unless her mother had met her.

B We think, therefore, that the order for committal must be discharged. The learned judge has condemned the mother's present husband in costs; there was no evidence of any sort against him, and we fail to see any ground on which he could be ordered to pay costs. The order against him must be discharged. The child was given up to the father immediately after BARGRAVE DEANE, J.'s, order, and she is still with him. The question arises whether anything, and, if so, what, ought to be done in the matter. The child is not a party to the divorce proceedings. She is not a ward of court. No doubt the Court of Appeal held in *Thomasset v. Thomasset* (1) that the court has power inter partes to make orders respecting the custody, maintenance, and education of children until twenty-one. It can order the guilty parent to provide maintenance up to twenty-one. It can order, as between the father and mother, that one of the parents shall have the custody of the child during minority; but we do not think that case justifies the contention that the court can make any order against the child. Even if the contrary view is correct, and there is a passage in LINDLEY, L.J.'s, judgment which tends in that direction, it must be observed that the learned judge added ([1894] P. at pp. 302, 303):

E "I do not say that a child who has attained years of discretion can, except under very special circumstances, be properly ordered into the custody of either parent against such child's own wishes."

F Moreover, the decision turned upon the right to order maintenance after sixteen, and not the right to order custody: (see the judgment of LOPES, L.J., ([1894] P. at pp. 305, 306)). Having seen the girl, we are satisfied that she strongly desires to live with her mother, and not with her father. She has attained sixteen. She is fond of her mother's present husband, and he is willing and able to provide for her maintenance and education. The father also is desirous and able to provide for her maintenance and education.

G In these circumstances we think the proper course for us to adopt is to discharge the order for custody and to leave the parties to their common law rights. If the girl is minded to leave her father's house, it is plain that the father cannot reclaim her by habeas corpus or otherwise. We have hesitated whether it would be right to direct proper proceedings to be taken for placing the child under the protection of the Chancery Division under s. 35 of the Matrimonial Causes Act 1857, and s. 4 of the Matrimonial Causes Act, 1859. There would certainly be advantages in making her a ward of court. But having regard to the small amount of her property, which—so far as we have been informed—does not exceed £150, we do not think we ought to direct such proceedings. We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to the custody of her daughter assuming her to be under sixteen. The court ought not to lay down a hard-and-fast rule on this subject. The statutory power conferred upon the court ought, in the language of LOPES, L.J., in *Thomasset v. Thomasset* ([1894] P. at p. 307):

I "to be exercised discretionally according to the particular circumstances in each case in which its interference is invoked."

And it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse. The fact that change of custody or liberty of access may unsettle the mind of the infant is only a circumstance to be considered, and ought not to be regarded as a complete bar to any change or new order for access. As to costs, the strict order would be that the mother, who was guilty of a technical contempt, ought to be ordered to pay the costs of the original motion, and, on the other hand, she ought to receive the costs of the appeal. Under these circumstances we think it better that no order should be made as to costs in either court.

Appeal allowed.

Solicitors: *Hasties; Alexander Pope.*

[*Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.*]

HERTFORDSHIRE COUNTY COUNCIL *v.* GREAT EASTERN RAIL. CO.

[COURT OF APPEAL (Lord Alverstone, C.J., Fletcher Moulton and Farwell, L.JJ.), May 19, 1909]

[Reported [1909] 2 K.B. 403; 78 L.J.K.B. 1076; 101 L.T. 213; 73 J.P. 353; 25 T.L.R. 573; 53 Sol. Jo. 575; 7 L.G.R. 1006]

Railway—Highway—Alteration—Statutory powers to undertakers—Duty to repair substituted means of communication—Railway constructed at higher level than road—Road raised by inclined “approaches” to level of railway—Railway undertakers bound to maintain and repair “approaches.”

Railway undertakers were authorised by a special Act of 1836 (and, therefore, passed before the Railway Clauses Consolidation Act, 1845) to alter roads for the purpose of constructing their railway. Having constructed the railway at a higher level than the highway, the company raised the highway, on each side of the railway by means of inclined “approaches” so as to provide a level crossing. The special Act did not provide for the maintenance and repair of the highway “approaches” and the company denied liability to repair them.

Held: where there was statutory authority to interfere with the highway there was a duty at common law (unless there was statutory exemption) to restore to the public the means of communication on the highway, which duty involved the obligation to keep in repair the substituted means of communication; accordingly, the railway company were under the duty at common law to maintain and keep in repair the highway “approaches” to the level crossing.

Decision of JELF, J., [1909] 1 K.B. 368, affirmed.

Notes. Applied: *Macclesfield Corpn. v. Great Central Rail. Co.* (1911), 104 L.T. 728. Considered: *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.*, [1914-15] All E.R. Rep. 355; *A.-G. v. Great Northern Rail. Co.*, [1916] 2 A.C. 356; *London and North Eastern Rail. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E.R. 692. Referred to: *Brackley v. Midland Rail. Co.* (1916), 114 L.T. 1150; *A.-G. for Ireland v. Lagan Navigation Co.*, [1924] A.C. 877.

As to obligations for level crossings of railway undertakers at common law, see 31 HALSBURY'S LAWS (3rd Edn.) 598, para. 915. For cases regarding level crossings see 38 DIGEST (Repl.) 350 et seq.

A Cases referred to :

- (1) *R. v. Kent (Inhabitants)* (1811), 13 East, 220; 104 E.R. 354; 38 Digest (Repl.) 442, 944.
- (2) *R. v. Lindsey (Inhabitants)* (1811), 14 East, 317; 104 E.R. 623; 26 Digest (Repl.) 646, 2920.
- (3) *R. v. Kerrison* (1815), 3 M. & S. 526; 105 E.R. 708; 26 Digest (Repl.) 646, 2921.
- (4) *West Lancashire R.D.C. v. Lancashire and Yorkshire Rail. Co.*, [1903] 2 K.B. 394; 72 L.J.K.B. 675; 89 L.T. 139; 67 J.P. 410; 51 W.R. 694; 19 T.L.R. 625; 47 Sol. Jo. 693; 1 L.G.R. 788; 38 Digest (Repl.) 321, 205.
- (5) *London and North Western Rail. Co. v. Skerton* (1864), 5 B. & S. 559; 4 New Rep. 424; 33 L.J.M.C. 158; 10 L.T. 648; 28 J.P. 518; 12 W.R. 1102; 122 E.R. 940; 38 Digest (Repl.) 311, 138.
- (6) *R. v. Isle of Ely (Inhabitants), Old Bedford Bridge and New Bedford Bridge Cases* (1850), 15 Q.B. 827; 4 New Mag. Cas. 128; 4 New Sess. Cas. 222; 19 L.J.M.C. 223; 15 L.T.O.S. 412; 14 J.P. 512; 14 Jur. 956; 4 Cox, C.C. 281; 117 E.R. 671; 26 Digest (Repl.) 646, 2913.

D Also referred to in argument :

West Riding of Yorkshire (Inhabitants) v. R. (1813), 2 Dow. 1; 5 Taunt. 284; 3 E.R. 767; 26 Digest (Repl.) 652, 2973.

North Staffordshire Rail. Co. v. Dale (1858), 8 E. & B. 836; 27 L.J.M.C. 147; 4 Jur. N.S. 631; 120 E.R. 312; 38 Digest (Repl.) 313, 148.

Newcastle-under-Lyne and Leek Turnpike Roads Trustees v. North Staffordshire Rail. Co. (1860), 5 H. & N. 160; 157 E.R. 1140; sub nom. *Leech v. North Staffordshire Rail. Co.*, 29 L.J.M.C. 150; 1 L.T. 332; 24 J.P. 71; 8 W.R. 216; 38 Digest (Repl.) 313, 149.

Oliver v. North Eastern Rail. Co. (1874), L.R. 9 Q.B. 409; 43 L.J.Q.B. 198; 38 J.P. 709; 38 Digest (Repl.) 351, 358.

A.-G. v. Conduit Colliery Co., [1895] 1 Q.B. 207; 71 L.T. 771; 59 J.P. 70; 43 W.R. 366; 11 T.L.R. 57; 15 R. 267, D.C.; 26 Digest (Repl.) 477, 1645.

Lancashire and Yorkshire Rail. Co. v. Bury Corpn. (1889), 14 App. Cas. 417; 59 L.J.Q.B. 85; 61 L.T. 417; 54 J.P. 197, H.L.; 26 Digest (Repl.) 653, 2988.

Hertfordshire County Council v. New River Co., [1904] 2 Ch. 513; 74 L.J.Ch. 49; 91 L.T. 796; 68 J.P. 552; 53 W.R. 60; 20 T.L.R. 686; 48 Sol. Jo. 641; 3 L.G.R. 64; 26 Digest (Repl.) 652, 2976.

G **Appeal** from a decision of JELF, J., on a Special Case stated by consent of the parties to the action.

The plaintiffs, the highway authority, claimed a declaration that the defendants, owners of a railway, were bound to maintain and keep in repair those parts of certain highways forming the approaches to three railway level crossings. The plaintiffs also claimed a mandatory order that the defendants forthwith, and from time to time, make such repairs to the highway approaches as might be necessary. The defendants owned a railway which had been made by the Northern and Eastern Railway company under powers conferred on them by special Act of Parliament passed in 1836, and the defendants were subject to all the obligations and liabilities of the Northern and Eastern Railway company. At the level crossings in question the railway had been constructed at a higher level than the highways which it crossed, and in order to bring the highways up to the level of the railway and thereby make the level crossings, the lengths of the highways adjoining, and on either side of, the railway were raised. The raised portions of the highways were called "the approaches." Gates were erected by the railway company at each side of the three level crossings. The defendants and their predecessors had always maintained and kept in repair those parts of the highways which lay between the level crossing gates and admitted their liability to do so. The highway approaches, which lay outside the gates, had also been kept in repair

and maintained by the defendants and their predecessors until shortly before this action when the defendants denied liability to maintain and repair the approaches. The highways on which the approaches lay had been declared main roads under s. 15 of the Highways and Locomotives (Amendment) Act, 1878. JELF, J., held that the defendants were bound to repair and keep in repair the highway approaches lying outside the gates of the level crossings. The defendants appealed. The relevant statutory provisions of the special Act of 1836 are referred to in the judgment of LORD ALVERSTONE, C.J.

Bankes, K.C. (Courthope-Munroe with him), for the defendants.

Danckwerts, K.C., and R. D. Muir, for the plaintiffs, were not called on to argue.

LORD ALVERSTONE, C.J.—This is an appeal from a decision of JELF, J., on a Special Case Stated, which raises the question of the obligation of the railway company to repair the inclined approaches to what is, as it exists at the present time, a level crossing on the railway. There was no railway there when the roadway was originally constructed. The railway was constructed under a special Act of Parliament (6 & 7 Will. 4, c. ciii.) passed in 1836, and at the time of the construction of the railway, for the convenience of construction, when they came to cross this road, or these three roads, each of the roads was raised a considerable height—that is to say, 5 ft. in two cases, and about 10 ft. in the other. Then, of course, inasmuch as there would have been an impassable barrier, due to the raising of the railway and the rails upon it, inclines or slopes had to be made which extended for a distance of sixty yards in one case and 120 in the other, rather more in one case than the other, in order that the road and the persons passing along it might be able to get up to the level of the railway. Therefore it became in one sense, the railway sense, a level crossing, but it was in fact a road raised up in order that it might be possible to cross the railway upon the level. For seventy years the defendant railway company have repaired the approaches to these three roads and they say that they are not liable, although they admit a liability to repair so much of the highway as is in between the two gates on either side of the railway. It is not quite clearly stated upon what view of the law or upon what facts that admission of liability is based. Counsel for the defendants suggested it was because they must repair that part of the highway in between the rails, and they could not repair that properly without repairing the part up to the gates. I do not propose to draw any inference against the defendants in consequence of that admission, although, if the matter came to be debated and worked out in all its legal bearings, I am not sure that it would be found that that obligation to repair that part of the highway in between the two fences or gates would erase any direct statutory authority in the private Act of Parliament.

The learned judge has accepted the principle, which has been acted upon in a number of cases, that where, under statutory authority, bridges and roads are interfered with, and there is a statutory duty to restore the means of communication, that involves the obligation to keep the substituted means of communication in repair. That principle has been applied in such a long series of cases that it would be quite impossible for this court to overrule it. It is not seriously disputed, and counsel for the defendants' main argument, which, of course, has been most ably presented to us, is that we cannot apply that principle, because the sections of this [special] Act of Parliament are inconsistent with any such common law principle being applied, and that the whole matter is governed by the Act. He further suggests that by analogy, because he cannot cite it as authority, the obligation of the railway company under the sections of the Railways Clauses Consolidation Act, 1845, is limited to repairing only the approaches where the road goes underneath or the road goes over the railway, assuming it to be the same in both cases, and that therefore we ought to construe the earlier Act of Parliament, [viz., the special Act of 1836] so as to exclude the operation of the common law doctrine.

Assuming, as I think I may without any further observation, that this common

A law doctrine has been recognised for a great many years and has been applied, I do not propose to go through again in my judgment the cases that have been cited, from the earliest case of *R. v. Kent (Inhabitants)* (1), *R. v. Lindsey (Inhabitants)* (2), and *R. v. Kerrison* (3). There are several other cases, all of them adopting this broad principle, that where by statute, for their own benefit, persons interfere with the public convenience and substitute by authority of statute some other convenience, without any direct words putting upon them the responsibility of keeping that convenience in repair, they have to supply the convenience, and therefore that involves the obligation to keep it in repair, as, for instance, the structure of a bridge. Adopting that principle, I have really nothing to add to what was said by JELF, J., on that part of the case. Is the argument of counsel for the defendants correct that the language of this statute excludes, or ought to be construed to exclude, the continuance of that obligation on the railway company based upon the common law doctrine?

There are not many sections to be construed. The first section he referred to was s. 31, which is, after all, only a section empowering the railway company to enter upon lands, and has, I think, a very indirect bearing, if any at all, upon this question; s. 31 empowers the railway company to divert and alter the course of any roads or ways or to raise or sink any roads or ways in order to more conveniently carry the same over or under or by the side of the railway. That, in terms, does not actually contemplate, though I do not think it is very important, the road crossing the railway upon what is called the level. Then one passes to s. 109, which is the section upon which I think to a large extent the question depends. [Section 109 empowered the company to alter roads.] But I ought, perhaps, first to refer to ss. 102 and 103, which provide specifically for what is to happen where it is proposed to cross roads upon the level. The railway cannot cross a street, highway, or public bridleway or footpath on the level without the previous consent in writing of two justices, and, when the bridleway or footpath is taken over the railway, the railway company shall make and maintain convenient ascents and descents, as the case may be, to such bridleway or footpath. This is one of the sections upon which counsel for the defendants relies for the purpose of saying that maintenance is referred to in a case where the railway is made so that it crosses the bridleway or footpath in another manner than on the level, which would include, of course, going over it and going under it. He also referred to s. 104, which he suggested only covers the same ground as s. 102, and which was said in the court below to have been left in the Act by accident. I am not quite sure, and it is not necessary to consider, whether s. 104 covers any particular case not included in s. 102, because the argument upon which he relies as to making and maintaining applies both to s. 102 and to s. 104. Then there is a section with regard to crossing turnpike roads (s. 105). All of those sections seem to me not to do more than apply to the special cases therein referred to—namely, making a railway to go over a road or under a road, and maintaining the ascents in those cases. They certainly, I think, open the defendants to this argument, that one does not quite see in principle why, if the approaches in one case are to be kept in repair and maintained by the railway company, the approaches in the other case should not. Of course, counsel for the defendants says it is a particular obligation, and it shows that no general principle can be applied.

Then he refers to s. 111, which provides that in all cases where in any part of any carriage or horse road it shall be found necessary to raise it, the company are to substitute another road temporarily and to restore the old road if they can within a certain limited time. That seems to me to be an obligation which imposes upon the company the duty of providing a temporary access until the permanent road is restored, and restoring a substituted road. I assume for this purpose that the substituted road is not the same road, not a mere question of temporary obstruction and then restoring the road. For the purpose of this case it must be taken that the substituted road is one which is different in level and which

is not the same road as it was before in that there are gradients up to the railway and gradients down from the railway. It seems to me not possible to contend that that section by any implication excludes the operation of this legal principle to which I have referred in the case of a road so constructed. It seems to me that where the company have cut through a public road and made a substituted road—a different road for the purpose of their own convenience—it may well be that that obligation still continues, and I see nothing in s. 111 upon which counsel for the defendants can rely in order to say that the common law principle must be excluded. The same observation may be made with regard to s. 112, except that the argument is much less strong upon that. Counsel for the defendants says because they have put in an express section about keeping the gates across the highway, therefore, if it had been intended that the railway company should be liable to repair, one would have found an express section dealing with repair. especially as one has got the word “maintenance” in the two sections to which I have already referred—namely, s. 104 and s. 105.

All I can say is this, that I think the argument based upon ss. 102, 103 and 104 is not sufficient. I think it is impossible to say that the learned judge came to a wrong conclusion in holding that there is nothing in this statute which prevents the railway company by law from being subject to the obligation that they would have been held to be liable to if the statute had not been passed. In other words, it seems to me that there are no sections which exclude the obligation of the principles to which I have referred.

Then it is said that, looking at the Railways Clauses Consolidation Act, 1845, and the decision of WRIGHT, J., in *West Lancashire R.D.C. v. Lancashire and Yorkshire Rail. Co.* (4), we ought to hold that that is an authority in favour of the contention of counsel for the defendants. I think that case is properly distinguished by JELF, J., in his judgment. It seems to me sufficient to say that that was a decision upon the clauses of the Railways Clauses Consolidation Act which do not apply to this kind of railway, and it was a decision based upon the particular words of the particular sections in the Railways Clauses Consolidation Act. I should only like to say for myself that if the matter ever comes before this court in a way necessary to decide it, I am unable to follow the distinction between a road diverted by going under a railway as compared with a road diverted by going over a railway, in respect of which the obligation was held to be different in the Irish cases, and in *London and North Western Rail. Co. v. Skerton* (5). I, therefore, come to the conclusion that I am unable to accede to the view presented by the defendants that there is anything in this private Act of Parliament which prevents the operation of that legal principle—i.e., the legal principle applied in cases where the works were constructed under statutory authority—and, therefore, there was Parliamentary recognition and sanction of those works. We have not heard counsel for the plaintiffs, and no question was raised in this Special Case as to the proper inference to be drawn from the fact that the railway company had repaired these roads for upwards of seventy years. All I desire to say is that, if the same question ever comes up again and it turns out that for a great many years an obligation of this kind has been undertaken without protest, I am by no means sure that might not be found sufficient justification for holding the obligation still to exist having regard to the language of s. 109 of their Act, and there may be, of course, corresponding sections in other Acts. However, the point is not raised by the Special Case, and, therefore, I do not wish to express any opinion upon it, but wish to reserve my judgment upon it until a similar point has been argued before me. For the reasons given by my brother JELF, which I have only endeavoured briefly to summarise in my own way, I consider this appeal fails and must be dismissed.

FLETCHER MOULTON, L.J.—I am of the same opinion and accept the judgment which has just been delivered, and also that of the learned judge in the

A court below. I would only add that in my opinion the law laid down in *R. v. Lindsey (Inhabitants)* (2) and *R. v. Kerrison* (3) and *R. v. Isle of Ely (Inhabitants)* (6), which appear to me to be sound law, amounts practically to this, that where a person, whether under statutory authority or in any other legal manner, for his own purposes interrupts a highway so as to render it impossible for the public to use the highway, there is an obligation on him to construct the works necessary to restore to them the use of the highway, and that that obligation is a continuing obligation, and that he must not only construct the works, but also maintain them. To divest himself from that obligation, he must show in the statutory authority under which he does the works, when he does them under an Act of Parliament, something amounting to an exemption from this continuing obligation, and mere silence is, in my opinion, not sufficient.

C **FARWELL, L.J.**—I am of the same opinion.

Appeal dismissed.

Solicitors: *J. N. Mason & Co., for Swoorder & Longmore, Hertford; E. Moore.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

D

E

EATON v. BEST

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Bigham and Walton, JJ.), January 21, 1909]

[Reported [1909] 1 K.B. 632; 78 L.J.K.B. 425; 100 L.T. 494; 73 J.P. 113; 25 T.L.R. 244; 22 Cox, C.C. 66]

F

Criminal Law—"Habitual drunkard"—*Inclusion of person who when sober can manage own affairs*—*Habitual Drunkards Act, 1879* (42 & 43 Vict., c. 19), s. 3.

G

A "habitual drunkard" within the meaning of s. 3 of the Habitual Drunkards Act, 1879, includes a person who by his habitual drinking is habitually unable to manage his own affairs although when sober he is capable of so doing.

Notes. The definition of "habitual drunkard" in s. 3 of the Habitual Drunkards Act, 1879, has been amended by the Mental Health Act, 1959 (see Part I of Sch. 7 to that Act; 39 HALSBURY'S STATUTES (2nd Edn.) 1104), but the amendment does not affect the decision in the present case.

H

As to the meaning of a habitual drunkard, see 22 HALSBURY'S LAWS (3rd Edn.) 723 n; as to punishment of habitual drunkards, see 10 HALSBURY'S LAWS (3rd Edn.) 508. For cases see 30 DIGEST (Repl.) 135 et seq. For the Habitual Drunkards Act, 1879, see 13 HALSBURY'S STATUTES (2nd Edn.) 168, and for the Inebriates Act, 1898, see *ibid.*, p. 180.

I

Case referred to:

(1) *Robson v. Robson* (1904), 68 J.P. 416, D.C.; 30 Digest (Repl.) 135, 867.

Case Stated by the stipendiary police magistrate for the city and county of Kingston-upon-Hull.

At a court of summary jurisdiction complaint was made by the appellant that the respondent,

"having within the twelve months preceding the date next hereinafter mentioned been convicted summarily at least three times of an offence mentioned

in the 1st schedule to the Inebriates Act, 1898, and being a habitual drunkard within the meaning of the Inebriates Acts, 1879 to 1898, unlawfully was on Aug. 8, 1908, found drunk and incapable in Spring Street, at 4.40 p.m."

At the hearing of the complaint it was proved or admitted that on Aug. 8, 1908, the respondent was found drunk in a highway in the city of Kingston-upon-Hull, and within twelve months preceding the date of the commission of the offence had been convicted summarily three times of other offences which are mentioned in the schedule to the Inebriates Act, 1898. The respondent (whose age was about thirty-five) was given to drink, and had been so for twelve or fourteen years. Through drink he lost his situation when working for his brother, a drysalter, some years ago, since when the only employment he had been able to get had been on docks. He would sometimes be drunk three or four times in one week, and at other times he would keep sober for four or five weeks; there had been no improvement latterly; when drunk he was more like a lunatic than a human being and did not appear to know what he was doing. He was separated from his wife six or seven years ago because of his drinking habits. When he was sober he was, in the words of his father, "as right as anyone," and knew what he was doing. He had been seen apparently dazed the day after drinking heavily, but not more dazed than any other person would be who had consumed as much alcohol, and his condition was no more peculiar than that of any other person who had been equally drunk. Nothing was noticed in the respondent attributable to a course of drinking. His father stated that he would give his son money and send him out to do any business if he were sober.

By s. 2 (1) of the Inebriates Act, 1898 :

"Any person who commits any of the offences mentioned in the First Schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him."

Section 3 of the Habitual Drunkards Act, 1879, provided that a

"habitual drunkard means a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself and his or her affairs."

For the appellant it was contended that the respondent was a "habitual drunkard" within the meaning of s. 3 of the Habitual Drunkards Act, 1879, inasmuch as he was

"by reason of habitual intemperate drinking of intoxicating liquor . . . incapable of managing himself and his affairs."

No arguments were adduced on behalf of the respondent but the magistrate, stating those which occurred to him in answer to the contentions on behalf of the appellant, said that he was not satisfied that the case of *Robson v. Robson* (1) bound him, as in that case the point was not taken as to whether the man's condition was the result of the habitual character of his drinking, or was only due to a particular preceding bout—the question there was one of fact as to whether the man's drunkenness, which the justices had found to be habitual, was or was not habitual. In the present case the question was: "Is the man a habitual drunkard?" Had the prosecution succeeded in proving that the respondent's incapacity on sundry occasions was caused by the habitual character of his drinking habits, or was it only because he was then drunk? There was no evidence of any symptoms of accretion of alcohol; on the contrary, when he was not drunk

A he was said to be "as right as anyone." The magistrate was of opinion that the appellant had failed to prove his case, and he dismissed the complaint. The question was whether on the above statement of facts the decision of the magistrate was correct in law.

McCardie for the appellant.

G. F. Mortimer for the respondent.

B
C **LORD ALVERSTONE, C.J.**—There is no reasonable doubt that on the facts as stated in the case most people would agree that the respondent was a habitual drunkard, but counsel on his behalf contends that he cannot be treated as a habitual drunkard under the Inebriates Acts, and suggests that the definition of "habitual drunkard" in s. 3 of the Habitual Drunkards Act, 1879, is not wide enough to include the respondent. By that section "habitual drunkard" is defined as meaning

D "a person who, not being amenable to any jurisdiction in lunacy [which, in my opinion, would exclude the case of persons who cannot manage their own affairs when sober] is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself, or to others, or incapable of managing himself or herself, and his or her affairs."

E Certainly the management by the respondent of his affairs was lamentable. It seems to me that we ought not to cut down the meaning of this remedial section, and we ought not to say that the section has no application because a person in the intervals of drinking is capable of managing his own affairs. The section applies to a man who by his habitual drinking is habitually in the condition of not being able to manage his own affairs. I think, therefore, that the case must go back to the magistrate to be dealt with.

BIGHAM, J.—I agree.

WALTON, J.—I agree.

F *Appeal allowed, and case remitted to the magistrate.*

Solicitors: *Sharpe, Pritchard & Co.*, for *H. A. Learoyd*, Hull; *C. J. Smith & Hudson*, for *Payne & Payne*, Hull.

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

R. v. LEWIS

[COURT OF CRIMINAL APPEAL (Channell, Jelf and Bray, JJ.), May 18, 1909]

[Reported 78 L.J.K.B. 722; 100 L.T. 976; 73 J.P. 346; 25 T.L.R. 582;
22 Cox, C.C. 141; 2 Cr. App. Rep. 180]

Criminal Law—Trial—Jury—Discharge—Discretion of judge—Review by Court of Criminal Appeal.

The appellant had been indicted for obtaining money under false pretences. At the trial, all the witnesses for the Crown not being present, the hearing was adjourned and the jury discharged. The appellant was tried later, found guilty and sentenced.

Held: the right to discharge a jury is entirely within the discretion of the judge who tries the case, and the Court of Criminal Appeal has no jurisdiction to review the exercise of that discretion; a jury, however, should not be discharged merely to enable the prosecution to present a stronger case against the prisoner on some other occasion.

Notes. Referred to: *R. v. Richardson* (1913), 8 Cr. App. Rep. 159.

As to the discharge of the jury in course of a trial, see 10 HALSBURY'S LAWS (3rd Edn.) 426, 427, and for cases see 14 DIGEST (Repl.) 346-349. As to appeals against conviction, see 10 HALSBURY'S LAWS (3rd Edn.) 535-541, and for cases see 14 DIGEST (Repl.) 599-610. For the Criminal Appeal Act, 1907, s. 4, see 5 HALSBURY'S STATUTES (2nd Edn.) 929.

Cases referred to:

- (1) *Winsor v. R.* (1866), L.R. 1 Q.B. 390; 7 B. & S. 490; 35 L.J.M.C. 161; 14 L.T. 567; 30 J.P. 374; 12 Jur. N.S. 561; 14 W.R. 695; sub nom. *R. v. Winsor*, 10 Cox, C.C. 327, Ex.Ch.; 14 Digest (Repl.) 370, 3590.
- (2) *R. v. Charlesworth* (1861), 1 B. & S. 460; 31 L.J.M.C. 25; 5 L.T. 150; 25 J.P. 820; 8 Jur. N.S. 1091; 9 W.R. 842; 9 Cox, C.C. 44; 121 E.R. 786; 14 Digest (Repl.) 346, 3353.
- (3) *Conway and Lynch v. R.* (1845), 5 L.T.O.S. 458; 14 Digest (Repl.) 370, *2237.

Appeal against conviction upon a certificate granted by the judge at the trial.

The appellant was indicted for obtaining money by false pretences. By arrangement between the parties, the trial began on April 20, 1909, and witnesses were called by the prosecution, but, as all the witnesses for the Crown were not present, application was made by the prosecution for an adjournment. This was opposed by counsel for the appellant, but the chairman adjourned the hearing till April 30, 1909, and discharged the jury. On that date the appellant was tried before the deputy chairman, found guilty, and sentenced to two years' imprisonment with hard labour.

Roome for the appellant.

Raymond Asquith for the Crown.

The judgment of the court was delivered by

CHANNELL, J.—The question in this case is one of law, as to whether the appellant, upon his trial on April 30, was entitled to say that the jury were improperly discharged on April 20. The matter has already been before the courts in its most solemn form—namely, upon a writ of error—and the question has been decided and the law settled in *Winsor v. R.* (1) and *R. v. Charlesworth* (2). There was at one time some doubt upon the question, and in *Conway and Lynch v. R.* (3), an Irish case, CRAMPTON, J., delivered a dissenting judgment which is reported in 31 L.J.M.C. 46. That judgment was afterwards approved in *R. v. Charlesworth* (2), which made it clear that the question of discharging a

A jury is entirely within the discretion of the judge at the trial. It is a matter for him to decide. It is said that there must be some necessity to justify such a procedure, but, in the judgment of CRAMPTON, J., to which I have referred, he said that the question of necessity was subject to the practice which had been growing up of allowing juries to be discharged under circumstances which would not have justified it in earlier times. The right to plead autrefois acquit on April 30 could not have arisen, as the appellant was never in peril on April 20. The law, as I have indicated it, is unaffected by the Criminal Appeal Act, 1907, and this court has no jurisdiction to review the exercise of the judge's unfettered discretion. Section 4 of the Criminal Appeal Act, 1907, is the only section that can possibly apply to this case, and it does not give us power to interfere, for there has been no miscarriage of justice. We cannot say it judicially, but we should like to say that we think that the discretion was exercised differently from what has been our own practice. A jury should not be discharged on the ground of necessity in order to let the prosecution present a stronger case. That is the rule, and, if there are cases where the witnesses are not forthcoming, the trial should be adjourned and resumed before the same jury. There may, of course, be cases where circumstances make the discharge of a jury a matter of necessity.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by* GERALD DODSON, Esq., *Barrister-at-Law.*]

MARRECO AND OTHERS v. RICHARDSON

[COURT OF APPEAL (Sir Gorell Barnes, P., Fletcher Moulton and Farwell, L.JJ.), May 14, 15, 1908]

[*Reported* [1908] 2 K.B. 584; 77 L.J.K.B. 859; 99 L.T. 486; 24 T.L.R. 624; 52 Sol. Jo. 516]

Limitation of Action—Acknowledgment—Part-payment—Necessity for inference of promise to pay balance—Part payment by cheque—Time at which payment is made—Limitation Act, 1623 (21 Jac. 1, c. 16)—Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1.

The defendant, being indebted to his solicitor in respect of a bill of costs, handed him, at an interview on May 10, 1900, a cheque for £20, by agreement post-dated May 20, 1900, on account of the bill. At the same interview it was further agreed that the cheque should not be presented for payment until June 20, 1900, on which day the cheque was presented for payment, and was paid by the defendant's bankers. On June 18, 1906, the executors of the solicitor, who had meanwhile died, issued a writ to recover the balance of the bill of costs after deducting the £20 paid by the defendant's cheque in 1900. The defendant relied on the statute of limitations, but the plaintiffs pleaded the payment of the cheque on June 20, 1900, as an acknowledgment of the debt by part payment.

Held: the debt was statute-barred because (i) (per SIR GORELL BARNES, P., and FLETCHER MOULTON, L.J.) a part payment of a debt does not cause the period of limitation to run afresh unless it is a part payment from which a promise to pay the balance can be inferred: *Hollis v. Palmer* (1) (1836), 2 Bing.

N.C. 713, approved and applied; and such a promise had been given by the defendant, not when the cheque was paid by his bankers, but when he gave it to the solicitors in May, 1900: *Gowan v. Forster* (2) (1832), 3 B. & Ad. 507, and *Turney v. Dodwell* (3) (1854), 3 E. & B. 136, applied: (ii) (per FARWELL, L.J.) the part payment was made, not when the cheque was paid, but when the defendant gave it to the solicitors: *Pearce v. Davis* (4) (1834), 1 Mood. & R. 365 and *Felix Hadley & Co. v. Hadley* (5), [1898] 2 Ch. 680, applied.

Notes. The statutes referred to in the judgments have now been repealed and replaced by the Limitation Act, 1939, the corresponding provisions of which are s. 2 (1) (a) (six year period of limitation for simple contract debts) and s. 23 (4) (part payment).

Referred to: *Rhokana Corpn., Ltd. v. I.R. Comrs.*, [1938] 2 All E.R. 51; *Re Hone (a bankrupt)*, *Ex parte The Trustee v. Kensington Borough Council*, [1950] 2 All E.R. 716.

As to when part payment by delivery of a cheque is made, see 24 HALSBURY'S LAWS (3rd Edn.) 309, 310, para. 612, and for cases see 32 DIGEST 383, 384, 657-664. For the Limitation Act, 1939, s. 2 (1) (a), s. 23 (4) see 13 HALSBURY'S STATUTES (2nd Edn.) 1160, 1184.

Cases referred to:

- (1) *Hollis v. Palmer* (1836), 2 Bing. N.C. 713; 3 Scott, 265; 2 Hodg. 55; 5 L.J.C.P. 264; 132 E.R. 275; 32 Digest 542, 1948.
- (2) *Gowan v. Forster* (1832), 3 B. & Ad. 507; 110 E.R. 184; 32 Digest 383, 661.
- (3) *Turney v. Dodwell* (1854), 3 E. & B. 136; 2 C.L.R. 666; 23 L.J.Q.B. 137; 23 L.T.O.S. 38; 18 Jur. 187; 118 E.R. 1091; 32 Digest 383, 657.
- (4) *Pearce v. Davis* (1834), 1 Mood. & R. 365, N.P.; 12 Digest (Repl.) 525, 3959.
- (5) *Felix Hadley & Co. v. Hadley*, [1898] 2 Ch. 680; 67 L.J.Ch. 694; 79 L.T. 299; 47 W.R. 238; 42 Sol. Jo. 655; 12 Digest (Repl.) 531, 4009.
- (6) *Irving v. Veitch* (1837), 3 M. & W. 90; Murp. & H. 313; 7 L.J.Ex. 25; 150 E.R. 1069; 32 Digest 383, 662.

Also referred to in argument:

Ramchurn Mullick v. Luchmeechund Radakissen (1854), 9 Moo. P.C.C. 46; 14 E.R. 215; sub nom. *Radakissen and Doss v. Ramchurn Mullick*, 2 C.L.R. 1664; sub nom. *Mullick v. Radakissen*, 23 L.T.O.S. 25, D.C.; 6 Digest (Repl.) 9, 9.

Appeal by the plaintiffs from a decision of BRAY, J., at the trial of the action without a jury at Salisbury.

The action was brought by the plaintiffs, as executors of a deceased solicitor, to recover the balance of a bill of costs due to their testator for work done by him as solicitor for the defendant upon his retainer. The writ of summons was issued on June 18, 1906. The particulars of claim endorsed on the writ showed that the costs included in the bill had all been incurred between the years 1891 and 1896, that is to say, more than six years before the commencement of the action, but showed a payment on account by the defendant to the solicitor of £20 by cheque on June 20, 1900. From the facts, which were practically undisputed, it appeared that at an interview between the solicitor and the defendant on May 10, 1900, the cheque in question was handed by the defendant to the solicitor on account of the bill of costs, and was by agreement post-dated May 20, 1900. At the same interview it was further arranged between the defendant and the solicitor that at the defendant's request the cheque should not be presented for payment until June 20, 1900. In accordance with that arrangement the cheque was presented on that day to the defendant's bankers, and was paid. The plaintiffs' case was that as there had been a part payment on June 20, 1900, and an implied promise resulting therefrom to pay the whole debt within six years from the commencement of the action, the case was taken out of the operation of the Statute of

A Limitations. The defendant's case was that the part payment took place on May 10, 1900, which was more than six years before the commencement of the action, and that therefore the claim was barred. BRAY, J., in a reserved judgment for the defendant, cited and followed *Turney v. Dodwell* (3), *Gowan v. Forster* (2) and *Irvine v. Veitch* (6). The plaintiffs appealed.

Ratcliffe Cousins and *Frank Phillips* for the plaintiffs.

B *Holman Gregory* and *Coutts Trotter*, for the defendant, were not called on to argue.

C **SIR GORELL BARNES, P.**—I am of opinion that this appeal should be dismissed. The question is whether the claim in this case is barred by the Statute of Limitations, as contended by the defendant. It is really a very short point, and it has been ably argued before us. The facts are extremely simple. [His Lordship stated the facts, and continued:] The defendant contended that the debt is statute barred, the plaintiffs say that there has been an acknowledgment of the debt within six years, so as to take it out of the operation of the Statute of Limitations. The only point taken is whether the giving of the cheque on May 6, 1900 and the payment thereof on June 20, 1900, amounts to an acknowledgment so as to bring the matter within the six years. BRAY, J., decided the case in the defendant's favour on the strength of certain authorities which are mentioned in his judgment, and the plaintiffs say that none of these authorities have any application to the present case. When the matter is carefully examined it will be found that those cases were rightly decided. The Limitation Act, 1623, provided that the limitation of time for bringing an action of this sort was six years, but it does not deal with the effect of an acknowledgment of a debt or part payment. At first it was held that only an express promise to pay the debt within the six years would take the case out of the statute, but afterwards it was held that a mere acknowledgment of the debt or part payment was sufficient. The general effect of the decisions was to make it very easy to get round the statute. In consequence of this the Statute of Frauds Amendment Act, 1828 (commonly called Lord Tenterden's Act) was passed, which, after reciting the Limitation Act, 1623, proceeded to say by way of further recital,

E "and whereas various questions have arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, and it is expedient to prevent such questions and to make provision for giving effect to the said enactments, and to the intention thereof";

G and it enacted by s. 1 that

H "in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefits thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby . . . provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."

I The result of this was to leave the questions of acknowledgment by part payment as they were before the Act.

The mere fact of part payment is not sufficient to take it out of the statute; it has to be part payment from which a promise to pay the balance can be inferred. The law as it is since Lord Tenterden's Act is thus stated in *LEAKE ON CONTRACTS* (1st Edn.), at p. 536:

"It was at first decided, under this statute, that payment of a debt or interest, when proved by a verbal admission of the debtor, was an acknowledgment by

words only within the enactment, and required to be made in some writing signed by the debtor. But this decision was subsequently overruled, and it is now held that an admission by the debtor of part payment, or payment of interest, is not within the enactment, and may be proved by words only without writing. The payment, in order to operate as a renewal of liability, must be made on account of the debt in question, and must be made in part payment of a greater sum due in respect of that debt; it must amount, in fact, to an admission that a larger sum is then due in respect of the debt in question, so that from such admission a promise to pay the balance remaining due may be implied."

The difference between a mere payment of interest and a payment of interest from which a promise to pay the whole of the debt may be implied, is well illustrated in *Hollis v. Palmer* (1). There the declaration stated that the defendant, sixteen years before the commencement of the action, delivered in his promissory note, payable on demand, with interest, to the plaintiff, but neglected to pay, except interest, which he paid up to a day within six years. The plea was that the cause of action did not accrue within six years. It was held on demurrer that the plea was sufficient. TINDAL, C.J., after referring to the proviso to s. 1 of the Act of 1828, said (2 Bing. N.C. at p. 717):

"Since that statute, as before, payment of interest may afford an inference that the principal is still due. But how are we to know whether it is so or not, unless we know the circumstances under which the interest has been paid. I think, therefore, that the declaration discloses only evidence of a cause of action, and not any actual cause of action that has not been barred by the place, and that, consequently, our judgment must be for the defendant."

That illustrates very clearly what I said just now.

In this case the part payment was made by cheque—that is to say, by a negotiable instrument—and such payment has always been treated as a conditional payment; it has the effect of suspending the right of action while the cheque is running. That being so, and the cheque being given at the time it was given, it was the acknowledgment which the plaintiffs said showed the promise to pay the whole debt which would prevent the operation of the statute; but that took place more than six years before the commencement of the action. It is now said on behalf of the plaintiffs that, because by arrangement between the parties the cheque was to be presented and paid on a day within six years from the commencement of the action, a fresh promise to pay the whole debt is to be implied at the date when the cheque was in fact presented and paid. In other words, it is said that the bankers made a fresh promise to pay when they paid the cheque on behalf of the defendant. Such a contention is inconsistent with what I conceive to be the law on the subject. In my opinion the fresh promise was made at the time when the parties met together and the defendant gave his cheque. Two of the cases which have been cited seem to support the principles which I have stated. The first is *Gowan v. Forster* (2), where PARKE, J., took the same view. He said in the course of the argument (3 B. & Ad. at p. 511):

"The reason why a part payment takes a case out of the statute is that it is evidence of a fresh promise. Here the promise must be considered as having been made when the bill was given, and not when it was paid."

LITLEDALE, J., in giving judgment, said (*ibid.* at p. 513):

"The promise is to be implied at the time when the bill was given. The bill might be an authority to the agent to pay at another time, but no promise by the principal at such time."

The second case is *Turney v. Dodwell* (3), which is a very clear case in favour of the

A defendant. LORD CAMPBELL, C.J., said, in the course of his judgment (3 E. & B. at p. 142):

"We think that, where a bill of exchange has once been so delivered in payment on account of the debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered as from the time of such delivery, whatever afterwards takes place as to the bill."

B For the reasons I have given, I am of opinion that the judgment of BRAY, J., is right, and that this decision should be affirmed.

C **FLETCHER MOULTON, L.J.**—The facts of this case are curious, but I have no doubt that the judgment of BRAY, J., is correct. It was very early recognised by the courts that a clear acknowledgment of a debt was an act from which might be implied a fresh promise to pay the debt, the consideration being the then existing liability to pay it. Such a promise might be proved in any way; it might be in writing, it might be oral, or it might be implied from the conduct of the debtor. This was found to be unsatisfactory, and Lord Tenterden's Act was passed, which required the acknowledgment or promise to be in writing, with this striking limitation—that nothing therein contained should affect the consequences of part payment. D The words are:

"Nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."

E That shows that the courts had recognised part payment of a debt as being an act of conduct which might well amount to a recognition of the debt, and from which a fresh promise to pay the balance might be inferred. Lord Tenterden's Act left the decisions as to the effect of part payment untouched. I have no doubt that part payment of a debt by itself did not necessarily constitute a renewal of the obligation to pay the balance of the debt. The part payment must be one from which the court could imply a recognition of the whole debt; it must be made under circumstances from which a promise to pay the remainder can be inferred. But a part payment F may be made under circumstances which negative the implied promise to pay the remainder. The courts are of course bound by Lord Tenterden's Act, and have acted loyally under it. In one respect they have perhaps enlarged a little the effect of the proviso in s. 1 of that Act. The intention of the Act was to prevent acknowledgments or promises from taking cases out of the statute unless they were in writing, or unless they were to be implied from the conduct of the person making the G part payment. The courts have held that the delivery of a negotiable instrument on account of the debt is to be considered as part payment. Therefore, if a negotiable instrument is given in part payment under circumstances from which an acknowledgment of the debt and a promise to pay the balance can be implied, this is quite sufficient to take the case out of the statute. As soon as you recognise that it is an acknowledgment of a debt by conduct, that part payment still survives, and is H sufficient to take the case out of the statute.

I When was the act of conduct in this case which recognised the debt, and from which a fresh promise to pay the balance of the debt might be implied? Clearly it was when the cheque for £20 was given in part payment of the debt; and suppose the period of six years from the accruing of the action had expired the day after the cheque was given, the giving of the cheque would have taken the case out of the statute. But in this case the period of six years from the giving of the cheque had expired before this action was brought, and it is now urged by the plaintiffs that because by arrangement between the parties the cheque was not to be presented for payment for several weeks after it was given, it must be taken that when the cheque was in fact paid, part payment must be deemed to have taken place. In one sense it may be true, because on June 20 £20 was paid which went in reduction of the debt, but that payment of the cheque can show only the honouring of an obligation already given. I cannot infer from that act any promise by

the defendant to pay the balance. If on May 10 the defendant had given a promissory note payable three months after date, payment could not have been enforced for three months, and the plaintiffs would have had a stronger case than the present one. The payment of the promissory note at the end of three months would only have been the discharge of the obligation of the drawer. There would not have been any fresh act or conduct from which I could infer a promise to pay the balance of the debt. It would simply mean that the drawer was honouring his promissory note. The result is that, in my opinion, there was here only one act of conduct which by law could enlarge the period, and that was the giving of the cheque on May 10. That was more than six years before the commencement of this action, and it is, therefore, statute barred.

FARWELL, L.J.—I agree. The only question is as to the date of part payment. A part payment was made on account of the debt, and if it had been made in due time—that is, within six years from the commencement of the action—it would have been sufficient to take the case out of the Statute of Limitations, but it was not made in due time. In *Pearce v. Davis* (4) (1 Moo. & R. at pp. 365, 366), **PATTESON, J.**, says :

“The production of this cheque is not evidence of any loan; if it be evidence of anything, it is rather evidence of payment; it operates as payment until it has been presented and refused; and even if payment of it be refused, the refusal must be proved to have taken place before action brought.”

If a man pays his tailor's bill by cheque and the tailor accepts the cheque, the tailor cannot sue on his bill until the cheque has been presented for payment and dishonoured. If the cheque is not presented in due time, and the bank on which the cheque is drawn fails, the loss will fall on the holder, and the only effect that can be given to the agreement not to present the cheque until June 20 is that if the bank had failed the loss might have fallen on the drawer. Payment is really made at the time when the cheque is given, and I infer from the judgment of **PATTESON, J.**, that the giving of the cheque would have supported a plea of payment. The effect of the giving of a cheque was considered by **BYRNE, J.**, in *Felix Hadley & Co. v. Hadley* (5). The headnote of that case in the *LAW REPORTS* says as follows :

“A cheque or bill of exchange given in respect of a pre-existing debt operates as conditional payment thereof, and on the condition being performed by actual payment, the payment relates back to the time when the cheque or bill was given.”

I should rather say that the giving of a cheque is payment conditional on its being ultimately met and paid, and it then becomes an actual payment ab initio, and not a conditional one. Therefore, in my opinion, there was only one act of payment here, and that was when the cheque was given on May 10.

Appeal dismissed.

Solicitors : *Alfred Jonas, for Powning, Jonas & Parker, Salisbury; Taylor, Hoare & Pilcher, for Wilson & Sons, Salisbury.*

[Reported by J. M. CHAPLIN, Esq., Barrister-at-Law.]

BROWN v. DEAN AND ANOTHER

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Atkinson, Lord Shaw and Lord Mersey), April 13, 14, 1910]

[Reported [1910] A.C. 373; 79 L.J.K.B. 690; 102 L.T. 661; 54 Sol. Jo. 442]

County Court—New trial—Power of judge to grant—County Courts Act, 1888 (51 & 52 Vict., c. 43), s. 93.

Section 93 of the County Courts Act, 1888 [now Ord. 37, r. 1 (1) of the County Court Rules, 1936] provided that the county court judge shall "in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable."

Held: this section did not give the judge an arbitrary discretion to order a new trial, but he could only do so in cases in which a new trial would be ordered according to the rules of law laid down and acted upon in the Supreme Court.

Decision of the Court of Appeal, [1909] 2 K.B. 573, affirmed.

Notes. The County Courts Act, 1888, s. 93, has been repealed. See now the County Court Rules, 1936, Order 37, rule 1 (1).

Considered: *Sanatorium, Ltd. v. Marshall*, [1916] 2 K.B. 57; *Hip Foong Hong v. Ncotia*, [1918] A.C. 888; *Astor v. Barrett*, [1920] 3 K.B. 633; *Manners v. Manners and Fortescue*, [1936] 1 All E.R. 41. Applied: *Ladd v. Marshall*, [1954] 3 All E.R. 745. Considered: *Mayer v. Leanse*, [1958] 3 All E.R. 373; *Devenish v. P.D.I. Homes (Hythe), Ltd.*, [1959] 3 All E.R. 843. Referred to: *Clarke v. West Ham Corpn.*, [1914] 2 K.B. 448; *Guest v. Ibbotson* (1922), 91 L.J.K.B. 558; *R. v. Copestake, Ex parte Wilkinson*, [1926] All E.R. Rep. 252; *Boyle v. Union Coal Storage Co.* (1935), 28 B.W.C.C. 49; *Moore v. Cunard Steamship Co. (No. 2)* (1935), 28 B.W.C.C. 469; *Rowell v. Pratt*, [1937] 3 All E.R. 660; *Dick v. Piller*, [1943] 1 All E.R. 627.

As to a new trial in the county court, see 9 HALSBURY'S LAWS (3rd Edn.) 266-269, and for cases see 13 DIGEST (Repl.) 448-450.

Cases referred to in argument:

Murtagh v. Barry (1890), 24 Q.B.D. 632; 59 L.J.Q.B. 388; 38 W.R. 526; 6 T.L.R. 300, D.C.; 13 Digest (Repl.) 448, 719.

Young v. Kershaw, Burton v. Kershaw (1899), 81 L.T. 531; 16 T.L.R. 52, C.A.; Digest (Practice) 602, 2430.

Lister v. Wood (1889), 23 Q.B.D. 229; 53 J.P. 773; 37 W.R. 738; 5 T.L.R. 475, C.A.; 13 Digest (Repl.) 447, 711.

Higgins v. King's Proctor, King's Proctor v. Carter, [1910] P. 151; sub nom.

Higgins v. Higgins, Carter v. Carter, 79 L.J.P. 37; 102 L.T. 259; 26 T.L.R. 303; 54 Sol. Jo. 405, C.A.; 27 Digest (Repl.) 590, 5515.

Anderson v. Titmas (1877), 36 L.T. 711; 41 J.P. 680; Digest (Practice) 602, 2429.

Ord v. Noel (1821), 6 Madd. 127.

Birch v. Birch, [1902] P. 130; 71 L.J.P. 58; 80 L.T. 364; 50 W.R. 437; 18 T.L.R. 485; 46 Sol. Jo. 393, C.A.; 23 Digest (Repl.) 254, 3102.

Appeal from a decision of the Court of Appeal (LORD ALVERSTONE, C.J., and FARWELL, L.J., FLETCHER MOULTON, L.J., dissenting), reported [1909] 2 K.B. 573, affirming a judgment of the Divisional Court (DARLING and JELF, JJ.), setting aside an order of the county court judge of Manchester ordering a new trial in an action brought by the respondents against the appellant.

The appellant was a teacher in an elementary school in Manchester, and the respondent Rose Dean, a girl of twelve years of age, was a pupil in the school. On Monday morning, June 1, 1908, the appellant ordered the girl to leave the class

room as she was behaving badly. She left slowly and "defiantly," and, according to his account, he "gave her a push" to make her go more quickly, according to her account he "thumped her on the back." On the evening of Tuesday, June 2, she had a violent hysterical attack, was very unwell for a considerable time, and had to be sent away for change of air. She, by her father as next friend, brought an action in the county court against the appellant, claiming £50 damages for the assault.

The action was tried in October, 1908. The learned judge thought the case one of great doubt, but as the defendant admitted a technical assault, though the judge was of opinion that it had been much exaggerated by the plaintiff and her witnesses, and the girl had unquestionably been ill for some time, and no other cause was suggested for such illness, he gave judgment for the plaintiff for £12, being the out-of-pocket expenses caused by the illness, and costs. Afterwards an application, supported by affidavits, was made for a new trial on the ground that evidence had come to the knowledge of the defendant which suggested a cause for the plaintiff's illness other than the assault. The learned judge ordered a new trial on the terms (inter alia) that the defendant should bring the damages into court and give security for the costs of the trial. The plaintiffs appealed, and the order was reversed as above mentioned.

H. Lynn and R. J. Neville, for the appellant.

E. E. Wild and Claughton Scott, for the respondents.

LORD LOREBURN, L.C.—The chief effect of the argument which your Lordships have heard is to confirm, in my mind the extreme value of the old doctrine, *Interest reipublicæ ut sit finis litium*, remembering, that people who have means at their command are easily able to exhaust the resources of a poor antagonist. With great respect for the authority of **FLETCHER MOULTON, L.J.**, I am of opinion that the order of the Divisional Court, confirmed by the majority of the Court of Appeal, is perfectly right. When a litigant has obtained a judgment in a court of justice, whether it be a county court or the High Court, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive. I do not refer to other considerations which must come in when the question is whether a new trial should be granted or not. There is no such evidence here. The evidence only goes to damages, the assault being in reality admitted; and the evidence would not be conclusive even as to damages. The learned judge says:

"The case is one of the gravest doubt. But still I am inclined to make the order for a new trial. I am not suggesting that the former decision is wrong, but I do think, especially as the defendant is in a public position, and desires a new trial, that he should have it. Now this man thinks or believes that he has found witnesses which may lead to a conclusion which may reasonably be in his favour."

Those are the grounds upon which the learned county court judge based his decision. I agree with the judgment of **FARWELL, L.J.**, in which he says, referring to the earlier authorities:

"In the present case the county court judge has disregarded those principles, and has granted a new trial on affidavits which show at the outside that there will be oath against oath on a new trial—and that is clearly not enough—which show nothing in the nature of surprise, fraud, or conspiracy, and also state nothing to show that the information alleged could not with reasonable diligence have been obtained at the first trial. The real ground that influenced the learned judge appears to have been that he came to his former conclusion of fact with hesitation, and that the matter is serious for the defendant in consequence of his position. Neither of these grounds is in my opinion sufficient."

A If, therefore, your Lordships have jurisdiction, you ought to exercise it in order to secure for this plaintiff the fruits of the lawful judgment which he has obtained from the county court. But it is said that we have no jurisdiction upon the ground that under the County Courts Act, 1888, a county court judge is entitled to grant a new trial "if he shall think just." Those words do not give him an arbitrary discretion, but mean "if he shall think just according to law." The rules to
 B which I have referred are the law, which he, like other judges, is bound to obey. Accordingly, in my opinion, this appeal ought to be dismissed with costs.

LORD ATKINSON.—I concur.

LORD SHAW.—I concur, but I hope that your Lordships will forgive me for expressing doubt upon a single point, and it is not really material to the judgment
 C which has just been pronounced. It is upon the subject of *res noviter veniens ad notitiam*. Speaking for myself, I do not at present see my way to go the whole length of the proposition which the Lord Chancellor has laid down, to the effect that the *res noviter veniens* must, if believed, be conclusive. It is possible to figure cases in which it might be so gravely material and so clearly relevant as
 D to entitle the court to say that that material and relevant fact should have been before the jury in giving its decision. I do not dissent from the judgment as pronounced, but I desire to express my opinion upon that topic. Moreover, I do not think that the facts alleged as new were either relevant or material to the main fact of the case, which was whether an assault had been committed in the school by the appellant on one of his pupils. I cannot read the passage from the judgment
 E of the learned county court judge as meaning anything else than that he granted the new trial because, whereas he was then inclined to decide in favour of the plaintiff, but was not very sure, he now inclines to think that he may not decide in favour of the plaintiff, but is not very sure. Anything less satisfactory as an exercise of discretion, or anything more illustrative of the danger of departing from the ordinary rules of administering remedial justice, I can hardly figure.

F **LORD MERSEY.**—I agree.

Appeal dismissed.

Solicitors: *Baker & Nairne*, for *Cobbett, Wheeler & Cobbett*, Manchester; *Sharpe, Pritchards & Co.*, for *W. Walker*, Manchester.

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

MACINTOSH AND ANOTHER v. DUN AND OTHERS

[PRIVY COUNCIL (Lord Loreburn, L.C., Lord Ashbourne, Lord Macnaghten, Lord Robertson, Lord Atkinson and Lord Collins), March 31, April 1, 2, June 3, 1908]

[Reported [1908] A.C. 390; 77 L.J.P.C. 113; 99 L.T. 64; 24 T.L.R. 705]

Libel—Privilege—Qualified privilege—Trade protection society—Information as to trader's credit supplied to member—Information given for profit, not in discharge of duty.

The underlying principle of the defence to an action for libel of qualified privilege is the convenience and welfare of society—not the convenience of individuals or of a class, but the general interest of society.

The proprietors of a mercantile agency supplied to their subscribers, for payment, information as to the commercial standing, position, and responsibility of business firms. In an action for libel brought by a trader as to whose standing and position information had been supplied by the agency to a subscriber,

Held: the publication of the words complained of was made by the agency, not in the discharge of a public or private duty, legal or moral, but from motives of self-interest by persons who traded for profit in the characters of other people, and, therefore, the defence of qualified privilege was not open to the agency.

Notes. Applied: *Elkington v. London Association for Protection of Trade* (1911), 28 T.L.R. 117. Distinguished: *London Association for Protection of Trade v. Greenlands, Ltd.*, [1916-17] All E.R. Rep. 452. Considered: *Watt v. Longsdon*, [1929] All E.R. Rep. 284; *Perera v. Peiris*, [1949] A.C. 1.

As to qualified privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 54 et seq., and for cases see 32 DIGEST 112 et seq.

Cases referred to:

- (1) *Toogood v. Spyring* (1834), 1 Cr. M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, 1489.
- (2) *Stuart v. Bell*, [1891] 2 Q.B. 341; 60 L.J.Q.B. 577; 64 L.T. 633; 39 W.R. 612; 7 T.L.R. 502, C.A.; 32 Digest 122, 1545.
- (3) *Whiteley v. Adams* (1863), 15 C.B.N.S. 392; 3 New Rep. 126; 33 L.J.C.P. 89; 9 L.T. 483; 10 Jur. N.S. 470; 12 W.R. 153; 143 E.R. 838; 32 Digest 130, 1615.
- (4) *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; 16 L.J.Ch. 153; 8 L.T.O.S. 361; 11 Jur. 52; 63 E.R. 950; 18 Digest (Repl.) 91, 748.

Also referred to in argument:

Harrison v. Bush (1856), 5 E. & B. 344; 3 C.L.R. 1240; 25 L.J.Q.B. 25, 99; 25 L.T.O.S. 194; 26 L.T.O.S. 196; 20 J.P. 147; 1 Jur. N.S. 846; 2 Jur. N.S. 90; 3 W.R. 474; 4 W.R. 199; 119 E.R. 509; 32 Digest 123, 1550.

Robshaw v. Smith (1878), 38 L.T. 423; 32 Digest 120, 1519.

Waller v. Loch (1881), 7 Q.B.D. 619; 51 L.J.Q.B. 274; 45 L.T. 242; 46 J.P. 484; 30 W.R. 18; 32 Digest 113, 1445.

Hebditch v. MacIlwaine, [1894] 2 Q.B. 54; 63 L.J.Q.B. 587; 70 L.T. 826; 58 J.P. 620; 42 W.R. 422; 10 T.L.R. 387; 9 R. 452, C.A.; 32 Digest 114, 1460.

Southam v. Allen (1673), T. Raym. 231; 83 E.R. 121; 32 Digest 33, 267.

King v. Watts (1838), 8 C. & P. 614, N.P.; 32 Digest 175, 2145.

Coxhead v. Richards (1846), 2 C.B. 569; 15 L.J.C.P. 278; 10 Jur. 984; 135 E.R. 1069; 32 Digest 122, 1539.

- A** *Bennett v. Deacon* (1846), 2 C.B. 628; 15 L.J.C.P. 289; 135 E.R. 1093; 32 Digest 132, 1626.
- Fleming v. Newton* (1848), 1 H.L. Cas. 363; 9 E.R. 797, H.L.; 32 Digest 127, 1584.
- Annaly v. Trade Auxiliary Co.* (1890), 26 L.R. Ir. 394; 32 Digest 132, o.
- B** *Williams v. Smith* (1888), 22 Q.B.D. 134; 58 L.J.Q.B. 21; 59 L.T. 757; 52 J.P. 823; 37 W.R. 93; 5 T.L.R. 23, D.C.; 32 Digest 75, 1051.
- Searles v. Scarlett*, [1892] 2 Q.B. 56; 61 L.J.Q.B. 573; 66 L.T. 837; 56 J.P. 789; 40 W.R. 696; 8 T.L.R. 562, C.A.; 32 Digest 127, 1586.
- Reis v. Perry* (1895), 64 L.J.Q.B. 566; 43 W.R. 648; 11 T.L.R. 373; 39 Sol. Jo. 470; 15 R. 427; 59 J.P. Jo. 308; 32 Digest 127, 1588.
- C** *Saunders v. Seyd and Kelly's Credit Index Co., Ltd., Seyd and Kelly's Credit Index Co., Ltd. v. Saunders and Chapman* (1896), 75 L.T. 193; 12 T.L.R. 546, C.A.; 1 Digest (Repl.) 40, 292.
- Cohen v. Merchants' and Traders' Association, Ltd.* (1900), 21 N.S.W.L.R. 241.
- M'Nally v. Oldham* (1863), 8 L.T. 604; 32 Digest 33, h.
- Foley v. Hall* (1891), 12 N.S.W.L.R. 175.
- D** *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524; 60 L.J.Q.B. 299; 64 L.T. 691; 39 W.R. 263; 7 T.L.R. 173, C.A.; 32 Digest 76, 1069.
- Homer v. Taunton* (1860), 5 H. & N. 661; 29 L.J.Ex. 318; 2 L.T. 512; 8 W.R. 499; 157 E.R. 1344; 32 Digest 66, 944.
- Amann v. Damm* (1860), 8 C.B.N.S. 597; 29 L.J.C.P. 313; 2 L.T. 322; 7 Jur. N.S. 47; 8 W.R. 470; 141 E.R. 1300; 32 Digest 31, 229.
- E** *Davies v. Snead* (1870), L.R. 5 Q.B. 608; 39 L.J.Q.B. 202; 23 L.T. 126, 609; 34 J.P. 693; 32 Digest 114, 1455.
- Jenoure v. Delmege*, [1891] A.C. 73; 60 L.J.P.C. 11; 63 L.T. 814; 55 J.P. 500; 39 W.R. 388, P.C.; 32 Digest 156, 1887.
- Ormesby v. Douglass*, 37 N.Y. 477.
- F** *Sunderlin v. Bradstreet* (1871), 46 N.Y. 188.
- Esher v. Dun* (1882), 12 Fed. Rep. 526.
- Locke v. Bradstreet* (1885), 22 Fed. Rep. 771.
- King v. Patterson* (1887), 60 Amer. Rep. 622.
- Douglass v. Daisley* (1902), 114 Fed. Rep. 628.
- Robinson v. Dun* (1897), 24 U.C. App. Cas. 287.
- G** *Todd v. Dun* (1888), 15 U.C. App. Cas. 85.
- Davis v. Hall* (1896), 2 A.L.R. 115.
- Bromage v. Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry. K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 32 Digest 154, 1857.
- Usill v. Hales* (1878), 3 C.P.D. 319; 47 L.J.Q.B. 323; 38 L.T. 65; 26 W.R. 371; 14 Cox, C.C. 61; 32 Digest 135, 1665.
- H**

Appeal against a decision of the High Court of Australia, whereby it was ordered that a verdict should be entered for the respondents (the defendants in the action) thereby affirming so much of a decision of the Supreme Court of New South Wales as set aside the verdict for £800, and judgment entered for the appellants at the trial of the action, and reversing so much of the decision as directed that a new trial should be had between the parties.

I The appellants carried on business in partnership as ironmongers under the style of John Macintosh & Sons, at Sydney, in the State of New South Wales. The respondents carried on business in partnership under the style of the Mercantile Agency, R. G. Dun & Co. The agency was started in 1841, since which date the respondents and their predecessors extended the business, and the agency had branches in the United Kingdom and almost all parts of the world. In particular a branch of the agency was carried on at Sydney, in the State of New South Wales.

The business of the respondents consisted in obtaining information with reference to the commercial standing and position of persons carrying on business in the places where the respondents' agency was carried on, and in communicating such information confidentially to their subscribers for business purposes in response to specific and confidential inquiry and request made by the subscriber, as and when the subscriber had occasion to require information.

In October, 1903, an old and well-established firm in Sydney, known as Dean & Son, failed, and called a meeting of its creditors. This failure came as a shock to the mercantile community in Sydney, and gave rise to general uneasiness; and rumours affecting the standing of several business houses, including the appellants, arose at this time, and, as a consequence, a great deal of financial investigation was made by mercantile houses as to persons with whom they did business. Among other business firms concerning whose standing inquiry was made by mercantile houses was the appellants' firm. A firm of Holdsworth, Macpherson & Co., who carried on business as ironmongers in Sydney and had done business with the appellants' firm for many years, were at the time in question and had been since 1902 subscribers to the respondents' agency. On Dec. 3, 1903, Holdsworth, Macpherson & Co. made inquiry in writing of the respondents' agency at their Sydney office concerning the appellants. In response to such written request by Holdsworth, Macpherson & Co., the reports in question, dated Nov. 13, 1903, and Dec. 10, 1903, were issued by one Green on behalf of the respondents at the respondents' Sydney office, and sent in confidence to Holdsworth, Macpherson & Co., for the purpose indicated in the written application. The reports when received by Holdsworth, Macpherson & Co. were treated by them as private and confidential. The appellants alleged that the reports contained matter defamatory of them and began the present action for libel.

Dickens, K.C., and *J. A. Simon, K.C.*, for the appellants, submitted that the publication of the defamatory matter was not privileged.

Sir R. Finlay, K.C., *Wise, K.C.* (of the Australian Bar), and *Frank Gover*, for the respondents, contended that the implication of malice was rebutted where, as here, the inquirer had an interest in obtaining the information sought.

June 3, 1908. **LORD MACNAGHTEN**.—This is an appeal from a decision of the High Court of Australia pronounced on cross-appeals from two orders of the Full Court of New South Wales. The action was an action for libel. It was tried before *COHEN, J.*, and a jury. The plaintiffs obtained a verdict for £800. The Full Court set the verdict aside, but directed a new trial. The High Court entered judgment for the defendants.

The question, and the only question on the present appeal, is whether the occasion on which the libels were published was or was not a privileged occasion. The plaintiffs are wholesale and retail ironmongers in Sydney. The defendants (as their acting manager in Sydney stated in an affidavit filed in the action) carry on the business of a trade protective society "in almost all parts of the civilised world" under the name of "The Mercantile Agency." That business, as the acting manager explained, "consists in obtaining information with reference to the commercial standing and position of persons" in the State of New South Wales "and elsewhere and in communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiry on their part." He stated further that all requests for information directed to the agency by their subscribers are in the following form :

"Subscriber's Ticket.
The Mercantile Agency.
R. G. Dun & Co.
Established 1841.

Give us in confidence and for our exclusive use and benefit in our business,

A viz., that of aiding us to determine the propriety of giving credit, whatever information you have, respecting the standing, responsibility, &c., of—

Name

Business

Town

Street address

State

B Subscribers to sign the above themselves.

.....

Subscriber."

C

The law with regard to the publication of information injurious to the character of another is well settled. The difficulty lies in applying the law to the circumstances of the particular case under consideration. In *Toogood v. Spyring* (1), PARKE, B., delivering the judgment of the Court of Exchequer, says (1 Cr.M. & R. at p. 193):

D

"The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

E

That passage which, as LINDLEY, L.J., observes in *Stuart v. Bell* (2), is frequently cited and "always with approval," not only defines the occasion that protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is "the common convenience and welfare of society"—not the convenience of individuals or the convenience of a class—but (to use the words of ERLE, C.J., in *Whiteley v. Adams* (3), "the general interest of society." Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be "recognised by English people of ordinary intelligence and moral principle" (to borrow again the language of LINDLEY, L.J.) it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance.

F

In deference, therefore, to the views of the learned judges of the High Court, the first question would seem to be: Under which category does the communication now in question properly fall? No doubt there was a specific request. In response to that request the communication was made. That much is clear. But it is equally clear that the defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers. It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance. If, then, the proprietors of the Mercantile Agency are to be regarded as volunteers in supplying the information which they profess to have at their disposal, what is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit.

I

Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people? The trade is a peculiar one; still there seems to be much competition for it; and in this trade, as in most others, success will attend the exertions of those who give the best value for money, and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.

It may not be out of place to recall the striking language of KNIGHT-BRUCE, V.-C., in *Pearse v. Pearse* (4), in reference to a somewhat similar subject. The question before him was the propriety of enforcing disclosure of communications between a client and his legal advisers. His Honour said (1 De G. & Sm. at p. 28):

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."

Then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great a price to pay for truth itself." It seems to their Lordships, following out this train of thought, that, however convenient it may be to a trader to know all the secrets of his neighbour's position, his "standing," his "responsibility," and whatever else may be comprehended under the expression of "et cetera," yet even so, accuracy of information may be bought too dearly—at least for the good of society in general. It is admitted that in this country there is no authority directly in point. There are direct authorities in the United States in favour of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question that must be decided by English law. In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned judges of the High Court their Lordships are of opinion that the decision under appeal is not in accordance with that principle. Their Lordships will, therefore, humbly advise His Majesty that the orders appealed from should be discharged and the judgments of the Full Court reversed, with costs in both courts, including the costs of the cross-appeals, and that any costs already paid by the appellants to the respondents should be repaid by the latter. The respondents will pay the costs of the appeal.

Solicitors: *Spyer & Sons*; *C. W. Dommett & Son*.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re NICHOLSON. EADE v. NICHOLSON

[CHANCERY DIVISION (Warrington, J.), May 7, 8, 1909]

[Reported [1909] 2 Ch. 111; 78 L.J.Ch. 516; 100 L.T. 877]

Trust—Investment—Power to retain—Unauthorised securities—Permanent and wasting nature—Right of tenant for life to income.

A will contained an express power to retain the investments of the testator in the same condition as they were at his death. The tenant for life of the residue was given the entire income thereof. The trustees, acting under the power, retained unauthorised securities of a permanent and of a wasting nature.

Held: the rule in *Howe v. Earl of Dartmouth* (1) (1802), 7 Ves. 137, did not apply as it was founded upon the presumed intention of a testator, who had given property of a wasting nature to be enjoyed by persons in succession, that such property be converted, and the tenant for life was entitled to the income of the unauthorised securities whether they were of a permanent or of a wasting nature.

Gray v. Siggers (2) (1880), 15 Ch.D. 74, followed.

Porter v. Baddeley (3) (1877), 5 Ch.D. 542, not followed.

Notes. Referred to: *Re Gough, Phillips v. Simpson*, [1957] 2 All E.R. 193.

As to income and capital receipts accruing to settled property, see 34 HALSBURY'S LAWS (3rd Edn.) 623 et seq., and for cases concerning right to income under a settlement, see 40 DIGEST (Repl.) 707 et seq.

Cases referred to:

- (1) *Howe v. Earl of Dartmouth, Howe v. Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, 265.
- (2) *Gray v. Siggers* (1880), 15 Ch.D. 74; 49 L.J.Ch. 819; 29 W.R. 13; 44 Digest 207, 362.
- (3) *Porter v. Baddeley* (1877), 5 Ch.D. 542; 44 Digest 207, 361.
- (4) *Re Wilson, Moore v. Wilson*, [1907] 1 Ch. 394; 76 L.J.Ch. 210; 96 L.T. 453; 44 Digest 206, 354.
- (5) *Macdonald v. Irvine* (1878), 8 Ch.D. 101; 47 L.J.Ch. 494; 38 L.T. 155; 26 W.R. 381, C.A.; 44 Digest 198, 274.
- (6) *Re Bates, Hodgson v. Bates*, [1907] 1 Ch. 22; 76 L.J.Ch. 29; 95 L.T. 753; 23 T.L.R. 15; 51 Sol. Jo. 27; 44 Digest 208, 370.
- (7) *Re Sheldon, Nixon v. Sheldon* (1888), 39 Ch.D. 50; 58 L.J.Ch. 25; 59 L.T. 133; 37 W.R. 26; 40 Digest (Repl.) 731, 2198.

Also referred to in argument:

Re Malam, Malam v. Hitchens, [1894] 3 Ch. 578; 63 L.J.Ch. 797; 71 L.T. 655; 38 Sol. Jo. 708; 13 R. 38; 40 Digest (Repl.) 727, 2167.

Morgan v. Morgan (1851), 14 Beav. 72; 51 E.R. 214; 40 Digest (Repl.) 733, 2219.

Summons to determine the application of income from settled property.

By his will made in 1900, Robert Nicholson appointed executors and trustees and he bequeathed his real and personal estate, upon trust to pay certain legacies; he also gave certain specific legacies, and then directed that all the residue of his real and personal estate be invested by his trustees, and he desired them to pay over the interest, dividends, and income thereof to his wife during her life for her separate use without power of anticipation; and after her death he directed that the interest, dividends, and income of the residuary estate be paid to his daughter Vera Marguerite Nicholson for her life, and after her death that the residuary estate be paid to her children as she appointed, and in default of appointment to them equally; with a gift over to other persons in case there were no such children. And the will contained the following provision:

"I authorise and empower my trustees at their discretion to sell and convey

all or any part of my said real estate, and to collect and get in any part of my personal estate, or to permit it to remain on investments the same as those in which it may be invested at the time of my death."

The will contained no trust for conversion, and no clause as to investments.

The testator died in 1902. He left one child, the defendant, Vera Marguerite Nicholson, who became of age in November 1902. His widow married H. G. Nicholson in 1905. The estate partly consisted of several securities which were not authorised trustees' securities, and among them were shares in the London and Middlesex Estates Co., Ltd., as to which it was stated in the evidence that the average dividends during the last five years had been $17\frac{1}{2}$ per cent. per annum, and that it was to all intents and purposes an assets realisation company. Those shares had been retained by the trustees. The present summons was taken out by one of the trustees, against the tenant for life, the daughter, and the other trustee, asking (inter alia) whether the income of the shares in the London and Middlesex Estates Co., Ltd., ought to be (until they should be realised) wholly applied as income or whether any part ought to be set aside as capital; and whether any of the income of the other investments forming part of the residuary trust estate, and not being trustees' securities, ought to have been retained as capital instead of being applied as income.

Cave, K.C., and *E. P. Hewitt* for the plaintiff trustee.

Rowden, K.C., and *Tyldesley Jones* for Mrs. Nicholson, the tenant for life.

Austen-Cartmell for the daughter, tenant for life in remainder.

L. W. Byrne for the defendant trustee.

WARRINGTON, J.—Two questions are raised in this summons. The first is the general one whether the tenant for life under the will of the testator is entitled to the actual income arising from the investments of the testator retained by the trustees; and, secondly, whether assuming that the tenant for life is so entitled, that principle would apply to shares said to be of a wasting nature as opposed to those of a permanent character. I have inverted the order of these questions because I wish to state the general question first, and the particular question second.

The will of the testator is a simple one. [His LORDSHIP stated the will, and continued:] At the time of the testator's death the estate was invested in a number of securities, including many which were unauthorised. Part of the estate consisted of shares in the London and Middlesex Estates Co., Ltd., a company which has been described in an affidavit in the case as an assets realisation company. This company has paid large dividends. I cannot, however, say, upon the evidence before me, that it is established that they have been paying any of those dividends out of capital. On the other hand, they have realised certain assets in pursuance of the objects for which the company were formed, and all they may have done is to treat as profits available for dividends the difference between the prices they have paid for the assets and the money which they have realised from their sale. I am, therefore, not at present in a position to say that this security is a wasting security. It may, however, be that it is; and I think it better to assume, for the purpose of what I am going to say, that it is a wasting security. Now, it is admitted that on this will, as far as unauthorised securities generally are concerned, the tenant for life is entitled to the actual income derived from them. The case in this respect is much the same as that of *Re Wilson, Moore v. Wilson* (4) before SWINFEN EADY, J. In that case there was no question of wasting securities, but only of unauthorised securities in the ordinary sense. The distinction between wasting and other unauthorised securities of the testator there was alluded to, but was not discussed. It is undoubtedly true that in a number of cases it has been suggested that there is the distinction contended for between wasting and unauthorised securities. But only in one case—that of *Porter v. Baddeley* (3)—has that distinction been recognised and acted upon.

A The question is as to the true effect of the doctrine which lawyers call the rule in *Howe v. Earl of Dartmouth* (1). That rule is that you must presume that if a testator gives in general terms personal estate to be enjoyed by several persons in succession he means what he says, and, if part of such personal estate consists of items of property of a wasting nature, the only way by which the testator's intention can be carried out is to convert the estate or treat it as converted; and
B to allow the tenant for life to have the income from the investments of the proceeds of the conversion. But the rule only means that the court will infer that, from the testator having given his property to be enjoyed by persons in succession, he meant that the estate should be converted for the purpose of giving effect to his intention. It becomes, therefore, a question of construction. Now, if that is so, I have to see whether in the will we have to deal with such an intention
C can be found.

There is in the will no trust for conversion. The residuary estate is given to the trustees upon trust to invest and hold the investments upon trust for various persons. The trust to invest must mean to invest such moneys as the trustees have in their hands, or such as may be paid to them. It cannot be a trust to convert the whole residuary estate in whatever condition it may be at the testator's death. The powers given by the will are discretionary powers; they are alternative powers, either to convert the residuary estate or to permit it to remain in the same state of investment as it was at the testator's death. Now, if the testator says that the trustees may retain any part of his estate in the investments in which it may be invested at his death, how can I say that as between the tenant for life and the remainderman he intended any particular investment to be converted?
E He has said that it may be retained, or, in other words, he has said that what he means is that, in the case of wasting securities retained by the trustees in their actual condition, the parties shall take the chance of the tenant for life outliving, or nearly outliving their continuance. That expresses my view as to the construction of this will, but I do not think that I should have been at liberty to have acted on that view if *Porter v. Baddeley* (3) had been the only authority on the question, because in that case HALL, V.-C., did come to the conclusion that there was the distinction contended for, and held that the trust to convert or retain did not authorise the trustees to pay the income of the wasting security to the tenant for life. But although this is so, I do not think that I am obliged to come to a decision contrary to my own view, because there is at least one other case where
F a judge, although he did not find it necessary to decide in disagreement with *Porter v. Baddeley* (3), yet did express his opinion the other way. I am, therefore, entitled to say that there is a conflict of authority, and am free to follow my own opinion.
G

In *Gray v. Siggers* (2), before MALINS, V.-C., the testator gave, not, as stated in the headnote to the LAW REPORT, several leasehold houses, but his real and the residue of his personal estate to his trustees upon trust to pay the income to his wife for life, and then to his grandchildren, with power to retain any portions of his property in the same state in which they should be at his decease, or to sell and convert the same, as they should think fit. Thus this was for all practical purposes the same case as the one with which I have to deal. Part of the estate consisted of leasehold houses held on short terms, and the question was whether under that will the tenant for life was entitled to the income in specie; and
H MALLINS, V.-C., came to the conclusion that she was. *Porter v. Baddeley* (3) was not cited to him. Why it was not cited I do not know, as it was decided some three years before *Gray v. Siggers* (2). MALLINS, V.-C., after reading the retainer clause in the will, says (15 Ch.D. at p. 77):

"So that they [the trustees] have the most complete power of selling, if they think fit, and of retaining, if they think fit; retaining for the purpose of enabling the wife to have the same income and the same enjoyment from it

that the testator himself had. Therefore the case is entirely taken out of *Howe v. Earl of Dartmouth* (1) and *Macdonald v. Irvine* (5) because of this power which gives the trustees the right to retain the property in specie. I cannot look at the question whether the leaseholds are for long or short terms, because, whether short or long the widow was to have the property in specie if the trustees thought fit to retain it."

Then he expresses an opinion as to what he thinks are the probabilities of the case. As to that I say nothing. He concluded that the rule in *Howe v. Earl of Dartmouth* (1) did not apply to the wasting securities or other unauthorised securities. The question was raised in *Re Bates, Hodgson v. Bates* (6) before KEKEWICH, J. For all practical purposes the will in that case was the same as that with which I have to deal. The investments in question in that case were shares in a colliery company which were said to be wasting securities. KEKEWICH, J., avoided deciding the point, because he came to the conclusion that, although the shares were hazardous, they were not wasting securities. But what he said seemed to show that, if the shares had been wasting securities, his opinion would have been the same as mine; he thought, however, that the point was concluded by *Porter v. Baddeley* (3) and accordingly he gave no decision upon it, and founded his judgment upon the facts that the investment was not a wasting security. It is curious that in *Re Bates, Hodgson v. Bates* (6), although *Gray v. Siggers* (2) was cited to the learned judge, no attention was drawn, either in the argument or the judgment, to the fact that that case was in conflict with *Porter v. Baddeley* (3), and the learned judge appears to have thought that *Porter v. Baddeley* (3) was the only authority on the point. Both *Gray v. Siggers* (2) and *Porter v. Baddeley* (3) were cited to NORTH, J., in *Re Sheldon, Nixon v. Sheldon* (7), but NORTH, J., avoided the difficulty by holding that the securities were not of a wasting nature. In these cases, therefore, the question was not really dealt with. The same remark applies to *Re Wilson, Moore v. Wilson* (4) before SWINFEN EADY, J. There in the course of his argument in reply Mr. Sargant who appeared for the tenants for life referred to the fact that in *Porter v. Baddeley* (3) the securities were wasting securities, and the learned judge thereupon remarked ([1907] 1 Ch. at p. 397):

"They were part of the residue, and there was power to retain them. Why should there be any distinction between hazardous and wasting securities on this point?"

But he did not find it necessary to decide the point, because he held that the securities in that case were wasting securities. In the case before me I do think it desirable to decide the point, because otherwise I must put the parties to the expense of an inquiry as to which of the unauthorised securities are wasting securities. In my opinion, for the reasons which I have given, I think that there is no distinction under this will, for the purpose of the application of the rule in *Howe v. Earl of Dartmouth* (1), between wasting and unauthorised securities. I assume these shares to be wasting securities, and I think the answer to the first two questions is that the tenant for life is entitled to the actual dividends of all such part of the testator's estate at his death as have been retained, whether of a wasting nature or not.

Solicitors: *Wansey, Bowen, Stammers & Co.; Robinson & Barrett.*

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.]

EBBERN v. FOWLER

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.J.J.), March 11, 1909]

[Reported [1909] 1 Ch. 578; 78 L.J.Ch. 497; 100 L.T. 717; 53 Sol. Jo. 356]

Settlement—"Children"—*Inclusion of illegitimate child en ventre sa mère.*

In 1878 J. K. went through a ceremony of marriage with E. K., his deceased wife's sister, at that date an invalid marriage. In 1879 a settlement was made by E. K.'s mother (in which she described E. K. as "the wife of J. K." although she must have known what the nature of the relationship was) providing for the "children" of E. K. Three weeks after the date of the settlement a child was born to E. K.

Held: the child was entitled to benefit under the settlement.

Notes. Marriage with a deceased wife's sister was validated by the Deceased Wife's Sister's Marriage Act, 1907. This Act has been repealed, and replaced by the Marriage Act, 1949, Sched. 1, part II (28 HALSBURY'S STATUTES (2nd Edn.) 722).

As to trusts in favour of illegitimate children, see 34 HALSBURY'S LAWS (3rd Edn.) 434-435, and for cases see 40 DIGEST (Repl.) 624-625.

Cases referred to:

(1) *Re Shaw, Robinson v. Shaw*, [1894] 2 Ch. 573; 63 L.J.Ch. 770; 71 L.T. 79; 43 W.R. 43; 38 Sol. Jo. 513; 8 R. 421; 40 Digest (Repl.) 624, 1174.

(2) *Hill v. Crook* (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 22 W.R. 137, H.L.; subsequent proceedings sub nom. *Crook v. Hill* (1876), 3 Ch.D. 773; 46 L.J.Ch. 119; 41 J.P. 228; 24 W.R. 876; 44 Digest 223, 476.

Also referred to in argument:

Occleston v. Fullalove (1874), 9 Ch. App. 147; 43 L.J.Ch. 297; 29 L.T. 785; 38 J.P. 196; 22 W.R. 305, L.C. & L.J.J.; 44 Digest 224, 487.

Appeal from a decision of JOYCE, J., holding that the plaintiff was not entitled to benefit.

By an indenture of settlement dated July 1, 1879, and made between Thomas Ebbern and Emma Matilda Ebbern, his wife, of the one part, and the said E. M. Ebbern, Rosetta Ebbern, and the defendants James G. W. Fowler and Mary Ann Fowler, his wife, of the other part, it was recited that certain stock to which the said E. M. Ebbern was entitled had with the consent of her husband been transferred into the names of the said E. M. Ebbern, Rosetta Ebbern, J. G. W. Fowler, and Mary Ann Fowler, and it was agreed and declared that E. M. Ebbern, Rosetta Ebbern, and J. G. W. Fowler should stand possessed of the said stock, and the securities for the time being representing the same upon certain trusts for the benefit of the said E. M. Ebbern and Thomas Ebbern during their respective lives, and after the determination of those trusts as to one equal third part upon trust to pay the dividends to the "said Rosetta Ebbern (daughter of the said Emma Matilda Ebbern)" during her life for her separate use without power of anticipation, and after her death to any husband she might marry during his life, if she should so appoint by will and subject thereto in trust for her children who being sons should attain the age of twenty-one years, or being daughters should attain that age, or marry, in equal shares. And as to one other equal third part upon similar trusts for the benefit of "the said Mary Ann Fowler (daughter of the said Emma Matilda Ebbern)" and her present or any future husband whom she might marry and her children. And as to the remaining equal third part upon trust to pay the dividends,

"Unto Elizabeth Kinder (daughter of the said Emma Matilda Ebbern and wife of John Kinder) during her life for her sole and separate use independently of the said John Kinder or any future husband whom she may marry, and free

from the control, debts, and engagements of the said John Kinder or any such husband, and so that she shall not have power to deprive herself thereof in anticipation, and her receipts alone shall (notwithstanding coverture) be good and effectual discharges for the same. And after the death of the said Elizabeth Kinder as to her said one equal third part or share of and in the said bank annuities, money, stocks, funds, and securities, In trust for the child (if only one) or for the children (if more than one) of the said Elizabeth Kinder who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age, or marry, to be divided between them (if more than one) in equal shares."

The settlement contained a further provision that if any of the daughters should die without leaving any child who should live to attain a vested interest in the trust premises the share of any such daughter as well original as accruing should be held upon the same trusts for the other daughters and their children as were declared concerning the original shares. And it was further provided as follows:

"And it is hereby declared that Francis Ebbern, the son of the said Elizabeth Kinder, born before her marriage with the said John Kinder, shall for the purpose of taking an interest under the trusts hereinbefore declared be considered as the legitimate child of the said Elizabeth Kinder."

Rosetta Ebbern married William Fitt and died on Nov. 23, 1887, intestate and without issue.

At the date of the settlement Elizabeth Kinder had for some time been cohabiting with John Kinder, who had been the husband of a deceased sister of Elizabeth, and on Oct. 31, 1878, she went through the ceremony of marriage with J. Kinder and continued to live with him as his wife until his death in 1887. Elizabeth Kinder had issue by the said John Kinder, Francis Ebbern, who died under the age of twenty-one, the plaintiff, John Thomas Ebbern, who was born three weeks after the execution of the settlement, viz., on July 23, 1879, and one other son, Gilbert Ebbern, who was born after the plaintiff and died under the age of twenty-one years. Elizabeth Kinder died in 1903 without having gone through the ceremony of marriage with anyone except J. Kinder. E. M. Ebbern died in 1907, her husband, Thomas Ebbern, having pre-deceased her.

This action was brought by J. T. Ebbern claiming a declaration that upon the true construction of the settlement and in the events which had happened the plaintiff was entitled to one-half of the trust funds. The defendants to the action were Mr. and Mrs. Fowler (who were both trustees and beneficiaries under the settlement) and their children, some of whom were infants, and the remaining trustee of the settlement. JOYCE, J., held (following *Re Shaw, Robinson v. Shaw* (1)) that the plaintiff was not entitled and dismissed the action. The plaintiff appealed.

Hughes, K.C., and *J. E. Harman* for the plaintiff.

Charles Church for the children of Mr. and Mrs. Fowler.

H. E. Wright for the trustees and infant children of Mr. and Mrs. Fowler.

SIR HERBERT COZENS-HARDY, M.R.—This in form is an appeal from a decision of JOYCE, J., but I think it is more accurate to say that in substance it is an appeal from the decision of NORTH, J., in *Re Shaw* (1), which JOYCE, J., with great propriety, if I may be allowed to say so, thought himself bound to follow, leaving the Court of Appeal to deal with that case as it might think fit. The point here arises upon a deed, and not upon a will, and is whether a child born a month after the execution of the deed, but the child of a woman who had gone through the ceremony of marriage with a man who had been her deceased sister's husband, can take under the limitations which I will read. I can see no ground for drawing any distinction between a deed and a will for the purposes of the present case or cases of this class, although undoubtedly in many other cases

A and in many other circumstances such a distinction must be drawn. The settlement was made by the grandmother. She had three daughters, one of whom was Elizabeth. The fund was settled on the grandmother and her husband for their respective lives, and then it was to go in thirds. One-third was given to her daughter Rosetta; another to a married daughter, Mary Ann Fowler, and her children; and the remaining third was given in these terms. [The MASTER OF THE ROLLS read the trust in favour of Elizabeth and her children and continued:] John Kinder was a person with whom Elizabeth could not have contracted a valid marriage, although in truth she had gone through the ceremony of marriage with him in October, 1878, the year before the settlement was executed. On the face of this deed I think it is apparent that the grandmother must have known that John Kinder had been married before to another daughter, who was dead, and that subsequently Elizabeth had gone through the ceremony of marriage with him. Notwithstanding that, she deliberately describes Elizabeth as the wife of John Kinder. She gives Elizabeth the beneficial interest for her separate use, which, of course, presupposes a marriage

C "independently of the said John Kinder or any future husband and free from the control, debts, and engagements of the said John Kinder and any such husband."

D She therefore treats Elizabeth as married; she treats John Kinder as her husband, and ultimately she gives the fund in trust for "the children of the said Elizabeth Kinder."

E Under these circumstances, and apart from the proviso which I shall come to afterwards, is it possible to distinguish this case from the principles emphatically laid down by the House of Lords in *Hill v. Crook* (2) and given full and consequential effect by HALL, V.-C., in the subsequent stage of the same case: *Crook v. Hill* (2)? To my mind it is apparent on the face of this deed that the intention was to treat the children of Elizabeth, whether by John Kinder or not, as persons entitled to benefit under this trust, and that being so, it appears to me that the plaintiff, who in the events which happened was begotten before the settlement, but was not born until three weeks after the settlement, was in law a person in esse who was entitled to take. I think it is impossible consistently with the decision of the House of Lords to hold that this child was not entitled to the benefits of this trust, and, in my opinion, on the same footing as a child actually born at the date of the settlement.

G But then it is said that even assuming that is the consequence of the earlier part of this deed, a different result ought to be arrived at when you come to the proviso. I ought to say that before the ceremony of marriage was gone through there was a child, Francis, born to Elizabeth. That child, assuming that this marriage ceremony was to be treated as constituting a valid marriage, was not legitimate on that hypothesis, and therefore it is consistent with the whole deed to declare, as was done

H by this proviso:
"That Francis Ebborn, the son of the said Elizabeth Kinder, born before her marriage with the said John Kinder, shall, for the purpose of taking an interest under the trusts hereinbefore declared, be considered as the legitimate child of the said Elizabeth Kinder."

I I think that means nothing more than this. If Francis had been born after the marriage ceremony he would have been undoubtedly within the meaning of the deed a child entitled to the benefit of the trusts, but having been born before the ceremony of marriage there would have been a serious question whether he would come under those benefits, and this proviso was inserted to remove all doubt upon that point.

There is nothing in any of the observations I have made upon the general purpose and intention of the deed which conflicts with any of the authorities upon this subject apart from the decision of NORTH, J., in *Re Shaw* (1). That decision I

must now shortly deal with. In 1843 William Shaw and his aunt by the half blood went through the ceremony of marriage, and in the following year they settled a fund "upon trust for the children or grandchildren or other issue of the said William Shaw and Emma his wife"—not of Emma alone, but of those two individuals who had gone through the ceremony of marriage—upon such terms as the mother should by deed appoint, and there was a gift over in default of appointment. There were ten children, one of whom was born a month after the execution of the deed, and therefore *en ventre sa mère* at the date of the deed, and nine others were born subsequently, and the question was not whether the whole ten could take, because the future illegitimate children certainly could not take, but whether this one could. The learned judge, after referring to the trusts of the settlement, says this ([1894] 2 Ch. at pp. 575, 576):

"That is clearly intended as a provision for illegitimate children subsequently to be born to an extent that cannot wholly take effect; it was not the intention to give the whole to the first; but it is said that the legal effect was to give the whole to the first. I am of opinion that such is not the legal effect. No doubt there was a child then begotten in favour of whom a settlement might have been made if proper and apt words had been used; if the settlement had referred to a child already begotten and not born, for example, that might have been sufficient. I do not find any such words. I do not find a trace of anything indicating a reference to that child otherwise than as one of a class. It is said that 'child' meant 'reputed child,' and that the conduct of the parents was such that this child gained the reputation of her being their legitimate child. I do not think that is enough."

In my opinion that is really inconsistent with the decision of the House of Lords in *Hill v. Crook* (2). In that case the gift was to a class. It was a gift to such of the children of Mary Crook (who had gone through the ceremony of marriage with a man who had previously married her deceased sister) as she should appoint, and in default of appointment for her children who should attain twenty-one or being a daughter or daughters marry under that age. The House of Lords decided that the class was not wholly void and uncertain by reason that it might include some future illegitimate child who could not take, because they overruled a demurrer allowed by STUART, V.-C., who held that two children born at the date of the testator's will could not take. They held they could, notwithstanding that there were some members of the class who might not be able to take. There were in fact two more children, one of whom was *en ventre sa mère* at the date of the will, and at the date of the testator's death. The question whether that child could take was left open. That question came before HALL, V.-C., upon further consideration. The Vice-Chancellor held that he was entitled to take, and it appears from the order on further consideration, which has been produced to us, that he declared that the two children born before the date of the will and the child *en ventre sa mère* at that date were all the persons entitled to take under the trusts of the will, and he held further that a fourth child who was born and begotten after the testator's death could not take, on the ground of public policy. That is to say, although the class intended to be benefited consisted of four persons, one of whom could not take, yet the court declared that the three members existing at the testator's death, treating the child *en ventre sa mère* as existing, could take and did take the whole. With great respect to NORTH, J., I think the view which he took was not consistent with the principles laid down by the highest possible authority binding upon us, and that his decision ought not to be followed. Therefore I think that the judgment of JOYCE, J., which was contrary to his own opinion, cannot be supported, and that this appeal must be allowed.

FLETCHER MOULTON, L.J.—I so entirely agree with the judgment of the MASTER OF THE ROLLS that I do not wish to add a word upon the general question. But I propose to say a few words about the proviso. I cannot see in the proviso any

A intention to modify the meaning of the trusts previously declared in the deed. Its object is simply to add to the list of beneficiaries a person who unquestionably would not belong to the class to be benefited on either of the possible interpretations of the settlement. In doing that the draftsman has possibly been a little over-emphatic—i.e., he states that the son born before the ceremony of the marriage is to be considered as the legitimate child of Elizabeth. He might have said simply
B the child of Elizabeth. But the fact that the draftsman has drawn the clause in this way does not, I think, give any solid ground for deciding that the original trust which was intended primarily to benefit the offspring of this union between Elizabeth and John Kinder is applicable only to the legitimate children of a future marriage. In my opinion this case is governed by *Hill v. Crook* (2), and the appeal must be allowed.

C
BUCKLEY, L.J.—At the date of the settlement the settlor had three daughters. One was a spinster, the second was the wife of J. G. W. Fowler, the third had gone through the ceremony of marriage with John Kinder, who had been her deceased sister's husband. By the settlement the lady, subject to certain life interests, settled this fund upon her daughters in thirds. The first daughter she describes as
D "Rosetta (daughter of the said Emma Matilda Ebbern)." The second she describes in the same way as "Mary Ann Fowler (daughter of the said Emma Matilda Ebbern)." The third, as to whom the question arises, she calls "Elizabeth Kinder (daughter of the said Emma Matilda Ebbern and wife of John Kinder)." She did not use the word wife with respect to Mrs. Fowler. That seems to me to be material. She then goes on to speak of John Kinder as the husband of Elizabeth, and she makes gifts to the children of Elizabeth Kinder. Now, in that settlement, so far, I find a statement by the settlor which has reference to the family relationship between Elizabeth and John Kinder, the nature of which she must have known to be such as it was, and she treats it as a marriage. She emphatically calls her the wife of the man, she calls the man the husband of the lady, and she speaks of their children. As LORD CAIRNS said in *Hill v. Crook* (2) the terms: "husband" and
F "wife," "father," and "mother," and "children" are all correlative terms. Therefore I am entitled to say that the settlor in this instrument is using such a dictionary as that "child" means the offspring of this union. Then I come to the proviso. I regard that proviso simply as meaning this—I am paraphrasing it in my own language—the settlor was saying: "According to my dictionary this relationship between John and Elizabeth Kinder, although not a marriage, is called a marriage.
G She is called the wife, he is called the husband, and the offspring are called children. Now, I remember that there is another person, Francis, who cannot be covered by that description, because he was born before the two persons whom I have called husband and wife went through the marriage ceremony; so that that child is illegitimate, even according to my use of the word 'marriage.' Therefore I am going to provide that though he is illegitimate, according to this convention, he shall, for
H the purpose of taking an interest under this settlement, be considered as a legitimate child." It appears to me that the effect of the proviso is simply to make the child legitimate for the purposes of the settlement in the same sense that the children born after the marriage ceremony were legitimate.

I The only other point that occurred to me was this, that, inasmuch as it is impossible legally to provide for future illegitimate children, it might be said that this being a gift to a class cannot be supported, because it includes, or may include, persons who cannot take. But having regard to *Crook v. Hill* (2) that cannot be argued, for this reason. In *Crook v. Hill* (2) beyond the two living children and the third child en ventre sa mère there was a fourth child born and begotten after the death of the testator, and the House of Lords upheld the claims of the two, leaving the claim of the third open without regard to the fact that there was a fourth child who would have been within the class if you were really carrying out the intention of the testator which was to benefit all the children. Subsequently exactly the same

question arose before HALL, V.-C., in a later stage of the case. The same facts were before him, and he then admitted the child who was en ventre sa mère and excluded the fourth child. That is to say, he affirmed the right of three members of the class to take notwithstanding that the class included persons who could not take. By the order on further consideration the court declared that

"the plaintiffs and the defendant Robert Crook are all of the persons intended to be denoted in the will by the words 'the children of my daughter Mary Crook' and entitled to take under that description the benefits conferred upon such children under or by virtue of the said will."

It is therefore necessarily involved in the decision of the House of Lords that any such objection as that the class might include persons who could not take on the ground of public policy is not open. That being so, it appears to me impossible to decide this case otherwise than by reversing the decision of NORTH, J., in *Re Shaw* (1). I think the basis of his judgment is to be found in the passage in which he says, referring to the settlement ([1894] 2 Ch. at p. 575):

"That is clearly intended as a provision for illegitimate children subsequently to be born to an extent that cannot wholly take effect; it was not the intention to give the whole to the first."

In the view of the learned judge a settlement in favour of a class of illegitimate children which might include after-born children ought not to be allowed to take effect as a provision for the existing children because that was not the class intended by the settlor. But that is contrary to the view of the House of Lords. I think therefore that this appeal must be allowed.

Solicitors: *E. W. Reeves*, for *Sedgwick, Turner, Oddie & Swarder*, Watford; *Church, Adams & Prior*, for *Matthew Arnold*, Watford; *E. J. H. Carter*.

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

Re MAIDSTONE PALACE OF VARIETIES, LTD. BLAIR v. MAIDSTONE PALACE OF VARIETIES, LTD.

[CHANCERY DIVISION (Neville, J.), June 16, 1909]

[Reported [1909] 2 Ch. 283; 78 L.J.Ch. 739; 101 L.T. 458; 16 Mans. 261]

Company—Debenture holders' action—Receiver appointed by Chancery Division—Claim against receiver by third party—Claim to be made in Chancery Division in action in which receiver appointed.

When the Chancery Division has appointed a receiver of a company it will not without its sanction allow its officer to be subject to an action in another court relating to the way he has discharged his duties. Any person aggrieved by the receiver's conduct should apply to the court in the action in which the receiver was appointed; and the court may order such a claim to be brought within a given time.

Notes. As to the status of receivers, see 6 HALSBURY'S LAWS (3rd Edn.) 513 and for cases see 10 DIGEST (Repl.) 821 et seq.

Case referred to:

(1) *Aston v. Heron* (1834), 2 My. & K. 390; 3 L.J.Ch. 194; 39 E.R. 993, L.C.; 16 Digest (Repl.) 201, 908.

Also referred to in argument:

Besant v. Wood (1879), 12 Ch.D. 605; 40 L.T. 445; 23 Sol. Jo. 443; 42 Digest 516, 801.

- A *Hart v. Hart* (1881), 18 Ch.D. 670; 50 L.J.Ch. 697; 45 L.T. 13; 30 W.R. 8; 42 Digest 459, 284.
Hands v. Blow, [1901] 2 Ch. 721; 70 L.J.Ch. 687; 85 L.T. 156; 50 W.R. 5; 17 T.L.R. 635; 45 Sol. Jo. 639; 9 Mans. 156, C.A.; 10 Digest (Repl.) 825, 5393.

B **Adjourned Summons** by the applicant Howard Burton asking that the respondents, the Electrical Light Power and Hiring Co., Ltd., might be ordered to formulate any claim they might have against the applicant (the receiver of the Maidstone Palace of Varieties, Ltd.) or against that company, and to bring before the court and duly prosecute such claim in the action in which the applicant had been appointed receiver; and that in default thereof the respondents might be restrained from instituting proceedings against the applicant to enforce such claim, and that the assets might be distributed without providing therefor and without regard thereto.

C By a hire-purchase agreement dated Mar. 4, 1908, the Maidstone Palace of Varieties, Ltd., agreed to buy certain plant and fittings from the respondents, the payments to be made over the period of five years and the plant and fittings to remain the property of the respondents during that period. On July 4, 1908, the respondents commenced an action against the Maidstone Palace of Varieties, Ltd., for breach of this agreement. On Sept. 23, 1908, Duncan Henry Blair commenced a debenture-holders' action against the Maidstone Palace of Varieties, Ltd., with the result that on Sept. 30, 1908, the applicant was appointed receiver and manager. On Nov. 28, 1908, the respondents obtained judgment against the Maidstone Palace of Varieties, Ltd., for £3,413 11s. 9d. and for the delivery up of the plant and fittings together with an injunction to restrain them, their servants and agents from removing, using, selling, charging or otherwise dealing in any way with the said plant and fittings; when it was later pointed out to the judge who granted this injunction that the property was already in the possession of an officer of the court, he ordered that the injunction should not apply to the applicant. The respondents claimed from the applicant the sum of £57 10s. per month payable under the hire-purchase agreement, and threatened to bring proceedings against him in the King's Bench Division, but did not in fact commence any such proceedings. The applicant took out this summons so that the matter might be disposed of.

A. P. Van Neck for the applicant.

A. J. David for the respondents.

G **NEVILLE, J.**—In this case the applicant is a receiver appointed by this court in a debenture-holders' action, and by virtue of that appointment he has had the management of the theatre known as the Maidstone Palace of Varieties. In the course of that management he made use of certain plant which is claimed by the respondent company as their property. They say that he had no right to use it except on the terms of paying them a rent, and they claim a considerable sum. It appears to me that a dispute of that kind is one which, as is shown in *Aston v. Heron* (1), this court will deal with itself, and that it will not allow its officer to be subject to an action in another court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for anyone aggrieved by his conduct is to apply to this court in the action in which he was appointed. If any wrong has been done by the officer the court will, no doubt, see that justice is done; but no one has a right to sue such officer in another court without the sanction of this court. The present application is accordingly right in form. The respondents must therefore bring in their claim in the debenture-holders' action within fourteen days, and must be restrained from commencing any other proceedings against the receiver.

Solicitors: *Edmonds & Co.*; *J. Scott Duckers.*

[Reported by A. J. B. TAPLING, Esq., Barrister-at-Law.]

Re HOWARTH. HOWARTH AND OTHERS *v.* MAKINSON

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Buckley and Kennedy, L.J.J.), May 12, 1909]

[Reported [1909] 2 Ch. 19; 78 L.J.Ch. 687; 100 L.T. 865; 53 Sol. Jo. 519]

Annuity—Rights as to property charged—Direction to pay out of income of fund—Charge on corpus.

A testator devised and bequeathed to the trustee of his will his real estate and the residue of his personal estate on trust for sale and conversion, and "to pay out of the income thereof or out of the income of my said real and leasehold estates until the same shall be sold" three annuities. "Subject to the aforesaid annuities" the testator gave his residuary estate to his brother absolutely. The income of the testator's estate having become insufficient to pay the annuities in full,

Held: the annuities were a charge on the corpus.

Decision of JOYCE, J., [1909] 1 Ch. 485, reversed.

Notes. Distinguished: *Re Boulcott's Settlement*, Wood *v.* Boulcott (1911), 104 L.T. 205. Applied: *Re Watkins' Settlement*, Wills *v.* Spence, [1911] 1 Ch. 1. Followed: *Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479. Referred to: *Re Jordison*, Raine *v.* Jordison, [1922] 1 Ch. 440; *Re Griffiths*, Haworth *v.* Welton, [1945] 1 All E.R. 610.

As to direction to pay annuity out of income of a fund, see 32 HALSBURY'S LAWS (3rd Edn.) 562 et seq.; and for cases see 39 DIGEST 124 et seq.

Cases referred to:

- (1) *Booth v. Coulton* (1870), 5 Ch. App. 684; 39 L.J.Ch. 622; 18 W.R. 877, L.J.; 39 Digest 148, 419.
- (2) *Re London, Brighton and South Coast Rail. Co., Ex parte Wilkinson* (1849), 3 De G. & Sm. 633; 19 L.J.Ch. 257; 14 L.T.O.S. 171; 14 Jur. 301; 64 E.R. 638; 39 Digest 146, 403.
- (3) *Phillips v. Gutteridge* (1862), 3 De G. J. & Sm. 332; 1 New Rep. 3; 32 L.J.Ch. 1; 7 L.T. 402; 8 Jur. N.S. 1196; 11 W.R. 12; 46 E.R. 664, L.C.; 39 Digest 151, 448.
- (4) *Re Boden, Boden v. Boden*, [1907] 1 Ch. 132; 76 L.J.Ch. 100; 95 L.T. 741, C.A.; 39 Digest 147, 415.

Also referred to in argument:

Birch v. Sherratt (1867), 2 Ch. App. 644; 36 L.J.Ch. 925; 17 L.T. 153; 16 W.R. 30, L.J.J.; 39 Digest 146, 405.

Poster v. Smith (1846), 1 Ph. 629; 15 L.J.Ch. 183; 41 E.R. 772, L.C.; 39 Digest 152, 454.

Appeal from an order of JOYCE, J., dated Jan. 30, 1909, and reported [1909] 1 Ch. 485.

William Howarth, who died on Sept. 27, 1887, by his will, dated April 23, 1884, after appointing his brother George Howarth trustee and executor, and after a specific bequest, devised and bequeathed his residuary real and personal estate to his trustee, his heirs, executors, administrators and assigns, on trust, at his or their discretion, to sell and convert the same as therein mentioned, and to stand possessed of the proceeds of such sale and the money so to be received and got in as aforesaid

"Upon trust to pay out of the income thereof or out of the income of my said real and leasehold estates until the same shall be sold the sums following, that is to say, one clear annuity or yearly sum of £500 unto Mary Alice Makinson. [The testator declared she should not have any power of anticipation, and in the same manner he gave an annuity of £260 to Elizabeth Dixon,

A and an annuity of £156 to Edith Dixon, otherwise Edith Salmer Sharlock Martin, and the will proceeded:] And, subject to the aforesaid annuities, I direct that the trustee or trustees shall hold the said moneys to arise and be received as aforesaid upon trust for and I give and bequeath the same to my said brother George Howarth, his executors, administrators, and assigns absolutely."

B And, in the event of George Howarth's death in the testator's lifetime, then the testator directed that the same should be held "subject to the aforesaid annuities," upon trust for the issue of George Howarth living at the testator's death.

C From the date of the death of W. Howarth to June 30, 1906, the income of his trust estate was more than sufficient to keep down the three annuities which to that date were regularly paid, but after that date the income became insufficient to pay the several annuities in full. Under these circumstances the executors of the will of George Howarth took out a summons to have it determined whether the three several annuities bequeathed to the defendants were a charge on the corpus of the real and personal estate devised and bequeathed by the will on trust for sale and conversion as therein mentioned, or only on the income for the time being of such real and personal estate, and whether the annuitants were entitled to have the arrears of their respective annuities and the deficiency between the income of the testator's estate and the amount of the said annuities raised out of his estate.

E The summons was heard by JOYCE, J., who held, following *Booth v. Coulton* (1), that the annuities were a continuing charge on the income until they were paid in full. The annuitants appealed, and asked that the annuities might be declared to be a charge on the corpus. There was a cross appeal by the plaintiffs, the representatives of the residuary legatee, who asked for a declaration that the annuities were a charge on the income for the time being only.

Younger, K.C., and *Ernest Radford* for the annuitants.

Hughes, K.C., and *Thomas Clarkson* for the residuary legatee.

F **SIR HERBERT COZENS-HARDY, M.R.**—In my opinion this appeal must be allowed. I think that on the language of this will the annuities are not merely a continuing charge on the rents and profits, but are a charge on corpus. The principle, so far as one can extract it from the cases on this subject, which are very numerous, is that if you find a trust to pay an annuity out of income and nothing either in the express terms of the will or on its construction to determine the time during which the income available for payment of the annuity is limited, then it may be a continuing charge. A mere gift for the payment of an annuity is not necessarily a trust to pay the annuity out of income only accruing during the life of the annuitant. If, however, you find a trust to pay out of income with no such limit as I have suggested, and then the disposition of the estate subject to the annuity, that charges the annuity on the corpus of the estate, just as much as a gift of real estate subject to the payment of the testator's debts charges the debts on the real estate. This case seems to me to be covered by authority as far as such a case can be. *Ex parte Wilkinson* (2) appears to me to be identical with it. *Phillips v. Gutteridge* (3) lays down a rule which I am not disposed to depart from, even if it were competent for me to do so; and I think that there is nothing in *Re Boden* (4) which is inconsistent with the view I have taken—namely, that this is not a charge limited to income accruing during the lifetime of the annuitant, and it is not merely a continuing charge upon income, but it is a charge on the corpus. The order of the court below must be varied in that sense.

I **BUCKLEY, L.J.**—The testator directed a conversion of all his estate, and then gave annuities out of income, and, "subject to the aforesaid annuities," he gave his estate to his brother absolutely. There is no life estate, or anything of that kind. What is meant by the words "subject to the aforesaid annuities"? In my

opinion they mean not subject to the payment of the annuities payable in the manner aforesaid, but subject to the full payment and satisfaction of certain annual sums. It is not necessary to discuss what the previous trust was, but whatever that trust was the property is given over, not subject to that trust, but subject to the annuities. The annuities are to be satisfied first, and then the legatee gets the residue.

KENNEDY, L.J.—It seems to me that the authorities on this point are rather in favour of the construction contended for by the annuitants than of that contended for by the residuary legatee. I therefore agree that the declaration should be varied in the manner suggested.

Appeal allowed.

Solicitors: *Rooke & Sons*, for *William Eaton*, Manchester.

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

BLAKISTON v. COOPER

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Ashbourne, Lord Robertson and Lord Collins), November 12, 16, December 10, 1908]

[Reported [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; 25 T.L.R. 164; 53 Sol. Jo. 149; 5 Tax Cas. 347]

Income Tax—Office of profit—Voluntary payment to holder—Easter offerings—Assessment of vicar of parish—Income Tax Act, 1842 (5 & 6 Vict., c. 35), s. 146, Sched. E, r. 1.

Easter offerings given to the vicar of a parish **held** to be profits accruing to the vicar by reason of his office within the meaning of r. 1 of s. 146, Sched. E, of the Income Tax Act, 1842, and as such assessable to income tax.

Notes. The Income Tax Act, 1842, s. 146, Sched. E, r. 1, was replaced by the Income Tax Act, 1952, Sched. 9, para. 1 (31 HALSBURY'S STATUTES (2nd Edn.) 522).

Considered: *Hartland v. Diggines*, [1925] 1 K.B. 372; *Seymour v. Reed*, [1927] All E.R. Rep. 294; *Down v. Compston*, [1937] 2 All E.R. 475; *Calvert v. Wainwright*, [1947] 1 All E.R. 282; *Moorhouse v. Dooland*, [1955] 1 All E.R. 93; *Temperley (I. of T.) v. Smith*, [1956] 3 All E.R. 92. Referred to: *Bolam v. Allgood* (1913), 110 L.T. 8; *Cowan v. Seymour*, [1920] 1 K.B. 500; *Hartland v. Diggines*, [1926] All E.R. Rep. 573; *Slaney v. Starkey*, [1931] 2 K.B. 148; *Henry v. Arthur Foster*, *Henry v. Joseph Foster*, *Hunter v. Dewhurst* (1931), 145 L.T. 225; *Corbett v. Duff*, *Dale v. Duff*, *Feebery v. Abbott*, [1941] 1 All E.R. 512; *Australia (Commonwealth) Taxation Comrs. v. Squatting Investment Co.*, [1954] 1 All E.R. 349; *Bridges v. Hewitt*, *Bridges v. Bearsley*, [1957] 2 All E.R. 281; *Jennings v. Kinder*, *Hochstrasser v. Mayes*, [1958] 1 All E.R. 369; *Wright v. Boyce*, [1958] 2 All E.R. 703; *Wright v. Boyce (I. of T.)* (1959), 38 Tax Cas. 160; *Benjamin v. Minister of Pensions*, [1960] 2 All E.R. 851.

As to voluntary payments to the holder of an office, see 20 HALSBURY'S LAWS (3rd Edn.) 322 et seq., and for cases see 28 DIGEST (Repl.) 225 et seq.

Cases referred to in argument:

Herbert v. McQuade, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 18 T.L.R. 728; 4 Tax Cas. 489, C.A.; 28 Digest (Repl.) 225, 973.

Poynting v. Faulkner (1905), 93 L.T. 367; 21 T.L.R. 560; 5 Tax Cas. 145, C.A.; 28 Digest (Repl.) 225, 973.

Turton v. Cooper (1905), 92 L.T. 863; 21 T.L.R. 546; 5 Tax Cas. 138; 28 Digest (Repl.) 226, 975.

A *Turner v. Cuxon* (1888), 22 Q.B.D. 150; 58 L.J.Q.B. 131; 60 L.T. 332; 53 J.P. 148; 37 W.R. 254; 5 T.L.R. 133; 2 Tax Cas. 422, D.C.; 28 Digest (Repl.) 157, 612.

Inland Revenue v. Strang (1878), 15 Sc.L.R. 704.

B **Appeal** from an order of the Court of Appeal (LORD ALVERSTONE, C.J., FLETCHER MOULTON and BUCKLEY, L.JJ.), reported [1907] 2 K.B. 688, who had reversed a judgment of BRAY, J., reported [1907] 1 K.B. 336, on a Case stated by the Commissioners of Income Tax.

C The question was whether the appellant, the vicar of East Grinstead, in the diocese of Chichester, was liable to income tax in respect of a sum paid to him as "Easter offerings." These offerings had been paid to the appellant for several years in response to a circular letter issued by the bishop, and supported by the churchwardens. The greater part of the money was collected in the church, but some of it was sent to the churchwardens directly. The offerings were intended as a freewill gift to the appellant personally, and he had no legal right to call for them. BRAY, J., held that the offerings were not assessable to income tax, but his judgment was reversed by the Court of Appeal. The vicar appealed to the House of Lords.

D *Danckwerts, K.C.*, and *Austen-Cartmell* for the appellant.

The Attorney-General (Sir William Robson, K.C.), *the Solicitor-General (Sir S. Evans, K.C.)*, and *W. Finlay* for the respondent.

The House took time for consideration.

Dec. 10, 1908. The following opinions were read.

E **LORD LOREBURN, L.C.**—I agree with the Court of Appeal. The only question is whether or not a sum given by parishioners and others to the vicar at Easter, 1905, is assessable to income tax as being "profits accruing" to him "by reason of such office." In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present. In this case, however, there was a continuity of annual payments apart from any special occasion or purpose, and the ground of the call for subscriptions was one common to all clergymen with insufficient stipends, urged by the bishop on behalf of all alike. What you choose to call it matters little. The point is, what was it in reality? It was natural, and in no way wrong, that all concerned should make this gift appear as like a mere present as they could. But they acted straightforwardly, as one would expect, and the real character of what was done appears clearly enough from the papers in which contributions were solicited.

H **LORD ASHBOURNE.**—The question in this case is a short one, and, naturally, it is of much interest to the clergy, and to many who are interested in their welfare. Are Easter offerings assessable to income tax as profits accruing by reason of the office of vicar? The Court of Appeal unanimously held in the affirmative, being of opinion that they were made to the vicar as vicar. These offerings had been made for several years to the appellant, the vicar of East Grinstead. They were made in response to a systematic appeal, initiated by the bishop and supported by the churchwardens, to induce collections to eke out slender stipends. People were urged, it is true, to subscribe as a personal freewill gift, the contributions were wholly voluntary, and the amount given was regulated entirely by the discretion of the subscribers. But in what character did the appellant receive them? It was suggested that the offerings were made as personal gifts to the vicar, as marks of esteem and respect. Such reasons no doubt played their part in obtaining

and increasing the amount of the offerings, but I cannot doubt that they were given to the vicar as vicar, and that they formed part of the profits accruing by reason of his office. The bishop was naturally anxious to increase the scanty stipends of ill-paid vicars. The whole machinery was ecclesiastical—bishop, churchwardens, church collections—and I am unable to see room for doubt that they were made for the vicar because he was the vicar, and became, within the statute, part of the profits which accrued to him by reason of his office. I can sympathise with the Lord Chief Justice in arriving at this conclusion, but I think that the appeal should be dismissed.

LORD ROBERTSON.—I am clearly of opinion that this judgment is right. When the broader facts of the case are remembered, I confess that, to my mind, it savours of paradox to say that this money did not accrue to the appellant by reason of his office of vicar of East Grinstead. The reason for the collection of the money was to supplement the legal income of the vicar, and, while this is the ordinary history of Easter offerings, in the present instance the thing is set out in black and white in the bishop's letter and the subsequent notices. The money is collected in church, the offertory being part of the service, and it is placed on the altar, the contributions of those unable to attend being handed to the vicar or the churchwardens. As I have said, the bishop's letter makes quite manifest what was sufficiently plain without it. It is, be it observed, a circular letter, and it applies not only to the appellant, but to each and every incumbent to the diocese. Its avowed object is to make up to the clergy the fall in their official incomes. It bases the appeal on the Christian duty incumbent on the people. While written with every desire to protrude the personal element, with a view to the present question, the letter does not conceal, but, on the contrary, demonstrates, that it is in virtue of his office that each clergyman is to take the offering which it was written to advocate.

LORD COLLINS.—I am of the same opinion.

Appeal dismissed.

Solicitors : *Hare & Co.* ; *Solicitor of Inland Revenue.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL v. BELGRAVE HOSPITAL

[CHANCERY DIVISION (Swinfen Eady, J.), January 21, October 29, 1909]

[Reported [1910] 1 Ch. 73; 79 L.J.Ch. 75; 101 L.T. 628; 26 T.L.R. 40;
54 Sol. Jo. 31]

Will—Gift to a hospital “to found a bed”—Sum to be invested and income solely applied in maintaining bed.

A testator bequeathed a sum of money free of duty to a hospital “to found” a bed to be called by a certain name. A bed in the hospital was selected and given the name specified by the testator. The sum was paid over to the hospital who applied part of it in discharge of their indebtedness to their bankers, and placed the balance to the general credit of the hospital with the intention of using it for the general purposes of the hospital. An action was brought against the hospital for a declaration that the sum ought to be invested and the income applied solely for the purpose of maintaining the bed.

Held: according to the true construction of the terms of the gift the sum could not be treated as revenue, but must be invested and the income applied, so far as it would go, in maintaining the bed.

Notes. *Re Ginger, Wood-Roberts v. Westminster Hospital Board of Governors*, [1951] 1 All E.R. 422. Referred to: *Re Mills, Midland Bank Executor and Trustee Co. v. United Birmingham Hospitals, Board of Governors*, [1953] 1 All E.R. 835.

Action for a declaration as to the effect of a will.

The testator, Alfred John Randall, by his will dated Dec. 10, 1907, appointed his friends therein named to be his executors and trustees, and gave, devised, and bequeathed to them all his estate and effects whatsoever and wheresoever situate both real and personal on trust to sell and convert into money and to stand possessed of the proceeds and of his ready money in trust to pay his just debts, funeral, and testamentary expenses, and the costs, charges, and expenses of his will, and then to pay legacies, of which one was given in the following words:

“To the Belgrave Hospital for Children at Clapham Road, Kennington, to found a bed there to be called the Eleanor Bed the sum of £1,000, such sum to be paid out of such portion of my estate as may legally be applied for that purpose, and I direct that the receipt of the treasurer or secretary for the time being of such hospital shall be a good and sufficient discharge to my trustees for the same. And I direct that this legacy for the Eleanor Bed is to be paid in priority to any of the legacies under this my will.”

The testator further provided:

“I direct that all the legacies bequeathed by this my will shall be paid free of duty.”

The testator died on Oct. 22, 1907, and his will was proved on Nov. 22, 1907. On Feb. 11, 1908, the amount of the legacy to the Belgrave Hospital for Children, was paid to and received by the treasurer for the time being of the said hospital.

On Nov. 11, 1908, this action was commenced by the Attorney-General against the defendant hospital, which was a corporation, for a declaration that according to the true construction of the will of the testator the defendants were bound to invest the £1,000 thereby given free of duty to them to found a bed to be called “the Eleanor Bed,” and to apply only the income of the investment for purposes connected with the hospital, and on condition that a bed to be called the “Eleanor Bed” was there maintained. By an order of Dec. 2, 1908, made on an application by the plaintiff by summons for directions it was ordered by consent of the defendants, who admitted (*inter alia*) the receipt by them of the legacy, and that they had not invested it as an endowment, but had used part thereof in discharge of the indebtedness of the hospital to their bankers, and had placed the balance

to the general credit of the hospital, and either used, or intended to use, the same for the general purposes of the hospital, that the action be forthwith set down for trial without pleadings, and entered on the non-witness list. One of the rules of the defendant hospital, which rules were admitted as evidence, provided that

"every donor of £1,000 may be elected a vice-patron, may name a cot in perpetuity, and may have his or her name recorded in some part of the hospital."

An affidavit was made by the secretary of the defendant hospital on May 17, 1909, in which he stated that the testator had called on him in May, 1907, when the financial position of the hospital, the urgent need for assistance, and the indebtedness of the hospital to its bankers were discussed, and the attention of the testator was drawn to the privileges given by the above stated rules to donors of the sum of £1,000, and the testator then promised to leave the hospital £1,000; that a bed in the hospital had been appropriated as "the Eleanor Bed," and a tablet placed over it; and that the sum of £1,000 was now insufficient to endow and maintain a bed in a London hospital, the average annual cost of which varied from about £75 to £105.

The action came on for trial on Jan. 21, 1909, but after hearing counsel for the Attorney-General and for the hospital, SWINFEN EADY, J., observed that the question raised for decision in a summary manner was an important one; and that the expression used by the testator was one constantly used in such cases, and must have acquired some accepted meaning; and the action was ordered to stand over generally for inquiries to be made of the Charity Commissioners as to what was the general practice in relation to gifts to hospitals in terms similar to those employed by the testator. An affidavit, dated June 15, 1909, by the secretary to the Charity Commissioners for England and Wales made in answer to the inquiries of the Charity Commissioners as to the general practice in relation to gifts to hospitals in similar terms to those employed by the testator, set out that it was the practice of the Charity Commissioners to cause entries to be made in their books of the terms of charitable gifts and of the particulars of the funds subject thereto, and verified two exhibits containing particulars compiled from the records so made, of numerous similar gifts to hospitals in London and in the country, by which funds have been bequeathed for "endowing" or "providing," or the "endowment in perpetuity," or "founding and maintaining" or "maintenance of," or "establishing or founding" beds or cots in hospitals, and showing that there are numerous cases in which the sum of £1,000 or some such amount has been given for such purpose, and that the funds so bequeathed have in many cases been invested in the name of the official trustee of charitable funds.

E. Beaumont for the Attorney-General.

P. W. Baker Wilbraham (*C. H. Sargent* with him) for the hospital.

SWINFEN EADY, J.—The question is whether the hospital was entitled to treat the sum of £1,000 as part of its annual income and apply it accordingly, or whether there was an obligation on the hospital to treat that sum as capital money for the purpose of endowing and providing income for a bed, and to invest it and use the income only for that purpose. Dealing with the language of the will, "To the Belgrave Hospital for Children to found a bed there to be called the Eleanor Bed," it is quite obvious that the intention of the testator was to establish something. He says "to found a bed," which involves the idea of establishing it; and it is established by providing a capital sum, the revenue from which may maintain it or be applied towards its maintenance. The suggestion is that the language of the will would be satisfied if some bed already existing in the hospital is called "the Eleanor Bed," and that when that is done the fund may be applied as part of the annual income of the charity and expended in the year in which it is paid over,

A if necessary; of course, properly expended (and there is no suggestion that it is not properly expended), and dealt with as annual income.

B In my opinion the idea involved in founding a bed negatives any such dealing with the fund. It appears from the affidavit that has been filed by the secretary to the Charity Commissioners who has searched their records, that he has found a large number of cases showing that it is a common practice of testators to give money, and frequently the sum is £1,000, for the purpose of establishing a bed or cot in some hospital. The word "establishing" is not always used, nor is the word "founding" always used; but various expressions are contained in the wills and in the letters evidencing voluntary gifts, involving the same idea. For instance, the words in the long list before me are sometimes for "endowing" a bed or a cot, or for "providing" one, or for the "endowment in perpetuity," or "for founding and maintaining" or "maintenance of," or for "establishing or founding" beds or cots in the hospitals. In my judgment nothing turns on the particular word used. That is to say, it is not essential that any particular word should be used in order that the fund should be treated as a capital investment. The question is, looking at the will, whether it was intended to be treated as capital, whether the words used are "to found a bed" or "to establish a bed," or "to endow in perpetuity a bed," or other similar or analogous expressions. The result is that the fund is to be used for the purpose of investment, so that by the income thereof from time to time, so far as it will extend, the needs of the bed or cot are satisfied.

E Then it was said that the £1,000 is not now sufficient to provide for one cot; that the annual expense of a cot is more than the income from that sum. The answer to that is that the income must be applied to it so far as it will extend. Then it was said that in this case the testator knew the needs of the hospital, knew there was an overdraft at the bank, and must, having regard to a certain conversation, have intended the fund to be applied as annual income. But this is a question of the construction of his will, and I can only look at the language he has used in his will in order to determine what the construction of it is. Under the circumstances I must decide that this fund can only be used for the purpose for which it is given—viz., to found a bed, that is to say as a capital fund. Perhaps it is right that I should add that no suggestion whatever has been made that the money has not been properly applied by the governors of the hospital. The only suggestion is that it has been applied for income purposes and not as capital; not properly applied in that sense. But it is, in my judgment, of the greatest importance that where property is given to a charity on certain terms, those terms should be strictly observed. I, therefore, determine, according to the true construction of the will, that the £1,000 cannot be properly applied as annual income of the charity, but must be invested and the income used so far as it will extend in the maintenance of a bed to be called "the Eleanor Bed." It was suggested that that must necessarily involve establishing some new bed, but I see no reason for that. It may well be that some bed already existing in the hospital may be appropriated for this purpose and named "the Eleanor Bed," which I gather has been done, and then the fund invested and the income applied towards the maintenance of the bed. There will be a declaration of the true construction of the will, with liberty for the Attorney-General to apply for the investment of the fund in the name of the official trustee of Charitable Trusts.

I Solicitors: *Treasury Solicitor; Hollams, Sons, Coward & Hawksley.*

[Reported by J. TRUSTRAM, Esq., Barrister-at-Law.]

CUNDIFF v. FITZSIMMONS

[KING'S BENCH DIVISION (Darling and Bucknill, JJ.), December 6, 1910]

[Reported [1911] 1 K.B. 513; 80 L.J.K.B. 422; 103 L.T. 811]

Mortgage—Land subject to rentcharge—Failure of mortgagee to take possession of land—Liability of mortgagee, as terre tenant, for rentcharge.

Where land which is subject to a rentcharge is mortgaged in fee, the mortgagee is personally liable to pay the rentcharge although he has never been in possession of the land or of the rents and profits thereof.

Notes. The "pernor" of the rents and profits means the taker, not necessarily the person who in fact takes them, but the person who is entitled to take them: see STROUD'S JUDICIAL DICTIONARY (3rd Edn.), vol. 3.

As to the nature of the mortgagee's interest, see 27 HALSBURY'S LAWS (3rd Edn.) 259, 260, and for cases see 35 DIGEST 391 et seq.

Cases referred to:

(1) *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811; 65 L.J.Ch. 871; 75 L.T. 148; 45 W.R. 74; 12 T.L.R. 621; 40 Sol. Jo. 716; 39 Digest 207, 966.

(2) *Re Blackburn and District Benefit Building Society, Ex parte Graham* (1889), 42 Ch.D. 343; 59 L.J.Ch. 183; 61 L.T. 745; 38 W.R. 178; 5 T.L.R. 565; 2 Meg. 1, C.A.; 39 Digest 206, 964.

Also referred to in argument:

Thomas v. Sylvester (1873), L.R. 8 Q.B. 368; 42 L.J.Q.B. 237; 29 L.T. 290; 21 W.R. 912; 39 Digest 205, 948.

Pertwee v. Townsend, [1896] 2 Q.B. 129; 65 L.J.Q.B. 659; 75 L.T. 104; 39 Digest 206, 961.

Swift v. Kelly (1889), 24 L.R.Ir. 107, 478; 39 Digest 206, b.

Brediman's Case (1606), 6 Co. Rep. 56 b.

Foley's Charity Trustees v. Dudley, [1910] 1 K.B. 317; 79 L.J.K.B. 410; 102 L.T. 1; 74 J.P. 41; 8 L.G.R. 320, C.A.; 39 Digest 207, 967.

Appeal from the decision of the learned judge of the Salford Hundred Court.

On Mar. 21, 1870, James Pearson conveyed to T. H. Robinson a plot of land with five houses thereon, situate in Park Street and Bedford Street in the city of Manchester, in fee simple subject to a yearly rentcharge of £8, such rentcharge being secured by a personal covenant to pay by Robinson, his heirs and assigns. On May 15, 1873, Robinson conveyed the said land and houses to George Heaton, subject to the rentcharge. On May 14, 1884, Heaton mortgaged the property to William and David Mounsey in fee simple, and covenanted with them duly to pay the rentcharge. On Mar. 20, 1887, William and David Mounsey transferred the mortgage to Christine and Mary Fitzsimmons, the defendants. In 1890 the rentcharge became vested in the plaintiff. In March, 1907, the mortgagor Heaton failed to pay the interest due under the mortgage, and the mortgagees thereupon appointed a receiver under the provisions of the Conveyancing Act, 1881, s. 24 (2). The receiver went into possession, but the outgoings upon the property, which was in a dilapidated condition, exceeded the receipts, and eventually the houses were condemned as dangerous structures, a hoarding was erected round them by the Corporation of Manchester, and they became derelict. On July 23, 1909, the receiver resigned his receivership. On June 24, 1909, the sum of £4, being a half-year's rent, had become due to the plaintiff in respect of the rentcharge, and, being unpaid, the plaintiff brought an action against the defendants as the owners in fee of the land out of which the rentcharge issued to recover the amount due. The mortgagees had never been in possession of the property, nor had they received any rents or profits from it. The learned judge held that the defendants, being in

A their capacity of mortgagees the legal owners of the premises, and being by reason of the mortgagor's default entitled to enter into possession at any time they chose, were liable as such for the rent, notwithstanding that they had never in fact been in actual possession. He, therefore, gave judgment for the plaintiff. The defendants appealed.

B *Hughes, K.C. (Tweedale with him)* for the defendants.
Grant, K.C. (Herz with him) for the plaintiff.

D **DARLING, J.**—This is an appeal from the decision of the learned judge of the Salford Hundred Court in an action brought by the owner of a certain chief rent or perpetual rentcharge against the mortgagees of the land out of which the chief rent issued to recover arrears of the rent. The mortgagees had never been in C possession of the land nor had they received any of the rents or profits of it. Notwithstanding this, the learned judge gave judgment for the plaintiff, and the question we have to determine is whether he was right in doing so. Both parties are agreed that the person who is liable to pay this chief rent is the terre tenant—that is to say, the person who, having a freehold interest in the land, has the D pernanacy or possession of such rents as there are. It is contended on behalf of the defendants that they were not the terre tenants, because, although they were the owners in fee simple of the land, they had never entered into possession and consequently were not the perners of the profits. For the plaintiff it was contended that the defendants as mortgagees, being entitled to take possession whenever they chose, must be treated as having the possession—in other words, that for this purpose possession and right to possession are the same thing.

E I think that the latter contention is the right one, and that so long as the freeholder has an immediate right to take possession he has sufficient pernanacy of the profits to render him liable to a chief rent issuing out of the land. I think the present case is covered by the passage from LITTLETON'S TENURES, s. 233, cited by STIRLING, J., in *Re Herbage Rents, Greenwich* (1). That passage is as follows:

F “If a man which hath a rent secke be once seised of any parcell of the rent and after the tenant will not pay the rent behind, this is his remedie: he ought to go by himsele or by others to the lands or tenements out of which the rent is issuing and then demand the arrearages of the rent; and if the tenant denie to pay it, this deniall is a disseisin of the rent. Also, if the tenant be not then G readie to pay it, this is a deniall, which is a disseisin of the rent. Also, if the tenant, nor any other man, be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a deniall in law, and a disseisin in deed, and of such disseasins he may have an assise of novel disseisin against the tenant, and shall recover the seisin of the rent, and his arrearages and his dammages and the costs of his writ and of his plea.”

And in s. 238 LITTLETON deals with the case of a rentcharge, and says: “Deniall H is a disseisin of a rent charge as well as of a rent secke.” That seems to show conclusively that the terre tenant, or person who is liable to pay the rentcharge, need not be in actual possession of the land, and that the owner will be terre tenant even where the land is derelict. There is undoubtedly a passage in the judgment of COTTON, L.J., in *Re Blackburn and District Benefit Building Society, Ex parte Graham* (2) which at first sight seems at variance with this view. He says I (42 Ch.D. at p. 349):

“The liability of the company entirely depends upon the possession of the land, although the original purchasers may still be liable on their covenant.” I think, however, that by the word “possession” there he was alluding not to the actual physical possession, but the legal possession. I come to the conclusion that the defendants here, as mortgagees, are the terre tenants; that they were in possession in the sense that they had the legal possession; and that the mere fact that they had not the actual possession did not excuse them from liability to

pay the chief rent. For these reasons I think that the judgment of the court below must be affirmed. A

BUCKNILL, J.—I am of the same opinion. The question we have to decide is whether the learned judge in the court below was right in holding that the defendants were, by reason of their seisin as mortgagees in fee, the terre tenants of this land, and as a consequence liable to pay the rentcharge issuing out of it. It was contended on the defendants' behalf that, in order to render a person liable as terre tenant, it is necessary that he should have not only a freehold estate in the land, but that he should also be in actual possession of it. The plaintiff's counsel, on the other hand, contended that the legal possession of the freeholder was enough without actual possession or occupation. In my opinion this contention is the right one. It is clear from the passage cited from *LITTLETON'S TENURES* that under the old law a mortgagee of the freehold would have been a necessary party in proceedings for the recovery of arrears of rentcharge, whether he was in actual possession of the land or not, and that the mere fact of his being the owner of the freehold and entitled to take possession if he chose so to do was sufficient to render him liable to pay the arrears of rentcharge. That being so, the fact that the defendants in the present case have not chosen to take possession, as it was open to them to do, cannot affect the question of their liability. For these reasons I agree that this appeal should be dismissed. B C D

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.*, for *Lloyd & Davies*, Manchester; *Pearce & Sons*, for *Tucker & Co.*, Manchester.

[Reported by **PHILIP B. DURNFORD, ESQ.**, *Barrister-at-Law.*] E

Re WEIR HOSPITAL

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), May 24, 25, June 7, 1910]

[Reported [1910] 2 Ch. 124; 79 L.J.Ch. 723; 102 L.T. 882; 26 T.L.R. 519; 54 Sol. Jo. 600] G

Charity—Cy-près doctrine—Application by Charity Commissioners—Jurisdiction of court to consider comparative advantages of different objects—Restraint of commissioners from carrying out ultra vires scheme.

Where the cy-près doctrine has to be applied by the Charity Commissioners in establishing a scheme for the administration of a charity it is competent to the court to consider the comparative advantages of various charitable objects, and to adopt by the scheme the one which seems most beneficial. But there can be no question of cy-près until it is clearly established that the directions of the testator are unable to be carried into effect. The court will not overrule the commissioners on matters of detail, but will restrain them from carrying out a scheme which is ultra vires. H

The testator devised two houses upon trust for the benefit of the inhabitants of the parish where they were situated. One was to be used as dispensary, cottage hospital, or convalescent home, and the other, after a restrictive covenant had expired, in conjunction or not with the first, for the same purpose. His residuary personal estate was given for the maintenance of the hospital. A dispensary was established in the first house. The Charity Commissioners approved a scheme whereby the dispensary was to be maintained, the second I

A house was to be turned into a home for nurses, and the bulk of the fund, about £100,000, was to be applied in enlarging and maintaining a general hospital situated outside the boundary of the parish.

Held: the scheme was ultra vires, and, therefore the order of the commissioners must be discharged and the matter remitted to them for re-consideration.

Re Campden Charities (1) (1881), 18 Ch.D. 310, applied.

B **Notes.** The Charitable Trusts Act, 1860, s. 2, has been repealed. See now the Charities Act, 1960, s. 18 (1) (a), 40 HALSBURY'S STATUTES (2nd Edn.) 144.

Considered: *Re Dominion Students' Hall Trust, Dominion Students' Hall Trust v. A.-G.*, [1947] Ch. 183. Referred to: *Dyson v. A.-G.*, [1911] 1 K.B. 410; *Re De Noailles, Clouston v. Tufnell* (1916), 114 L.T. 1089.

C As to the cy-près doctrine and its application, see 4 HALSBURY'S LAWS (3rd Edn.) 317 et seq., and for cases see 8 DIGEST (Repl.) 450 et seq.

Cases referred to:

(1) *Re Campden Charities* (1881), 18 Ch.D. 310; 50 L.J.Ch. 646; 45 L.T. 152; 30 W.R. 496, C.A.; 8 Digest (Repl.) 458, 1581.

D (2) *A.-G. v. Ironmongers' Co.* (1840), 2 Beav. 313; (1841), Cr. & Ph. 208, L.C.; sub nom. *Ironmongers' Co. v. A.-G.* (1844), 10 Cl. & Fin. 908, H.L.; 8 Digest (Repl.) 504, 2254.

(3) *A.-G. v. Haberdashers' Co.* (1791), 1 Ves. 295; 30 E.R. 351, L.C.; 8 Digest (Repl.) 456, 1545.

(4) *Philpott v. St. George's Hospital, A.-G. v. Philpott* (1859), 27 Beav. 107; 28 L.J.Ch. 657; 33 L.T.O.S. 141; 23 J.P. 390; 5 Jur. N.S. 664; 7 W.R. 659; 54 E.R. 42; 8 Digest (Repl.) 450, 1459.

E (5) *A.-G. v. Earl of Mansfield* (1827), 2 Russ. 501; 38 E.R. 423, L.C.; 8 Digest (Repl.) 454, 1515.

(6) *A.-G. v. Habiteley* (1850), 11 Ves. 241; 32 E.R. 1080, L.C.; 8 Digest (Repl.) 453, 1510.

F (7) *A.-G. v. Sherborne Grammar School (Governors, etc.)* (1854), 18 Beav. 256; 2 Eq. Rep. 917; 24 L.J.Ch. 74; 23 L.T.O.S. 326; 18 J.P. 312; 18 Jur. 636; 2 W.R. 396; 52 E.R. 101; 8 Digest (Repl.) 453, 1505.

Also referred to in argument:

Chamberlayne v. Brockett (1872), 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 21 W.R. 299, L.C. & L.J.J.; 8 Digest (Repl.) 439, 1299.

Appeal by the petitioners from the decision of EVE, J. (102 L.T. 354).

G *P. Ogden Lawrence, K.C.*, and *C. E. Shebbeare* for the petitioners.

Jessel, K.C., and *Sheldon* for the trustees.

The Attorney-General (Sir William Robson, K.C.) and *Austen-Cartmell* for the Crown.

Cur. adv. vult.

H June 7, 1910. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—This is a petition under s. 8 of the Charitable Trusts Act, 1860, against an order of the Charity Commissioners establishing a scheme for the administration of a charity. EVE, J., dismissed the petition, and the petitioners have appealed to this court. Now, the jurisdiction of the Charity Commissioners in establishing a scheme is the same as that of the Court of Chancery. It is, therefore, necessary to consider the principles upon which the Court of Chancery proceeded in this matter.

I The first duty of the court is to construe the will, and to give effect to the charitable directions of the founder, assuming them not to be open to objection on the ground of public policy. The court does not consider whether those directions are wise, or whether a more generally beneficial application of the testator's property might not be found. There are many charitable purposes which, according to modern views, are productive of more harm than good—for example, doles in

money or kind. But, apart from such statutory power as is expressly conferred by s. 30 of the Endowed Schools Act, 1869, the court must give effect to a testator's directions as to doles. There are, however, many cases in which what is known as a *cy-près* application is made by the court. In general this is limited to old charities, where by reason of lapse of time and change of circumstances the original purpose cannot be carried into effect in the exact way directed by the testator. The well-known case of a fund for the redemption of Barbary slaves is a good instance: see *A.-G. v. Ironmongers' Co.* (2). *Re Campden Charities* (1) is a more recent instance. There may be modern charities in which the *cy-près* doctrine can be properly applied, although such cases rarely occur. For example, the fund may be so large as to satisfy the court that it cannot all be applied to the original prescribed purpose. If so, the general charitable intent will prevail, and the particular mode will be disregarded. Wherever the *cy-près* doctrine has to be applied, it is competent to the court to consider the comparative advantages of various charitable objects, and to adopt by the scheme the one which seems most beneficial. But there can be no question of *cy-près* until it is clearly established that the directions of the testator cannot be carried into effect.

In the present case, the charity is modern. It was created by the will of Mr. Weir, who died in 1902. The charity property consists of: (i) Two freehold houses at Balham, one of which is a comparatively small house in Devonshire Road, and the other of which, called the Hawthorns, is a large house in which the testator resided, with a considerable garden; and (ii) the testator's residuary personal estate of the value of £100,000. The construction of the will does not present much difficulty. The testator's desire and intention was that the Hawthorns should be adapted by means of accumulated income for the purposes of: (a) A dispensary; (b) a cottage hospital; (c) a convalescent home; or (d) some other medical charity, to be associated with his name and called "the Weir Hospital," and to be supported and maintained out of the income of the £100,000, after setting aside some small sums which need not be further mentioned. Of the above objects it seems to be admitted that the Devonshire Road House is ample for a dispensary, and that the Hawthorns from its position is not suitable for a convalescent home. This leaves only (b) and (d). As to (b) there is not a particle of evidence to show that a cottage hospital, with an out-patient department and a resident medical officer's house, cannot advantageously be established there on such a scale as will absorb all or substantially all the available income. Mr. Penfold's report negatives any such view. If it be thought expedient to enlarge the site by purchasing some adjoining property, or to spend more than the accumulated income in erecting or adapting buildings, this can be done under the powers conferred upon the Charity Commissioners by s. 21 of the Charitable Trusts Act, 1853, and s. 15 of the Act of 1860. This would not be an application of the funds *cy-près*. It would be merely an administrative act for the benefit of the testator's charity. With regard to (d) it is proved that £100,000 will not suffice to provide a general hospital, such as we are all familiar with. But the testator has not expressed a desire for a general hospital. In these circumstances it seems to me that there is no justification for invoking the *cy-près* doctrine. The trustees have simply to obey the explicit directions of the testator.

Of the four objects named, one at least is practicable. They have no right to say: "We do not consider a cottage hospital a good thing at Balham, and we will not apply the charity funds for such a purpose, but we will by our own act produce a state of facts which will render it impossible to apply the whole income on the Weir Hospital, and thus invoke the *cy-près* doctrine." The trustees applied to the Charity Commissioners under the Charitable Trusts (Recovery) Act, 1891, for leave to retain the freehold houses and for advice. The commissioners thought it would be a more useful thing to assist an excellent general hospital, the Bolingbroke Hospital, situate in Wandsworth and not in Balham, and some considerable distance away from the Hawthorns. The majority of the trustees, with some

A hesitation, adopted the suggestion, and ultimately a scheme was sealed under which the Devonshire Road house was to be continued as a dispensary, the Hawthorns was to be used as a nurses' home (as to which I will only say that I doubt whether it is a "medical charity"), and £50,000 was to be applied out of capital towards completing the Bolingbroke Hospital, and the residue of the income of the charity was to be applied in augmentation of the income of the Bolingbroke Hospital, which was to be called the Weir and Bolingbroke Hospital. The whole scheme is contingent upon the establishment of another scheme for the Bolingbroke Hospital, and no application for such a scheme has yet been made.

B In my opinion, this scheme was not authorised. If the general principle of the scheme was sound the court would hesitate to interfere with the discretion of the commissioners on the mere ground that some details might be open to objection. C But if the commissioners have gone wrong by disobeying those rules of law which govern them it is the duty of the court to interfere. *Re Campden Charities* (1) is a clear authority for this proposition. In what I have said I do not intend to cast any reflection upon the trustees, who were honestly desirous of assisting the Bolingbroke Hospital, a most excellent charity, and who were told by the commissioners that such desire could be lawfully effected. In framing schemes even D the most experienced persons are liable to mistakes in law, and it would be wrong for anyone to blame them, and least of all a judge whose mistakes in law are corrected by the House of Lords. But I cannot part with the case without expressing my astonishment that the commissioners should have directed the payment out of the charity funds of £5,000 to the Bolingbroke Hospital without any scheme and without even notice of intention to make such a payment. There has been E no attempt to justify this. Happily the whole fund, except the £5,000, is safe, and will now be applied under a scheme so framed as to give effect to the directions contained in the testator's will. The appeal must be allowed.

F **FARWELL, L.J.**—This appeal raises questions of considerable importance to the parties, but of even greater importance to the public as affecting the jurisdiction of the Charity Commissioners and their administration of the large trust funds committed to their care. By s. 2 of the Charitable Trusts Act, 1860, the Charity Commissioners (subject as therein mentioned) are authorised

"to make such effectual orders as may now be made by any judge of the Court of Chancery . . . for the establishment of any scheme for the administration of any such charity."

G Now, the Court of Chancery adopted schemes as the convenient machinery in most cases of charitable trusts for carrying into execution such trusts and giving effect to the intentions of the founder thereof. As charities are for the most part created in perpetuity, it would obviously have created a block in chambers and have put the charity funds to continual heavy costs if all charitable trusts had been retained and dealt with by masters and chief clerks in chambers as in the case of ordinary trusts. In *A.-G. v. Haberdashers' Co.* (3) LORD THURLOW said (1 Ves. at pp. 295, H 296):

"As to the execution of the trust, it is not to be kept under the direction of the court to be executed by the court from time to time, but is to be executed under a general direction to the trustees, which is the only way of administering I a charity."

But the scheme is mere machinery. The function and duty of the court is to give effect to the testator's will; nor is there any jurisdiction to apply *cy-près* so long as any lawful charitable object of the testator's bounty is available, however inexpedient such object may appear to the court as compared with other objects. The law is clearly stated by LORD ROMILLY in *Philpott v. St. George's Hospital* (4) (27 Beav. at p. 112), a case in which a scheme proposed to apply money left on trust to establish almshouses for the purposes of a hospital.

In the present case the testator has expressed his wishes in plain terms. His desire is that No. 12, Devonshire Road, and his own residence, the Hawthorns, as soon as the restrictive covenants affecting it had expired, should be devoted to use as "a dispensary, cottage hospital, or convalescent home, or other medical charity, to be called 'the Weir Hospital,'" and that the income of his entire residuary estate, subject to certain small payments thereout, should first be applied in providing for an expenditure of a sum not exceeding £400 a year on No. 12, Devonshire Road, and that the balance should be accumulated until the Hawthorns became capable of use as a hospital in order to provide a sum for alterations and additions, and subject thereto the whole income was to be applied in the support and maintenance of the hospital. The trust funds amount to about £100,000, but I observe that many of the investments are not trustee securities, and that about £200 a year is produced by shares in securities of brewery companies, which can hardly be regarded under present circumstances as a secure source of income. It is, in my opinion, clear on the evidence that a dispensary at No. 12, Devonshire Road, with an endowment of £400 a year as proposed by the scheme, is reasonable and proper and within the terms of the will. It is also clear on Mr. Penfold's report, obtained by the instructions of the Charity Commissioners and sent to them, that the Hawthorns would be (to use his own words) "a good and appropriate position on which to erect buildings specially adapted to the requirements of the trustees"—i.e., as a cottage hospital—"if one or two of the adjoining sites in Grove Road can be acquired." One of such sites is now on offer to the trustees, and it is clearly within the power of the Charity Commissioners under s. 16 of the Act of 1860 to authorise its purchase without any scheme for the purpose. The commissioners, however, have from the first taken the view put forward in the exhibit, and which counsel told us was their case, and I can only say that it shows an entire misapprehension of their duties and powers. This report, after an inaccurate and incorrect reference to Mr. Penfold's report, states (at p. 2) that the commissioners,

"after carefully considering the possibilities of a convalescent home and of a cottage hospital, decided that such institutions in the locality in question were not desirable forms of medical charity; . . . that cottage hospitals are not suited to the needs of the nearer suburbs of London,"

and they determined to establish a nurses' home at the Hawthorns, and, subject thereto, to hand over the whole of the estate to the Bolingbroke Hospital. It was no part of the commissioners' duty to consider whether cottage hospitals are or are not desirable. The testator had in terms directed such a hospital to be established at the Hawthorns. The dispensary was already provided for at No. 12, Devonshire Road, and a convalescent home was not thought expedient. There remained nothing but the cottage hospital or other medical charity. They have chosen a nurses' home (as to which I will only say that I think it extremely doubtful whether such a home as they propose is a charity at all), which absorbs only a small sum, and they refuse to set up a cottage hospital partly on the grounds that they disapprove of such hospitals and partly because they consider the income is more than sufficient for such a purpose.

I am not sure which ground is the more untenable. The first is obviously bad for the reason already given. The second appears to assume that it is wrong to have a large margin on starting such a hospital. In my opinion the reverse is the case. It might be wrong to embark on a scheme which left no margin for contingencies; but the wise man would certainly apportion his expenditure so as to leave some margin, and when I consider the nature of the investments and the amount of margin in this case I see nothing extravagant in its amount. The existence of such a margin does not render the charity named by the testator impossible, but is a guarantee of its success, and I am of opinion that neither the trustees nor the commissioners have authority to choose their charity so as to leave a surplus

A to be applied *cy-près*. They are bound to apply the funds in the named charities unless it be impracticable. It is clearly impossible for the commissioners or trustees to decline to carry out the trusts of a single named lawful charity because they disapprove of it. It is equally clear that if they have the choice of two or more charities they cannot apply a part of the trust funds towards one of such charities and refuse to apply the balance to the others because they disapprove of them. A case for the *cy-près* application of trust funds cannot be manufactured, but must arise *ex necessitate rei*. I give the commissioners and the trustees full credit for desiring to do their best; but it is of great importance that their conduct should be in accordance with law. It is contrary to principle that a testator's wishes should be set aside and his bounty administered not according to his wishes but according to the view of the commissioners, and if it is wished that testators should continue to become "pious founders" it is eminently desirable that no doubt should be cast on the security and permanency of their bequests. One of the strongest inducements to gifts of this nature is that desire for posthumous remembrance which has inspired similar gifts for centuries.

There remains the question of the £5,000. On Aug. 12, 1907, while the express trust for accumulation was in force, and before any scheme for the administration of the charity had been applied for, £5,000 was paid by the commissioners to the Bolingbroke Hospital out of the trust funds. This payment was clearly unjustifiable: if it had been made by trustees they would be personally liable to replace it; it is so hopelessly wrong that counsel for the Crown could suggest no ground of justification; it was wrong on the elementary principle that it is unlawful for A.'s trustees to take A.'s money and give it to B. Such a payment could only be justified as part of a scheme if there were a case for *cy-près* application and if a scheme for such application had been made. No such application had been made. A colourable request for this payment was signed by the trustees at the request of the commissioners on the form used for schemes; but it was not (as the commissioners show by their subsequent letters that they knew) a scheme. If it had been, notices had to be given and time had to elapse under the Act before it could come into force, and as any such scheme must affect the Bolingbroke Hospital, the trustees of that hospital must have submitted to the jurisdiction of the commissioners and consented to the scheme, and this they never have done to this day. There is not a shadow of excuse for this payment, and it is alarming to find that a Government office is capable of such a misapplication of funds committed to its care. I cannot find, however, that the legislature has given the court any jurisdiction to set this right. The court can refuse to sanction a scheme, but no provision is made enabling the court to enforce repayment of money mistakenly applied by the commissioners, but I trust that the Attorney-General will consider whether this sum cannot in some way be recovered for the Weir Charity. The legislature appears to have trusted to that control over Government departments that the House of Commons possesses, and which is usually enforced by question and answer in the House. One of the commissioners is a member of Parliament, and it is his business to answer questions relating to his department. On Mar. 23, 1908, one of the commissioners in the House was asked (*inter alia*) under what statutory powers this £5,000 was paid. This part of the question was not answered. On May 20, 1908, he was again asked the same question, and simply referred to his former answer. In July, 1908, the question was repeated to another Charity Commissioner in the House, and on pressure he stated that he would write a letter referring to the sections of the statute under which the payment was made. Such a letter was afterwards sent, and none of the sections referred to therein have any bearing whatever on the point and counsel for the Crown admits that there is no such section, and there ended the inquiry in the House into the statutory powers of the commissioners to make this payment. Comment is unnecessary. The facts speak for themselves. I agree that this appeal must be allowed. EVE. J., appears to have thought that the commissioners have

a free hand and can do as they please. I cannot agree with him, and his attention does not appear to have been called to the payment of the £5,000. A

KENNEDY, L.J.—In my opinion this appeal must be allowed. Where the directions of the testator do not offend against either law or public policy, the application of the *cy-près* doctrine to the employment of his charitable bequest is permissible only if the administration of the trust fund in accordance with the testamentary directions of the donor either is, or—as is the commoner case for the application of the doctrine—has through a supervening change of circumstances in course of time become, practically impossible. I think that there is authority for admitting into the category of such practical impossibilities the case of a fund which is from the first, or has become, grossly in excess of any amount which could, without unreason, be expended in loyally fulfilling the express terms of the benefaction. But neither the Court of Chancery nor the Board of Charity Commissioners, which has been entrusted by statute, in regard to the application of charitable funds, with similar jurisdiction, is entitled to substitute a different scheme for the scheme which the donor has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to the special predilections which inspired his liberality, and untrammelled by his directions, would have dictated a different use of his money. The *cy-près* doctrine can properly be applied only where (to borrow language from SIR GEORGE JESSEL, M.R., in *Re Campden Charities* (1) (18 Ch.D. at p. 323)) it is or has become impossible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied, and it can only be applied beneficially to similar purposes by different means. If the charity can be administered according to the directions of founder or testator, the law requires that it should be so administered. If, on the other hand, it is from the first, or it becomes in course of time clear that the funds cannot beneficially be used in that way, and the doctrine of *cy-près* is, therefore, properly and necessarily applicable, this court will not be induced to interfere, on points of detail, with a scheme sanctioned by the Board of Charity Commissioners. It must be convinced that, in the words of SIR GEORGE JESSEL, M.R., there has been some slip or gross miscarriage which calls for the intervention of the court to set aside and remodel the scheme. The principles and the practice which I have sought to summarise appear, I think, distinctly in the pronouncements of LORD ELDON in *A.-G. v. Earl of Mansfield* (5) (2 Russ. at p. 520) and *A.-G. v. Whiteley* (6) (11 Ves. at p. 251); of LORD ROMILLY in *A.-G. v. Sherborne Grammar School (Governors, etc.)* (7) (18 Beav. at p. 280) and in *Philpott v. St. George's Hospital* (4) (27 Beav. at pp. 111, 112); and the judgments of SIR GEORGE JESSEL, M.R., and JAMES, L.J., in *Re Campden Charities* (1). B C D E F G

It follows that in the present case there are two dominant questions to be considered—viz.: (i) Can the testamentary directions of Mr. Weir in regard to his charitable bequest be followed in a scheme of administration? (ii) If so, is the scheme sanctioned by the order sealed by the Board of Charity Commissioners on Dec. 8, 1908, such an administrative scheme? I shall not recapitulate here the provisions of Mr. Weir's will verbatim. In substance the material parts are these: The value of the property, other than the real property next mentioned, set apart for the charitable purpose is about £100,000, and, as invested, it produces an income of about £3,000 a year. Mr. Weir for some time before his death had resided at the Hawthorns, his freehold property, consisting of house and gardens, in Grove Road, Streatham. He possessed also a freehold house, No. 12, Devonshire Road, Balham. By his will Mr. Weir directed the three trustees appointed thereby, until a restrictive covenant affecting the Hawthorns shall expire (as in fact it did in November, 1907), to use the Devonshire Road house as "a dispensary, cottage hospital, or convalescent home, or other medical charity, to be called the 'Weir Hospital'," for the benefit of the inhabitants of the parish of H I

A Streatham and the neighbourhood; and when, on the expiration of the restrictive
covenant, the Hawthorns should become available, to use the Hawthorns for the
same purpose, either in conjunction or not with the Devonshire Road house, as
might be found desirable. Until the Hawthorns could be so used, it might be
let as a private residence for the best rent that could be obtained. He bequeathed
B to the trustees "for the purposes of the hospital" such of his furniture at both
houses as they should select as likely to be of use in the hospital; and also all
his testimonials, the pictures worked by his daughter, paintings by Seddall,
Hopkins, and any portrait of himself that he might possess, to be hung in the
board room or other public room of the hospital, and to be kept in good order and
condition out of the income of the hospital. That income, amounting, as I have
C said, to some £3,000 a year and arising out of property which was bequeathed to
the trustees to be held by them for the support and maintenance of the hospital,
was the subject of an express direction and declaration. So long as the hospital
was carried on at No. 12, Devonshire Road only, the trustees were not to expend
more than £400 yearly upon its support and maintenance, and they were enjoined
D to invest the balance of the income so as to provide a fund for the alterations of
the Hawthorns required to adapt it to the purposes of such hospital, and for
the erection of additional buildings therefor in the grounds of the said messuage,
which he directed to be done so soon as the Hawthorns were released from the
restrictive covenant. Finally, the testator declared that the hospital should be
carried on by a committee consisting of the three trustees and three other persons
to be nominated by the vestry of Streatham, with a power to co-opt additional
members of the committee, but so that the total number of the committee should
E not exceed nine.

The plan of the charity to be established as the donor clearly willed it, in its
essential characteristics, is, therefore, as it appears to me, unquestionably this:
The establishment, temporarily at No. 12, Devonshire Road, and—after the expira-
tion of the restrictive covenant affecting the testator's home the Hawthorns—at the
Hawthorns, either with or without the continued use of 12, Devonshire Road as an
F adjunct, of a hospital for the benefit of the parish of Streatham and the neighbour-
hood, and to be governed by his three trustees under his will and an equal number
appointed by the vestry of Streatham, with a limited power to co-opt, the term
"hospital" being expressly limited to (i) a dispensary; (ii) a cottage hospital; (iii)
a convalescent home; (iv) any other medical charity. The site of the testator's
home in life, to be altered or enlarged if necessary, was to be the site of the hospital.
G The hospital was to bear his name as its name. In it were to be treasured and
preserved, as visible memorials of the founder, certain personal chattels for which
he evidently had a special affection. Until such time as the Hawthorns could be
adapted and used for the hospital, the income of the trust funds, except so much,
not exceeding £400 in any one year, as would be required for the maintenance of
the hospital in its temporary home at No. 12, Devonshire Road, was to be allowed
H to accumulate for the purpose of providing a fund for such alteration and enlarge-
ment of the Hawthorns as might be necessary to adapt it to the purposes of the
hospital. Upon its face the beneficent scheme of Mr. Weir's charity, as explicitly
set forth in his will, appears to be simple and practicable enough.

I Let us now consider what as a matter of history the Board of Charity Com-
missioners has in fact done. In the metropolitan borough of Battersea, which
does not include any part of the ancient parish of Streatham, that parish being
now comprised in the Balham and Streatham bounds of the metropolitan borough
of Wandsworth, is an excellent general hospital, founded in 1880, and well known
as the Bolingbroke Hospital. It appears from the evidence to be about half a mile
from the nearest part and nearly four miles from the furthest part of Streatham,
and about one and a quarter miles from the Hawthorns. In 1907 the Bolingbroke
Hospital was being altered and enlarged, and a large sum was required by its
managers for this purpose. On Aug. 12, 1907, on the application of the majority

of the Weir Hospital trustees, but without any general scheme for the administration of the Weir Hospital Charity having been drawn up, the secretary of the trustees on the preceding July 30 having informed the Secretary of the Charity Commissioners of the intention of the Weir Hospital trustees to apply for such a general scheme, the Board of Charity Commissioners ordered the payment to the Bolingbroke Hospital out of the Weir Hospital funds of the sum of £5,000, and it was paid accordingly. On Dec. 8, 1908, the Board of Charity Commissioners sealed an order for the establishment of a scheme. It is to set aside or vary that order that the present appellants presented the petition, from the dismissal of which by EVE, J., the present appeal to this court has been brought.

The main features of this scheme, to which alone I need, for the purposes of this judgment, to refer, are these: (i) The Weir Hospital Charity and its endowments are to be administered together with the charity now called the Bolingbroke Hospital Incorporated. (ii) The Bolingbroke Hospital is to take the name of the Weir and Bolingbroke Hospital. (iii) Provision is made for admitting to a share in the administration and management of the charity both the trustees for the time being under Mr. Weir's will and also, under the style of the co-opted trustees, persons resident in the parish of Streatham. There are also provisions for some special medical and nursing assistance to sick persons of the parish of Streatham and the neighbourhood. (iv) Besides the sum of £5,000 already mentioned, £45,000 more out of the funds of the Weir Hospital Charity are to be expended in defraying the cost of completing and equipping the enlargements of the Weir and Bolingbroke Hospital. (v) The dispensary at 12, Devonshire Road is to be continued and a yearly sum of £400 is to be paid for the maintenance and support of the dispensary. (vi) The Hawthorns is to be used as a nurses' home, to be called the Weir Nurses' Home, in connection with the Weir and Bolingbroke Hospital and subject to the directions of the committee of the hospital; but of a number of these nurses, I think twenty, only a small fraction will be employed in gratuitous service. It appears to me to be impossible, in this state of facts, to treat the action of the Board of Charity Commissioners as an administration of the charitable bequest of the testator in accordance with the directions of his will. The learned counsel for the Crown was obliged to admit that the transfer in 1907 of the sum of £5,000 to the Bolingbroke Hospital was indefensible. Whether this serious error is irreparable or not I do not know. It was committed, no doubt, with the best intentions; but after reading the affidavit of Sir Henry Kimber as to questions and answers in Parliament, and the letter of July 24, 1908, written by the Parliamentary representative of the board, one cannot but feel surprise and regret that the Charity Commissioners did not give a closer and more careful consideration to the propriety of such a course before making the order of Aug. 12, 1907. This transfer, however, forms, after all, but a part of the deviation from the directions contained in Mr. Weir's will. According to those directions, the capital fund of £100,000 was to be kept and used as the source of the income which would defray the expenses of maintaining the Weir Hospital to be established on the site of the Hawthorns, and also, if it was retained as an adjunct, of the establishment at No. 12, Devonshire Road. The alteration of the Hawthorns in order to adapt it to its use as the hospital was to be paid for—as will its enlargement be, if deemed proper for the same purpose—out of the accumulations of income arising in the years of the period during which only No. 12, Devonshire Road was available for use as the hospital. According to the scheme now in question, no less than £50,000, one-half of the capital of the Weir Hospital Fund, is to be expended on enlarging the Bolingbroke Hospital and equipping its new wards. I doubt whether the nurses' home which it is proposed to establish at the Hawthorns, constituted and used, as it will be, in connection with the Weir and Bolingbroke Hospital, for the accommodation of nurses, of whom only a few are to supply gratuitous nursing to sick folk in the district, could be rightly treated as falling within this description "medical charity" within the meaning of the will.

A But, be that as it may, the result of the scheme will be that the funds supplied by Mr. Weir's charity will be used, not to create and support for the benefit of the inhabitants of the parish of Streatham and the neighbourhood a separate Weir Hospital at the Hawthorns, but as to one-half of the total sum to enlarge and as to the residue of it to support an existing general hospital outside the parish of Streatham, and between one and two miles distant from the testator's chosen site, with the nurses' home at the Hawthorns as an adjunct, and, to the extent of £400 yearly, the dispensary at No. 12, Devonshire Road. But, if this be not a scheme for the administration of the Weir Hospital Charity, and therefore it can be regarded as legitimate only if the *cy-près* doctrine is properly applicable to the administration of the charity, one has to ask oneself the question whether there is such proved impossibility to administer this charity in accordance with the directions of Mr. Weir's will as will render the application of the *cy-près* doctrine legally justifiable. I share the inability of the MASTER OF THE ROLLS and FARWELL, L.J., to find such ground of justification. The evidence is clear that, whilst there are reasonable objections to the site of the Hawthorns as a site for a convalescent home, it is a good site for the establishment of a cottage hospital. The trustees consulted Mr. Penfold at the suggestion of the Board of Charity Commissioners, and his report in substance was that the Hawthorns would be a good and appropriate position on which to erect buildings especially adapted for a cottage hospital, provided that the area were extended—that is to say, if one or two of the adjoining sites in Grove Road could be acquired. It is in evidence that one such adjoining site can be bought by the trustees. The Board of Charity Commissioners have statutory power to authorise its purchase. It appears to me that it is not open to the Board of Charity Commissioners because—whether rightly or wrongly—they think that, as I understand from his affidavit to be the view of Sir Henry Burdett, the creation of a cottage hospital on a Streatham site is on grounds of advantage to the Wandsworth district in one great general hospital as a medical charity less desirable than the enlargement of a general hospital in the position of the Bolingbroke Hospital outside the district to set aside the clear directions of the testator who has in founding his charity expressly included a cottage hospital as one of the alternative forms of medical charity which his trustees may adopt for the establishment of the Weir Hospital. The fact that according to competent opinion the charitable fund might have more usefully been applied in a different way is not lawful ground for disregarding the express terms of the gift. Still less in my judgment is it open to the Board of Charity Commissioners while not establishing a cottage hospital at the Hawthorns to choose to place there an institution in the form of a nurses' home which with the dispensary maintained, quite properly, at No. 12, Devonshire Road will need so little financial support from the charitable funds in the hands of the Weir Hospital trustees that a large surplus will result and then to say that the existence of the surplus thus created entitles them to apply the *cy-près* doctrine and under it to subsidise the Bolingbroke Hospital. I should be greatly surprised if anyone asserted that if a cottage hospital was established on the Hawthorns site, enlarged as it can be according to Mr. Penfold's suggestion, and equipped as it might be with resident medical officers and accommodation for out-patients, the yearly income of £3,000, after providing for its wants and the wants of the dispensary at No. 12, Devonshire Road, would leave more than a reasonable margin for the contingent expenditure for which those who have to maintain such establishments are always bound to make provision. In my judgment the petitioners have made out their case, and the judgment of EVE, J., should be reversed.

Appeal allowed.

Solicitors: *Walter W. Young; Bayley, Adams, Hawker & Noble; Treasury Solicitor.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

R. v. BROS. Ex parte HARDY

[KING'S BENCH DIVISION (Darling, Pickford and Lord Coleridge, JJ.), October 28, 1910]

[Reported [1911] 1 K.B. 159; 80 L.J.K.B. 147; 103 L.T. 728; 74 J.P. 483; 27 T.L.R. 41; 55 Sol. Jo. 47; 22 Cox, C.C. 352]

Magistrates—Procedure—Indictable offence—Preliminary examination—Duty to take deposition of witness dangerously ill—Indictable Offences Act, 1848 (11 & 12 Vict., c. 42), s. 17—Criminal Law Amendment Act, 1867 (30 & 31 Vict., c. 35), s. 6.

Where there was a charge of an indictable offence, s. 17 of the Indictable Offences Act, 1848, **held** to impose on the magistrate the primary duty of going to take the deposition of a witness who was dangerously ill and unable to attend the court, unless it was impracticable for him to do so. It was within his discretion to decide whether or not it was practicable for him to do so. This discretion should be exercised in a judicial manner. If it was not practicable for the magistrate to take the deposition, another magistrate might do so under s. 6 of the Criminal Law Amendment Act, 1867.

Notes. Section 17 of the Indictable Offences Act, 1848, has been replaced by ss. 4 (1), (3), and 78, of the Magistrates' Courts Act, 1952, and r. 5 (1) (2) of the Magistrates' Courts Rules, 1952. Section 6 of the Criminal Law Amendment Act, 1867, was amended by s. 131 of the Magistrates' Courts Act, 1952, and by the 5th Schedule.

As to taking of deposition of witness who is ill, see 10 HALSBURY'S LAWS (3rd Edn.), 378, 379, and for cases see 14 DIGEST (Repl.) 221-223. For Criminal Law Amendment Act, 1867, s. 6, see 5 HALSBURY'S STATUTES (2nd Edn.) 833. For Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 416.

Case referred to :

(1) *R. v. Katz* (1900), 64 J.P. 807; 17 T.L.R. 67; 14 Digest (Repl.) 223, 1858.

Rule Nisi directed to James Reader White Bros, a metropolitan police magistrate, to show cause why he should not take the evidence of one Ralph Price Hardy at the residence of the said Hardy pursuant to s. 17 of the Indictable Offences Act, 1848, or pursuant to s. 6 of the Criminal Law Amendment Act, 1867 (Russell Gurney's Act), in order that such evidence might be used upon the hearing of an information brought by the applicant, a private prosecutor, against certain persons charged with indictable offences under the Assurance Companies Act, 1909.

The magistrate's affidavit stated :

"An application was made by counsel, under Russell Gurney's Act (Criminal Law Amendment Act, 1867), s. 6, for me to take the deposition of Ralph Price Hardy, said to be dangerously ill. As the depositions were being taken before the court under the Indictable Offences Act, 1848, I was of opinion that that was the proper procedure in this case. I refused, therefore, to take a deposition under Russell Gurney's Act on the authority of *R. v. Katz* (1). No application has yet been made for me to take the deposition under the Indictable Offences Act, 1848, s. 17. As the case is still pending I have no doubt application will be made, and I should be glad of the direction of the Court of King's Bench in the matter. It is practicable and permissible to take the deposition under the Indictable Offences Act, 1848, but the question for the court is whether it is expedient. It is unusual for the court to take a deposition outside the courthouse, except in the case of murder, or, perhaps, manslaughter, and I have never known it done in a case of misdemeanour. Information was laid and summonses issued under s. 24 of the Assurance Companies Act, 1909, which

A makes it a misdemeanour to falsify a balance-sheet. The matter would have
been dealt with summarily, but doubt having arisen as to the jurisdiction of
the court, it was decided to take depositions under the Indictable Offences
Act, so that the defendants might be tried on indictment at the Central
Criminal Court. If the case had been dealt with under the Summary Jurisdic-
tion Acts it would have been heard, tried, and determined in open court under
B s. 20 of the Summary Jurisdiction Act, 1879. Now applications to a magistrate
to go out and take depositions are made only by a superior officer of police in
serious charges. It would be a new departure to allow private prosecutors to
take a magistrate away from his court whenever an important witness in an
indictable misdemeanour was certified to be dangerously ill."

C By s. 17 of the Indictable Offences Act, 1848 :

"In all cases where any person shall appear or be brought before any justice
or justices of the peace charged with any indictable offence, whether com-
mitted in England or Wales, or upon the high seas, or on land beyond the sea,
or whether such person appear voluntarily upon summons or have been appre-
D hended with or without warrant, or be in custody for the same or any other
offence, such justice or justices, before he or they shall commit such accused
person to prison for trial, or before he or they shall admit him to bail, shall in
the presence of such accused person, who shall be at liberty to put questions to
any witness produced against him, take the statement (M.) on oath or affirma-
tion of those who shall know the facts and circumstances of the case, and shall
E put the same into writing, and such depositions shall be read over to and signed
respectively by the witnesses who shall have been so examined, and shall be
signed also by the justice or justices taking the same; and the justice or justices
before whom any such witness shall appear to be examined as aforesaid shall,
before such witness is examined, administer to such witness the usual oath or
affirmation, which such justice or justices shall have full power and authority
to do, and if upon the trial of the person so accused as first aforesaid it shall be
F proved, by the oath or affirmation of any credible witness, that any person
whose deposition shall have been taken as aforesaid is dead, or so ill as not to be
able to travel, and if also it be proved that such deposition was taken in the
presence of the person so accused, and that he or his counsel or attorney had a
full opportunity of cross-examining the witness, then, if such deposition purport
to be signed by the justice by or before whom the same purports to have been
G taken, it shall be lawful to read such deposition as evidence in such prosecution,
without further proof thereof unless it shall be proved that such deposition was
not in fact signed by the justice purporting to sign the same."

By s. 6 of the Criminal Law Amendment Act, 1867 :

"Whenever it shall be made to appear to the satisfaction of any justice of the
peace that any person dangerously ill and in the opinion of some registered
H medical practitioner not likely to recover from such illness, is able and willing
to give material information relating to any indictable offence, or relating to any
person accused of any such offence, and it shall not be practicable for any justice
or justices of the peace to take an examination or deposition in accordance with
the provisions of the said Act of the person so being ill, it shall be lawful for the
said justice to take in writing the statement on oath or affirmation of such
I person so being ill, and such justice shall thereupon subscribe the same, and
shall add thereto, by way of caption, a statement of his reason for taking the
same, and of the day and place when and where the same was taken, and of
the names of the persons (if any) present at the taking thereof, and, if the same
shall relate to any indictable offence for which any accused person is already
committed or bailed to appear for trial shall transmit the same with the said
addition to the proper officer of the court for trial at which such accused person
shall have been so committed or bailed; and in all other cases he shall transmit

the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or attorney, had, or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same."

W. H. Leycester for the defendants.

Leslie Scott, K.C., and *A. P. Poley* in support of the rule.

DARLING, J.—In this case a rule nisi had been obtained calling upon a metropolitan magistrate to show cause why he should not go and take the deposition of a person who is dangerously ill and unable to attend the police-court. The obligation is imposed on the magistrate to take the depositions of all persons in these circumstances by s. 17 of the Indictable Offences Act, 1848. [His LORDSHIP having read the section, continued:] Therefore, there was a primary duty to take the depositions of all persons who can throw any light on the case where there is a charge of an indictable offence, and that would oblige the justice to go to the bedside of the witness in all cases of a charge of an indictable offence. Then came the Criminal Law Amendment Act, 1867, which by s. 6 provides that where it is not practicable to take the deposition of a sick person in accordance with s. 17 of the Indictable Offences Act, 1848, then if it is made to appear to the satisfaction of any justice, not merely the justice who is charged with the investigation of the case, that any person who is dangerously ill, it shall be lawful for him to take that person's deposition.

In the present case the magistrate asks this court for our direction, and we can say that the duty of the magistrate is to take the depositions of all persons who can give useful evidence on oath. That may not always be practicable, and it must be obvious that a magistrate cannot give up the investigation of the cases and the consideration of all the work on which he is engaged and go away to a distance. That would be impracticable. In such a case the parties should find some other magistrate to take the deposition, possibly in the place where the sick person is to be found, and the deposition would be taken under the Act of 1867. The magistrate states that it is unusual to take a deposition outside the court-house except in the case of murder or perhaps manslaughter, and that he has never known it done in a case of misdemeanour. All I can say is that there is no such limitation in s. 17 of the Indictable Offences Act, 1848, which applies where a person is charged with any indictable offence. It is obvious that a case of manslaughter may not be nearly so serious as many other indictable offences. There is no authority for saying that the magistrate is not bound to take a deposition outside his court except in cases of murder or manslaughter. The magistrate goes on to say that applications to a magistrate to go out and take depositions are made only by a superior officer of police in serious charges. There is nothing to show that no one has a right to make such applications except a superior officer of police. He also says that it would be a new departure to allow private prosecutors to take a magistrate away from his court whenever an important witness in an indictable misdemeanour was certified to be dangerously ill. It may be that it would be a new departure, but the magistrate is not bound to go unless he thinks it practicable for him to do so. If it is not

A practicable for him to go, the deposition can be taken under the Act of 1867. I do not think that the magistrate is at liberty to make a rule that he will not go unless he is asked by a superior officer of police and unless the case is one of murder or manslaughter. He must go in every case where there is a charge of an indictable offence if it is practicable for him to do so. Whether it is or whether it is not practicable is for the magistrate to decide, exercising his discretion in a judicial manner. I think this rule should not be made absolute, as under the circumstances there is no occasion to do so. As the magistrate has said that it is practicable to take the deposition under the Indictable Offences Act, 1848, we think he ought to do it.

C **PICKFORD, J.**—I am of the same opinion. Section 17 of the Act of 1848 makes it the duty of the magistrate to take the depositions in the case of all indictable offences. That is a duty which he can only perform if it is practicable, and if it is not practicable, an application can be made to some other justice under the Act of 1867. If it is practicable, it is not for the magistrate to consider whether it is expedient or not, and the only matter he can consider is whether it is practicable. The result of any other decision would be disastrous, because unless it is not practicable, it would be impossible for any other justice to take the deposition under the Act of 1867, and therefore, the result would be that the deposition could not be taken at all. I agree that in considering whether it is practicable the magistrate is entitled to take into consideration whether the taking of the deposition will be such an interference with public business as to make it impracticable.

E **LORD COLERIDGE, J.**—I agree. The magistrate, having held that it is practicable for him to take the deposition under the Indictable Offences Act, 1848, and having intimated that on application being made under that Act he would not take it on the ground that he never did it except in cases of murder or manslaughter and only when asked by a superior officer of police, has laid down a rule which the law does not justify. If it is practicable he ought to go and take the deposition, and he is the person to decide whether it is practicable.

F *Rule discharged.*

Solicitors : *Hargrave, Son & Barrett; Blanckensee & Co.*

[*Reported by W. DE B. HERBERT, ESQ., Barrister-at-Law.*]

BENNETT v. WHITE

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.J.J.), June 22, 1910]

[Reported [1910] 2 K.B. 643; 79 L.J.K.B. 1133; 103 L.T. 52]

Set-off—"Mutual debts"—Absolute assignment to defendant of debt owing by plaintiff to third party—Right of defendant to set-off assigned debt against debt owing by him to plaintiff.

A defendant is entitled to set-off against a debt sued for by the plaintiff a debt owed by the plaintiff to a third person which has been absolutely assigned to the defendant with express notice in writing to the plaintiff.

Dicta of LORD ESHER, M.R., in *Read v. Brown* (1) (1888), 22 Q.B.D. 128, at p. 132, considered and applied.

Decision of the Divisional Court, [1910] 2 K.B. 1, reversed.

Notes. Section 25 (6) of the Supreme Court of Judicature Act, 1873, was repealed by s. 207 and the 7th Schedule of the Law of Property Act, 1925, but was re-enacted in almost identical terms by s. 136 of the latter Act.

Referred to: *Mathieson's Trustee v. Burrup, Mathieson & Co.*, [1927] All E.R. Rep. 172.

As to right of set-off, see 34 HALSBURY'S LAWS (3rd Edn.) 396-401, and for cases see 40 DIGEST (Repl.) 424-427. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

- (1) *Read v. Brown* (1888), 22 Q.B.D. 128; 58 L.J.Q.B. 120; 60 L.T. 250; 37 W.R. 131; 5 T.L.R. 97, C.A.; 8 Digest (Repl.) 611, 525.
- (2) *Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd., Associated Portland Cement Manufacturers (1900), Ltd. v. Tolhurst*, [1902] 2 K.B. 660; 71 L.J.K.B. 949; 87 L.T. 465; 51 W.R. 81, C.A.; affirmed [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 52 W.R. 143; 19 T.L.R. 677, H.L.; 8 Digest (Repl.) 547, 33.

Also referred to in argument:

- Rees v. Watts* (1885), 11 Exch. 410; 3 C.L.R. 1435; 25 L.J.Ex. 30; 1 Jur. N.S. 1023; 3 W.R. 575; 156 E.R. 891, Ex.Ch.; 24 Digest (Repl.) 787, 7762.
- Cochrane v. Green* (1860), 9 C.B.N.S. 448; 30 L.J.C.P. 97; 3 L.T. 475; 7 Jur. N.S. 548; 9 W.R. 124; 142 E.R. 176; 40 Digest (Repl.) 407, 19.

Appeal by the defendant, one White from the decision of the Divisional Court (DARLING and BUCKNILL, JJ.).

The plaintiff, in an action brought in the Mayor's Court on May 17, 1909, claimed the sum of £31 as money payable by the defendant to the plaintiff for printing work done and materials provided by the plaintiff at the request of the defendant. This debt of £31 was not disputed by the defendant.

The defendant by his amended plea sought to set-off against the plaintiff's claim a debt of £31 owed by the plaintiff to one Burton, which Burton had absolutely assigned to the defendant by a deed of assignment dated May 5, 1909. Burton had given the plaintiff written notice of the assignment on the same day.

The recorder held that the debt assigned by Burton to the defendant could not be set-off and gave judgment for the plaintiff for £31. The defendant appealed to the Divisional Court, who confirmed the recorder's decision. The defendant appealed.

Atkin, K.C., and *Valetta* for the defendant.

E. A. Harney for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This appeal raises a point of some importance; but I am bound to say that if the Divisional Court had not taken a

A different view I should not have considered it to be a point of any difficulty. The plaintiff Bennett sued the defendant White in the Mayor's Court for a debt admitted to be due. The defendant by his pleading raised this case. He said: "I have the right to set-off, for Bennett owed Burton more than £31. And Burton has assigned that debt to me, and you have had notice of that assignment." The learned recorder held that it was not the subject of a set-off. He referred to the ANNUAL PRACTICE, in which a judgment of mine in *Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd.* (2), when I was sitting in the other branch of the Court of Appeal, is cited, and the Divisional Court have upheld him in the conclusion at which he arrived. The passage referred to is that in which I said ([1902] 2 K.B., at p. 676) this:

C "Now, this sub-section relates to procedure only. It does not enlarge the class of choses in action, the assignability of which was previously recognised at law or in equity."

I do not desire to qualify in any shape or way what I there said. I think that it is correct. But both the learned recorder and the Divisional Court have overlooked that although the right of set-off depends upon the Statutes of Set-off (2 Geo. 2, c. 22, and 8 Geo. 2, c. 24), yet it cannot be disregarded that there is a subsequent statute which has materially altered the position of the assignee of a debt. At the time of the statute 2 Geo. 2, c. 22, such a thing as an assignment of a debt was unknown and unrecognised by the law. Then came the Supreme Court of Judicature Act, 1873, and that statute by s. 25 (6), enacts as follows:

E "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

H What is the effect of that? It seems to me that the construction of it does not allow of doubt. Where an assignment of a debt is made and notice is given to the debtor, the assignee has a legal right of action against the debtor to the same extent as the assignor had. The debtor is protected by the enactment that the assignment is to be

I "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed."

If authority were wanted, I think that what was said by LORD ESHER, M.R., in *Read v. Brown* (1) is conclusive. He says, dealing with this very sub-section (22 Q.B.D., at p. 132):

"In construing s. 25 (6), we must adopt the ordinary rule as to the construction of Acts of Parliament, that of giving, if possible, a meaning to each word. Now, the defendant's argument comes to this, that the 'legal right' to a debt is the same thing as the 'legal and other remedies' for it; but if that is a correct

argument, the provision that the assignment shall transfer 'the legal right to the debt' is mere tautology, and the section must be read as if the words were not there. That is a wrong rule of construction; the words mean what they say. They transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee, and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him. The assignee becomes the assignee of a legal debt, and is not merely an assignee in equity, and the debt being his he can sue for it, and sue in his own name."

I think, therefore, that this is a case which we must treat exactly the same as if it were under the statute 2 Geo. 2, c. 22, a case in which the defendant had at the time he was sued a debt originally due to him by the plaintiff himself. With great respect to the learned recorder and the Divisional Court, I think, as I have already said, that they have overlooked the effect of s. 25 (6), of the Supreme Court of Judicature Act, 1873, and that all equities are preserved. I think, therefore, that the point upon which this case was decided was a bad point, and that the plea raised by the defendant was in law a good plea. The Divisional Court took a wrong view, and the order of the learned recorder giving judgment for the plaintiff must be set aside and the order of the Divisional Court also, and the defendant must have the costs. There is a difficulty in doing anything more than that, because it appears, as was stated by counsel for the plaintiff and admitted by counsel for the defendant, that the learned recorder on the second day of the trial said that he had made up his mind; and therefore, counsel for the plaintiff had not the opportunity of re-examining the plaintiff in order to show that the assignment was either nil or not to the full amount alleged. I think, therefore, that the case must go back to the learned recorder for a re-hearing.

FARWELL, L.J.—I am of the same opinion. With great respect to the Divisional Court, they have, I think, overlooked the words of s. 25 (6), of the Supreme Court of Judicature Act, 1873,

"subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed."

In this case no injustice will be done. The learned judges seem to have thought that you must trace the pedigree of the debt. But, with great respect to their Lordships, I am of opinion that there was nothing to justify that in the present case. The form of plea given in *BULLEN AND LEAKE'S PRECEDENTS OF PLEADING* (3rd Edn.), p. 682, is as follows:

"That the plaintiff at the commencement of the suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim . . ."

That was so at the time, and always has been the proper form. Here the case is subject to the provisions of the Judicature Act, 1873. Now, an absolute assignment of a debt constitutes a good assignment of the debt at law. I think that not only the dicta in *Read v. Brown* (1), but also the actual decision there, cover the present case. In that case the plaintiff brought an action in the Mayor's Court as assignee of a debt alleged to be due for goods sold and delivered to the defendant by the assignor; and it was held that the debt was transferred to the assignee and became as though it had been his from the beginning. If s. 25 (6), of the Supreme Court of Judicature Act, 1873, had the very limited meaning which the Divisional Court have attributed to it, the decision of the Court of Appeal in *Read v. Brown* (1), must have been otherwise than it was.

KENNEDY, L.J.—I also agree. I must say, speaking for myself, that in a case like the present in which such a small sum is involved, I should be sorry if it could be held that this particular defence would have been a valid one. But I am further of opinion, as are the other members of the court, that this is not the right view

A to take. In my opinion there clearly can, as the law now stands, be a set-off of a debt arising as in the present case. "Mutual debt" means a liquidated sum. This was so in the present case, and the passage which has been read from the judgments in *Read v. Brown* (1) covers the whole ground apart from any other authority. In my opinion we cannot do more than the MASTER OF THE ROLLS has indicated.

Appeal allowed.

B Solicitors: *Montague Perkins; Moeran & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

WERTHEIM v. CHICOUTIMI PULP CO.

[PRIVY COUNCIL (Lord Macnaghten, Lord Atkinson, Lord Collins and Lord Shaw), February 16, 17, 18, March 18, 1910]

[Reported [1911] A.C. 301; 80 L.J.P.C. 91; 104 L.T. 226; 16 Com. Cas. 297]

Sale of Goods—Contract—Breach—Measure of damages—Difference between market price and price obtained on re-sale—Market price to be taken at time of breach—No market at contract place of delivery—Market price at place of sale, less carriage.

E The rule that the measure of damages for delay in delivering goods in accordance with a contract is the difference between the market price at the time when the goods ought to have been delivered and the price at the time when they were in fact delivered is intended to place the party complaining, so far as it can be done by money, in the position in which he would have been if the contract had been duly performed.

F A purchaser of goods, which had not been delivered at the time fixed by the contract, resold them before delivery at a price very little below the market price at the time when they ought to have been delivered, and considerably above the market price at the time when they were in fact delivered. The contract provided for the delivery of the goods at a place where there was no market for them. In an action for damages,

G **Held:** the purchaser was entitled to recover as damages the difference between the market price of the goods at the time of the breach and the price for which they were actually sold; there being no market for the goods at the contractual place of delivery, the damages for non-delivery should be calculated with reference to the market price at the place at which the purchaser intended to sell the goods, less the cost of carriage to that place.

H **Notes.** Distinguished: *Sharpe v. White* (1911), 25 O.L.R. 298. Considered: *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways of London*, [1911-13] All E.R. Rep. 63. Applied: *Taylor v. Bank of Athens*, *Pinnock v. Bank of Athens* (1922), 91 L.J.K.B. 776. Considered: *The Arpad* [1934] All E.R. Rep. 326. Applied: *Sommerfeldt v. Petrovitch*, [1949] 4 D.L.R. 825; *Cotter v. General Petroleum*, [1950] 4 D.L.R. 609. Referred to: *Williams v. Agius*, [1914] A.C. 510; *Hill v. Showell* (1918), 87 L.J.K.B. 1106; *Slater v. Hoyle and Smith*, [1918-19] All E.R. Rep. 654; *Zauscher v. Earl*, [1943] 2 W.W.R. 697; *Auclair v. Brownsburg*, [1946] Que. K.B. 466; *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; *Pilkington v. Wood*, [1953] 2 All E.R. 810; *Diamond v. Campbell-Jones*, [1960] 1 All E.R. 583.

I As to measure of damages in contract, see 11 HALSBURY'S LAWS (3rd Edn.) 241 et seq., and for cases see 17 DIGEST (Repl.) 91 et seq.

Cases referred to :

- (1) *Irvine v. Midland and Great Western Rail. Co. (Ireland)* (1880), 6 L.R.Ir. 55.
- (2) *Hamilton v. Magill* (1883), 12 L.R.Ir. 186; 39 Digest 481, 1027 i.
- (3) *Rodocanachi v. Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp. M.L.C. 100, C.A.; 39 Digest 669, 2570.
- (4) *Wilson v. Lancashire and Yorkshire Rail. Co.* (1861), 9 C.B.N.S. 632; 30 L.J.C.P. 232; 3 L.T. 859; 7 Jur. N.S. 862; 9 W.R. 635; 142 E.R. 248; 17 Digest (Repl.) 181, 767.
- (5) *Schulze v. Great Eastern Rail. Co.* (1887), 19 Q.B.D. 30; 56 L.J.Q.B. 442; 57 L.T. 438; 35 W.R. 683; 3 T.L.R. 635, C.A.; 8 Digest (Repl.) 154, 974.
- (6) *Grand Tower Co. v. Phillips* (1874), 23 Wall. S.C. 471.
- (7) *Cahen v. Platt* (1877), 24 Sickel, 348.
- (8) *Wemple v. Stewart* (1856), 22 Barb. 154.
- (9) *Ströms Bruks Akt. v. Hutchison*, [1905] A.C. 515; 74 L.J.P.C. 130; 93 L.T. 562; 21 T.L.R. 718; 10 Asp. M.L.C. 138; 11 Com. Cas. 13, H.L.; 17 Digest (Repl.) 75, 5.

Also referred to in argument :

- Borries v. Hutchinson* (1865), 18 C.B.N.S. 445; 5 New Rep. 281; 34 L.J.C.P. 169; 11 L.T. 771; 11 Jur. N.S. 267; 13 W.R. 386; 114 E.R. 518; 39 Digest 673, 2590.
- Ogle v. Earl Vane* (1867), 2 L.R.Q.B. 275; 7 B. & S. 855; 36 L.J.Q.B. 175; affirmed (1868), L.R. 3 Q.B. 272; 9 B. & S. 182; 37 L.J.Q.B. 77; 16 W.R. 463, Ex.Ch.; 39 Digest 676, 2624.
- Elbinger Akt. v. Armstrong* (1874), L.R. 9 Q.B. 473; 43 L.J.Q.B. 211; 30 L.T. 871; 38 J.P. 774; 23 W.R. 127; 17 Digest (Repl.) 132, 388.
- Dunlop v. Higgins* (1848), 1 H.L. Cas. 381; 12 Jur. 295; 9 E.R. 805, H.L.; 17 Digest (Repl.) 61, 682.

Appeal from a decision of the Court of King's Bench for the province of Quebec, reversing in part the judgment of the Superior Court, whereby the action of the appellant was dismissed with costs and entering judgment for the appellant for 2434.00 dollars in respect of a portion of the appellant's claim in such action.

The respondents were a company manufacturing pulp at Chicoutimi in the province of Quebec. The appellant was the sole member of the firm of A. Wertheim & Co., of Hamburg, which for years had business relations with the respondents. On Dec. 9, 1898, a contract was made between the respondents and the appellant's firm for the sale to the appellant of the whole output of the respondents' mill from Jan. 1, 1899, to Dec. 31, 1899. The contract in addition to terms as to quality, packing, and mode of payment, contained the following clauses :

"Method of delivery.—Sellers are to deliver the pulps free alongside the steamer or vessel at the port of Chicoutimi, or in buyer's option free alongside steamer or vessel at Quebec. Being understood that steamer or vessel chartered by buyers will only load where they will always be afloat.

Price.—For pulp delivered free alongside at Chicoutimi buyers agree to pay sellers eleven dollars (\$11.00) per ton of 2,000 lb. air-dry weight, and for pulp delivered free alongside vessel at Quebec, buyers are to pay twelve dollars and twenty-five cents (\$12.25) per ton of 2,000 lb. air-dry weight."

Deliveries of pulps were duly made by the respondents under the contract, but the parties did not agree as to the conditions of delivery, which resulted in the making of certain claims for allowances by the appellant and certain counter-claims by the respondents. These claims and counter-claims were mutually settled by an agreement made between the appellant and the respondents dated Mar. 13, 1900, in the following terms :

"Quebec, 13 Mars, 1900.—La Compagnie de Pulpe de Chicoutimi consent à livrer à A. Wertheim & Cie., de Hambourg, trois mille (3000) tonnes de sa pâte en bois habituelle, humides, de 2240lbs. à \$11.00 la tonne de 2000lbs.

A sèche, livrée à Chicoutimi sur vapeur ou vaisseau ou char, du premier Septembre au premier Novembre courant si possible si faire se peut en partie plutôt. Ceci en règlement complet total et absolu de toute réclamation quelconque qu'ils ont ou pourraient avoir sur les transactions faites jusqu' à ce jour, en vertu du contrat du 9 Decembre, 1898. Termes de paiement comme ci-devant, La Cie de Pulpe de Chicoutimi, J. E. A. Dubuc, Dir.-Gt.—A. Wertheim & Cie, V. Hillern Flinsch."

B

The appellant, by a letter dated Oct. 7, 1900, required the respondents to put at his disposal 1,500 to 2,000 tons of the said 3,000 tons of pulp not later than the last week of October, and the balance of 1,000–1,500 tons not later than Nov. 15; and the respondents, by letter dated Oct. 22, 1900, informed the appellant's American agent that they would be ready to deliver the pulp about Nov. 20. Subsequently, after the navigation had been closed, the respondents received shipping instructions for the pulp from the appellant's agent in New York, by letter dated Nov. 1, 1900, with the intimation that the respondents must pay the extra freight to Portland, Boston, or West St. John. The respondents refused to pay such extra freight, and none of the pulp was shipped during the winter of 1900. The appellant protested against the refusal of the respondents to assent to his suggestion as to the payment of extra freight, and threatened litigation, but in May, 1901, the appellant re-opened negotiations with the respondents, and requested them to ship at Chicoutimi 3,000 tons of pulp, which the respondents agreed to do. In June, 1901, a shipment of 23,600 bales, weighing about 3,050 tons moist of pulp, was made by the respondents at Chicoutimi for Manchester, in accordance with the said request of the appellant. The pulp was accepted by the appellant without protest, and the price thereof was duly paid by the Banque National in Chicoutimi on behalf of the appellant. Upon its arrival in Manchester the pulp was delivered by the appellant to various purchasers to whom he had sold it. On June 24, 1901, the appellant's agent wrote to the respondents concerning the weight of the bales, but made no complaint as to the quality thereof. In July, 1901, the appellant procured a report to the effect that the bales were not of "prima" quality, and that the difference in value between bales of "prima" quality and the said bales was 8s. 6d. per ton moist; and reports to the effect that the bales contained an undue quantity of moisture.

On Mar. 10, 1902, the appellant commenced an action against the respondents in the Superior Court, claiming in his declaration (inter alia): (i) The sum of 20,047.50 dollars as damages for the respondents' failure to deliver the 3,000 tons of pulp under the contract of Mar. 13, 1900, not later than Nov. 1, 1900, representing the alleged difference between the price of pulp in November, 1900 (70s.), and that in July, 1901 (42s. 6d.); (ii) the sum of 6155.80 dollars as damages for the respondents' failure to deliver pulp of the quality stipulated for in the contract of Mar. 13, 1900, being the amount alleged to have been assessed by an arbitrator under the provisions of the contract of Mar. 13, 1900; (iii) the sum of 649.00 dollars in respect of an alleged deficiency in the weight of the pulp, calculated at 11 dollars per ton.

The respondents by their plea, filed June 9, 1902, in substance pleaded as to (i) that the 3,000 tons of pulp had only to be delivered before Nov. 1, 1900, "if possible"; that the pulp was manufactured and delivered as quickly as possible; that the appellant would not take delivery of it in the autumn of 1900; that the appellant had required delivery thereof in June, 1901; and that the pulp so delivered was accepted and paid for without protest by the appellant; as to (ii) that the said pulp was of ordinary and merchantable quality, and similar to that which had previously been supplied to the appellant without objection; as to (iii) that there was no deficiency in weight in the said pulp when it was accepted by the appellant. The appellant by his answer to the plea, filed June 19, 1902, denied the allegations in the plea and further alleged that he had many times demanded the delivery of

the pulp, that the respondents had neglected to deliver the same in accordance with the contract; and that the respondents were fully aware of the damage he had suffered. A

The action was heard in the superior court before McCORKILL, J. After hearing the evidence of a large number of witnesses called on behalf of the appellant and the respondents, the learned judge dismissed all the claims of the appellant. The appellant appealed from the judgment of the superior court to the Court of King's Bench of the province of Quebec. The appeal was heard by TRENHOLME, LAVERGNE, Cross, CIMON, and CAGNÉ, JJ., and on Oct. 3, 1908, the court (LAVERGNE and CIMON, JJ., dissenting) allowed the appeal as to the sum of 2,434 dollars, being part of the sum of 20,047.50 dollars claimed as damages for late delivery but calculated the damages in respect of 2,000 tons of pulp only. They dismissed the appeal as to the other items of the appellant's claim. B C

Sir R. Finlay, K.C., and *G. G. Stuart, K.C.* (of the Canadian Bar), appeared for the appellant.

Atkin, K.C., *L. Taschereau, K.C.* (of the Canadian Bar), and *T. Mathew* for the respondents.

Mar. 18, 1910. **LORD ATKINSON.**—This is an appeal from a decision of the Court of King's Bench for the province of Quebec (Appeal side) affirming in part and reversing in part a judgment of the Superior Court of that province, dated Nov. 12, 1907. By the former judgment the respondent company was condemned in the sum of 2,434 dollars and costs. D

The respondent company carry on the manufacture of wood pulp at the town of Chicoutimi, which is situate on the river Saguenay, a tributary of the St. Lawrence in the province of Quebec. The appellant is the sole partner in a German firm of merchants carrying on business at Hamburg in Germany. He has an agent at Manchester named Reichenbach, where he trades in the pulp which he imports from Canada and elsewhere, and an agent at New York named Goldman. He claims in this action to recover damages from the respondents under three separate heads for three separate breaches of a contract entered into between them on Mar. 13, 1900, to deliver at Chicoutimi f.o.b. 3,000 tons of moist wood pulp between Sept. 1 and Nov. 1 in that year, at a price which was equivalent to 25s. per ton. The contract was in the terms following: [His LORDSHIP read the contract set out above, and continued:] The first breach relied upon consists in the respondents having delayed the delivery of this quantity of pulp till June, 1901; the second in the alleged inferior quality of the pulp actually delivered; and the third in its alleged deficiency in weight. In the view which their Lordships take of the appellant's claim under the second and third heads, it is unnecessary to deal with the amount demanded in respect of each. E F G

The first was the main claim. In respect of it the appellant claimed 27s. 6d. per ton on the 3,000 tons mentioned in the contract, that being the difference between the market price of such pulp at Manchester, the ultimate destination of the pulp, at the time it should have been delivered, namely, 70s. per ton, and its market price there at the time it was in fact delivered, namely, 42s. 6d. per ton; the difference between the market values of the pulp at these respective times being, according to the contention on behalf of the appellant, the well-established and indisputable measure of damages for delay in breach of contract in delivery of goods. The appellant in reality never sustained this loss nor anything like it, because he sold the goods under contracts, some anterior in date to the contract sued upon, the others anterior in date to the actual delivery, at the price of 65s. per ton, which is only 5s. per ton less than the top market price for which the pulp could presumably have been sold in Manchester had it arrived there in November, 1900, the contract time. Yet so rigid, it is insisted, is this formula or rule, that the re-sales must be ignored as collateral and irrelevant matters and damages be awarded for a loss which in reality has never been sustained. H I

A That, however, is not the only peculiarity of the appellant's claim. He admits that 13s. per ton would cover all the costs and expenses of the transport of the pulp from Chicoutimi to Manchester. It would thus cost him when delivered there 38s. per ton in all. If the pulp had been delivered in November and the appellant had sold it then at the highest market price, namely, 70s. per ton, he would have made a profit on it of 32s. per ton; but if the appellant was to succeed in this action, B he would have received from the sub-vendees the price at which the goods were actually sold, namely, 65s. per ton, plus 27s. 6d. per ton, from the respondents in the shape of damages, making together 92s. 6d. per ton, leaving a profit of 54s. 6d. per ton or 22s. 6d. per ton more than if the contract had never been broken at all. One cannot but feel that the reasoning which leads to results so unjust and anomalous must be fallacious. On the assumption that by this delay in delivering C of the pulp the respondents were guilty of a breach of their contract—a point to be dealt with presently—and that the appellant was, therefore, entitled to recover some damages in respect of it, the main question for decision is on what principle and by what rule those damages are to be measured under the circumstances of this case.

That question has given rise, apparently, to much conflict of judicial opinion. By the judgment and decree appealed from, the damages seem to have been fixed D at 5s. per ton, that being the difference between the full market value of the pulp at Manchester when it should have reached that town, and the rate at which it was sold when it in fact reached there. The rate per ton so fixed is, in their Lordships' opinion, the highest rate at which it could properly be fixed, since it covers the loss actually sustained. And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should so far as E it can be done by money, be placed in the same position as he would have been in if the contract had been performed: *Irvine v. Midland and Great Western Rail. Co. (Ireland)* (1), approved of by PALLES, C.B., in *Hamilton v. Magill* (2). That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages the difference in market prices at the respective times above mentioned is merely designed to apply this principle, and, as stated in one of the American F cases cited, it generally secures a complete indemnity to the purchaser. But it is intended to secure only an indemnity. The market value is taken because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain G them in that market at that price. In such a case the price at which the purchaser might in anticipation of delivery have re-sold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter: *Rodocanachi v. Milburn* (3). The purchaser not having got his goods should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, H when the delivery of goods purchased is delayed, the goods are presumed to have been at the time when they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market, but if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, that presumption is rebutted, I and the real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss which he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss which he never suffered, and be put as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position. The authorities cited, *Wilson v. Lancashire and Yorkshire Rail. Co.* (4), and *Schulze v. Great Eastern Rail. Co.* (5), bear out this conclusion. In both these cases the goods,

by reason of the delay in delivery, had become valueless, or of less value to the purchaser, and it is clear from the judgments that the measure of damages in such a case is the difference between the contract price and the value of the goods to the purchaser when obtained. The same remark applies to the other cases cited.

In order to deal with the several points raised in argument, and to determine whether the respondents committed any breach of contract in fact, or what is the number of tons on which the rate of 5s. per ton should properly be calculated, and whether the appellant's claims under the second and third heads are valid or not, it is necessary to examine the correspondence and oral evidence at some length. [His LORDSHIP reviewed the evidence and correspondence, found that the respondents could have delivered to the appellant 1,500 tons of dry pulp, equivalent to 3,000 tons of wet pulp, and continued:] The trial judge McCORKILL, J., adopted these figures and found as a fact that the respondents had on hand sufficient dry pulp after satisfying their earlier contracts to deliver to the appellant all that the latter was entitled to demand. It appears to their Lordships to be an error to suppose, as apparently had been supposed, that this learned judge merely found that the respondents could have delivered 1,500 or 2,000 tons before Nov. 1. His finding to the contrary is quite plain and unambiguous. Their Lordships are, therefore, of opinion that the damages should have been calculated on 3,000 tons of pulp, not upon 2,000, as appears to have been done, and that the sum awarded is therefore too little by £250.

It was pointed out by counsel for the respondents, that the delivery contracted for was a delivery at Chicoutimi, not at Manchester; that there is no market at Chicoutimi; and that, therefore, the rule insisted upon on behalf of the appellant could not be applied, but, having regard to the long course of dealing between the parties and the inter-communication between Chicoutimi and Manchester consequent upon it, their Lordships think, on the authority of the three cases cited from the American Reports—namely, *Grand Tower Co. v. Phillips* (6), *Cahen v. Platt* (7), and *Wemple v. Stewart* (8), as well as from *Ströms Bruks Akt. v. Hutchison* (9)—that the market price at Chicoutimi may for the purposes of this measure of damages be fairly taken to be the market price at Manchester, despite the distance which separates them, of course, less the cost of carriage, which in this case is admitted to be 13s. per ton. If this be taken to be so, the same sum of 13s. per ton must, of course, be deducted from the price (65s. per ton) obtained on re-sale, so that the difference between the two equally diminished sums is necessarily the same—namely, 5s. per ton. This is, in their Lordships' opinion, the amount of damages which the appellant is entitled to recover under this head.

As to claims 2 and 3 [alleged inferior quality of the pulp, and alleged deficiency in weight] the trial judge and both the courts before which the case has come have considered the evidence given in support of them loose and unsatisfactory. Their Lordships are inclined to concur in that view, and are not by any means convinced that the decision arrived at was erroneous so as to induce them to overrule it on a pure question of fact. No cross-appeal has been lodged in this case, though it is stated that the respondents have appealed against the judgment, and that this appeal is now pending in the Canadian Court. Their Lordships do not think, however, they are precluded from amending the judgment appealed against by increasing the amount awarded by £250—i.e., 5s. per ton on 1,000 tons together with the sum of £1,044 19s. 8d. for freight from Manchester to the different places of delivery, and interest from Feb. 28, 1902, to Feb. 28, 1911, agreed at £807 15s. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed, but that the judgment appealed against should be amended by being increased by the sum of £2,102 14s. 8d., or its equivalent in dollars.

Solicitors: *Stephenson, Harwood & Co.*; *Charles Russell & Co.*

[Reported by C. E. MALDEN, ESQ., Barrister-at-Law.]

A

J. LYONS & CO., LTD. v. LONDON CORPORATION

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Jelf and Sutton, JJ.), June 8, 9, 1909]

B

[Reported [1909] 2 K.B. 588; 78 L.J.K.B. 915; 101 L.T. 206; 73 J.P. 372; 25 T.L.R. 636; 7 L.G.R. 811]

Public Health—London—Removal of "house refuse"—Obligation of local authority—Refuse of restaurant—Public Health (London) Act, 1891 (54 & 55 Vict., c. 76), ss. 30, 33, 141.

C

Refuse produced in a shop used as a tea shop for providing customers with refreshment and food for profit consisted of ashes, clinkers, coffee grounds, eggshells, broken crockery, potato parings, dust, and general dirt and sweepings from rooms. In an action against the local sanitary authority for failing to remove the refuse,

D

Held: the refuse was of the nature and character of "house refuse" within s. 30 of the Public Health (London) Act, 1891, and the sanitary authority were bound by that section to remove it without payment.

Notes. The Public Health (London) Act, 1891, ss. 30 and 33 have been replaced by the Public Health (London) Act, 1936, ss. 87 and 92 respectively. For a definition of house refuse see now s. 304 of the 1936 Act. For the provisions of the general statute see Public Health Act, 1936, ss. 72, 73.

Referred to: *Metropolitan Water Board v. Avery* (1913), 83 L.J.K.B. 178.

E

As to removal of refuse in London, see 31 HALSBURY'S LAWS (3rd Edn.) 132 et seq., and for cases see 38 DIGEST (Repl.) 209 et seq. For the Public Health (London) Act, 1936, see 15 HALSBURY'S STATUTES (2nd Edn.) 887.

Cases referred to:

F

(1) *Westminster Corpn. v. Gordon Hotels, Ltd.*, [1906] 2 K.B. 39; 75 L.J.K.B. 439; 94 L.T. 521; 70 J.P. 258; 22 T.L.R. 439; 4 L.G.R. 538, D.C.; on appeal, [1907] 1 K.B. 910; 76 L.J.K.B. 482; 71 J.P. 200; 96 L.T. 535; 23 T.L.R. 387; 5 L.G.R. 545, C.A.; affirmed [1908] A.C. 142; 77 L.J.K.B. 520; 98 L.T. 681; 72 J.P. 201; 24 T.L.R. 402; 6 L.G.R. 520, H.L.; 38 Digest (Repl.) 209, 323.

G

(2) *Gay v. Cadby* (1877), 2 C.P.D. 391; 46 L.J.M.C. 260; 36 L.T. 410; 41 J.P. 503, D.C.; 38 Digest (Repl.) 209, 320.

(3) *London and Provincial Laundry Co. v. Willesden Local Board*, [1892] 2 Q.B. 271; 67 L.T. 499; 56 J.P. 696; 40 W.R. 557; 36 Sol. Jo. 506, D.C.; 38 Digest (Repl.) 210, 326.

(4) *St. Margaret's Vestry v. Queen Anne Mansions Co.* (1893), 57 J.P. Jo. 277, D.C.; 38 Digest (Repl.) 209, 321.

H

(5) *St. Martin's Vestry v. Gordon*, [1891] 1 Q.B. 61; 60 L.J.M.C. 37; 64 L.T. 243; 55 J.P. 437; 39 W.R. 295; 7 T.L.R. 70, C.A.; 38 Digest (Repl.) 210, 325.

Also referred to in argument:

Holborn Union v. St. Leonard's, Shoreditch, Vestry (1876), 2 Q.B.D. 145; 46 L.J.Q.B. 36; 35 L.T. 400; 41 J.P. 38; 25 W.R. 40; 38 Digest (Repl.) 210, 328.

I

Frederick v. Bognor Water Co., [1909] 1 Ch. 149; 78 L.J.Ch. 40; 99 L.T. 728; 72 J.P. 501; 25 T.L.R. 31; 53 Sol. Jo. 31; 7 L.G.R. 45; 43 Digest 1080, 145.

Case Stated by an alderman of the city of London, sitting as a court of summary jurisdiction at the Mansion House.

An information was preferred on Nov. 11, 1908, by J. Lyons & Co., Ltd. (the appellants) against the respondents for that they being the sanitary authority for the city of London did unlawfully fail without reasonable cause to comply with

s. 30 of the Public Health (London) Act, 1891, in not removing house refuse from premises in the city of London, at the ordinary time, and, the appellants, the occupiers of the premises, having on Oct. 29, 1908, served on the respondents a written notice requiring the removal of such refuse, the respondents did not comply with such notice within forty-eight hours after such service, contrary to the statute. At the hearing of the information the following facts were admitted or proved in evidence before the magistrate. The respondents were the sanitary authority for the city within the meaning of the Act. The appellants were a limited company and were the occupiers of a shop on the ground floor, together with the basement and back portion of the first floor, of 31, Poultry, in the city of London, but no other part of the premises. The appellants used the premises as a tea shop, providing, with a view to making a profit, customers with refreshment and food (namely, tea, cold meat, bread, eggs, butter, cakes, and vegetables) which was consumed on the premises. Some of the food was cooked or prepared on the premises and some was not. Cabbages were not supplied to customers but were supplied to the staff. No person slept on the premises in the occupation of the appellants at night. On or about Oct. 29, 1908, the respondents failed to remove certain refuse from the shop and premises at 31, Poultry, aforesaid, and on Oct. 29, 1908, they were served by the appellants with a written notice requiring the removal of such refuse. The respondents failed to comply with the notice within forty-eight hours after service thereof. The refuse in respect of which the notice was served on the respondents consisted of the following items:—ashes and clinkers, coffee grounds, a little newspaper, about six cabbage leaves, eggshells, dust and general dirt, a little broken crockery, tea leaves, potato parings, scrapings from the sink, and sweepings from rooms, but did not include scraps left by customers, which were otherwise disposed of by being given away in charity. The refuse amounted to less than four bushels, and between one-half and two-thirds of the bulk was general sweepings and ashes. The refuse above described was unsorted and was contained in four skips (which had been sealed up), and had been collected from the above-mentioned premises.

It was contended on behalf of the appellants that the refuse of the appellants' premises was "house refuse" and not "trade refuse"; that, in determining the question whether refuse is "house refuse" or "trade refuse," regard was to be had to the nature and character of the refuse, and that it was immaterial how the refuse originated if it was of the nature and character of house refuse. The attention of the magistrate was called to *Westminster Corpn. v. Gordon Hotels, Ltd.* (1) ([1906] 2 K.B. 39), and it was submitted by counsel for the appellants that a restaurant was nothing more than the dining-room of a hotel. The magistrate was of opinion on the above facts that the premises were not a "house" within the meaning of the judgment in *Westminster Corpn. v. Gordon Hotels, Ltd.* (1), and that the refuse was not "house refuse" within the meaning of the Public Health (London) Act, 1891, and he thereupon dismissed the information.

By the Public Health (London) Act, 1891:

"Section 30 (1). It shall be the duty of every sanitary authority—(a) to secure the due removal at proper periods of house refuse from premises, and the due cleansing out and emptying at proper periods of ash-pits, and of earth-closets, privies, and cesspools (if any) in their district, and the giving of sufficient notice of the times appointed for such removal, cleansing out, and emptying, and (b) where the house refuse is not removed from any premises in the district at the ordinary period, or any ashpit, earth-closet, privy, or cesspool in or under any building in the district is not cleansed out or emptied at the ordinary period, and the occupier of the premises serves on the authority a written notice requiring the removal of such refuse, or the cleansing out and emptying of the ashpit, earth-closet, privy, or cesspool, as the case may be, to comply with such notice within forty-eight hours after that service, exclusive

A of Sundays and public holidays. (2) If a sanitary authority fail without reasonable cause to comply with this section, they shall be liable to a fine not exceeding £20. . . . Section 33 (1). If the sanitary authority are required by the owner or occupier of any premises to remove any trade refuse, that authority shall do so, and the owner or occupier shall pay to that authority a reasonable sum for such removal, and such sum, in case of dispute, shall be settled by the order of a petty sessional court. (2) If any dispute or difference of opinion arises between the owner or occupier and the sanitary authority as to what is to be considered as trade refuse, a petty sessional court, on complaint made by either party, may by order determine whether the subject-matter of dispute is or is not trade refuse, and the decision of that court shall be final. . . . Section 141. In this Act, unless the context otherwise requires—The expression “house” includes schools, also factories and other buildings in which persons are employed. The expression “house refuse” means ashes, cinders, breeze, rubbish, night-soil, and filth, but does not include trade refuse. The expression “trade refuse” means the refuse of any trade, manufacture, or business, or of any building materials.”

D *Danckwerts, K.C. (F. F. Daldy and Bethune with him), for the appellants.*

Macmorran, K.C. (Courthope-Munroe with him), for the respondents.

LORD ALVERSTONE, C.J.—I personally much regret that the ingenuity of counsel succeeded in inducing the Court of Appeal to stop the consideration of this point when *Westminster Corpn. v. Gordon Hotels, Ltd.* (1) came before them on appeal from our decision in this court, because we certainly hoped there would be the guidance of the Court of Appeal and possibly of the House of Lords upon the principle which is involved in this present case. However, as we have not got that guidance, we must proceed according to our own lights.

The reason why I think it is very desirable there should be some further consideration of this matter—and it is quite easy to devise a means by which it may be done—is that the principle for which counsel for the respondents has contended has been to a certain extent, and almost to the full extent, recognised in *Gay v. Cadby* (2), then possibly in *London and Provincial Steam Laundry Co. v. Willesden Local Board* (3), and also in *St. Margaret's Vestry v. Queen Anne Mansions Co.* (4). Although that principle was not approved of in the judgment of the Court of Appeal in *St. Martin's Vestry v. Gordon* (5), it does seem to me that the question does require some further consideration as to whether or not where the refuse (whatever be its character) is produced solely in the course of carrying on a trade, that will be “trade refuse” within the meaning of this Act of Parliament. I think that, having regard to the decision of the Court of Appeal in *St. Martin's Vestry v. Gordon* (5) it is not possible for us in this court to adopt that view. It is not infrequently that the matter arises, but the present is an illustration of the identical case of a restaurant, which occurred to counsel who were then arguing *Westminster Corpn. v. Gordon Hotels, Ltd.* (1), having now come up for decision by this court. If I may quote my own words for the purpose of indicating why I say that, in my judgment in that case I said this ([1906] 2 K.B. at p. 48):

“It is, as I have said, difficult to draw the line, and I am not at all sure on which side of the line an ordinary restaurant would fall; by which term I mean a restaurant in which no one resides, but to which people simply come in considerable numbers to take their meals in the middle of the day or in the evening, the business producing a considerable quantity of refuse.”

I had in my mind the view that possibly on consideration by a higher tribunal the principle that counsel for the respondents has contended for in this case is a principle that, in my opinion, is well worthy of further consideration—namely, that the distinction is between that which is produced in a place of business by the business and that which is produced in a house in the course of living in that house, the one being “trade refuse” and the other being “house refuse.”

The argument in this case, however, has satisfied us that, at any rate for the purpose of the decision of this case, we must hold that this is "house refuse," and that this appeal ought to be allowed. I should like to say in the first instance, if this had been dealt with by the magistrate as a question of fact, upon evidence before him upon which he could fairly come to that conclusion to which he came, we should not interfere; and if the finding which counsel for the respondents has read and relied upon, "and that the said refuse was not 'house refuse' within the meaning of the Public Health (London) Act, 1891," is to be taken to be a finding of fact, I do not think we ought to interfere. But I think the learned alderman has stated most clearly, and it appears in the Case, what he meant when he put those words into his opinion. He refers in the preceding paragraph to *Westminster Corpn. v. Gordon Hotels, Ltd.* (1), and he says:

"And it was submitted by counsel for the appellants that a restaurant was nothing more than the dining-room of a hotel."

He goes on to state his opinion that on the above facts the premises were not a "house" within the meaning of the judgment in that case. It was a very natural sequence of argument, and it is quite plain the learned alderman thought that unless the place came within the meaning of the word "house" in the sense which counsel for the respondents has referred to—namely, a house where people live and sleep and all the ordinary operations of life are carried on—the principle of *St. Martin's Vestry v. Gordon* (5) did not apply. Therefore it seems to me that his finding that the refuse was not "house refuse" is only a consequence of his finding that these premises were not a "house."

In my opinion he has misdirected himself on the question of law, because, if he is wrong in the view that *Westminster Corpn. v. Gordon Hotels, Ltd.* (1) is only to be applied where the premises are a house or a collection of houses in the ordinary sense of the word, the reasoning of his judgment fails. The refuse in this case is for all practical purposes the same thing as was the refuse in the *Gordon Hotels Case* (1). It is not suggested by anybody that there is any substantial difference between them, and there cannot be in the nature of things. A description of the refuse is fully given in the Case. In these circumstances, are we able to adopt the principle which I think is the only principle upon which this case can be successfully argued for the corporation? Unless the corporation can establish the principle for which counsel for the respondents has contended, that this refuse, being produced in a trade, is not to be regarded as "house refuse," we ought not to draw the fine distinction which is attempted to be drawn when the character of the stuff which is to be taken away is practically identical with the stuff that was treated as "house refuse" in the *Gordon Hotels Case* (1), and is the same as would be produced in any ordinary house. I do not think it would be right or wise for us—at any rate, in this court—to draw a distinction between some of the rooms of a house, namely, dining-rooms and kitchens, as distinguished from dining-rooms and kitchens plus bedrooms, in order to refine away the effect of the decision in the *Gordon Hotels Case* (1). I think it right that I should repeat that, if the other principle could be adopted of everything produced in a trade being trade refuse, that would be a clear line which would be a safe guide on which to act. But that I think we cannot adopt in this court, having regard to the judgment of the Court of Appeal in *St. Martin's Vestry v. Gordon* (5) and having regard to our own judgment in the *Gordon Hotels Case* (1), because, if the argument about the trade producing the refuse being the guide is a good argument, it certainly applied in the *Gordon Hotels Case* (1), as the whole of the refuse in that case was produced in the course of carrying on the trade of a hotel keeper. That fact existed in that case, and therefore we ought certainly not to draw in this court the distinction, unless we can see that there is certain legal ground for making a sub-division in respect of the way in which this particular trade refuse arose.

Counsel for the respondents has addressed to us an argument that the real answer

A to *St. Martin's Vestry v. Gordon* (5) was that the Public Health (London) Act, 1891, was intended to enact something different to what had been enacted in the Metropolis Management Act, 1855, upon which that case had been decided, and therefore, inasmuch as the previous decision was on the Act of 1855, this court was at liberty to construe s. 141 (the definition section) of the Act of 1891 in favour of the respondents. I pointed out that that argument does not carry counsel very far, and I agree with the view—which I have expressed before—presented by B counsel for the appellants, that, if we look at ss. 125 to 127 [repealed] of the Metropolis Management Act, 1855, on the one hand and s. 128 [repealed] of that Act on the other hand, I think the Act of 1855, although framed in a different way, did, practically speaking, draw the same distinction. Section 125 enabled the vestry to employ people to remove dirt, ashes, rubbish, ice, snow, and filth, and C by s. 126 the occupier could not refuse to allow them to remove soil, dirt, ashes, or filth, and by s. 127 the dirt, dust, night-soil, ashes and rubbish became the property of the vestry with power to dispose of it. Then s. 128 provided:

D "In case any scavenger be required by the owner or occupier of any house or land to remove the refuse of any trade, manufacture, or business, or of any building materials, such owner or occupier shall pay to the scavenger a reasonable sum for such removal, such sum, in case of dispute, to be settled by two justices."

It is quite true to say that there was in terms no definition of "house refuse," and no definition of "trade refuse"; but there were two groups of sections which I think have been reproduced in the interpretation clause—s. 141 of the Public E Health (London) Act, 1891. There the expression "house refuse" means "ashes, cinders, breeze, rubbish, night-soil, and filth, but does not include 'trade refuse'." That is the way, in my judgment, in which the later legislation has adopted the distinction embodied in ss. 125 and 127 of the Act of 1855. Then the expression "trade refuse" means "the refuse of any trade, manufacture, or business, or of any building materials." It clearly is not disputed that that is s. 128 repeated F again, because the words are exactly the same.

Therefore, if I am right in the view that ss. 125 to 127 dealt with "house refuse," and s. 128 dealt with "trade refuse," then the main argument on which counsel for the respondents relies is cut away from under him. Then, when he calls attention to the fact that in *St. Martin's Vestry v. Gordon* (5) the vestry were proceeding under the Act of 1855, and were dealing with ashes only, that cannot G avail him in the present case, because we have thought that the words "ashes, cinders, breeze, rubbish, night-soil, and filth, but does not include trade refuse," in the expression "house refuse," were quite wide enough to include the stuff taken away in the *Gordon Hotels Case* (1). Therefore we could not in the face of our previous judgment adopt that argument for the respondents. I think, therefore, that the result of the decisions binding on this court, as they now stand, is H that if the thing that is being demanded to be taken away is "house refuse" in fact—if that is its character—then it is not a good answer to say that that "house refuse" has been produced really in the course of carrying on a trade.

I need not refer to the authorities again except in a few sentences. I still think that there is a broad distinction between *Gay v. Cadby* (2) and *St. Margaret's Vestry v. Queen Anne Mansions Co.* (4) and *London and Provincial Steam Laundry Co. v. Willesden Local Board* (3), because the article in question in those cases was produced solely in the course of carrying on a particular kind of trade. But I am bound to say that, thinking as I do that there was that distinction, I ought not to give effect to that distinction in this court unless I am able to go the whole length that counsel for the respondents invited us to go, and say that any house refuse produced in the carrying on of a trade, such as the dust in shops, the ashes in shops, the refuse from the luncheons of the shopkeeper in a shop which is locked up at night and in which he does not live, is "trade refuse," and not "house

refuse." Unless I can go as far as that, it seems to me that I am bound by the decisions in the Court of Appeal and in this court, and in that case I would only call attention to the fact that an exactly similar argument was addressed to the court in *St. Martin's Vestry v. Gordon* (5), and LORD ESHER ([1891] 1 Q.B. at p. 67) declined distinctly to say that the ashes in the shop, and the dust in the shop, would be refuse of the trade, and it was in that connection that he expressed his dissent from the decision in *Gay v. Cadby* (2), if it goes the full length which counsel for the respondents is obliged to contend that it does. Although LORD LINDLEY adhered to his judgment in *Gay v. Cadby* (2), at which I am not at all surprised, LOPES, L.J., certainly laid down a definition of "trade refuse" which would have excluded and negatived the contention for which counsel for the respondents has argued. Then this court followed that decision in deciding *Westminster Corpn. v. Gordon Hotels, Ltd.* (1) in 1906, and while the judgment in that case stands I am wholly unable to accede to that which was the main argument addressed to us for the respondents.

I think, therefore, that the learned magistrate misdirected himself in thinking that unless refuse was produced in a house which contained all the ordinary elements of a dwelling-house, as, for instance, sleeping as well as dining there, the refuse must be "trade refuse." It seems to me that that was wrong, and that, having so directed himself, he has not found as a fact simpliciter that this was "trade refuse," but he has simply said it was not "house refuse" because the place where it was produced was not a "house." I do not refer particularly to the earlier sections of the Act which counsel for the appellants relies upon where "premises" are referred to as well as "houses." They do not in any way militate against the view I am expressing. I do not think that they carry the matter very much further. But for the reasons I have given I think the magistrate misdirected himself in point of law, and that this stuff was in fact that which has been decided to be "house refuse" in certainly two cases binding upon this court. I therefore think the appeal must be allowed, and that the Case must go back with directions to the learned magistrate to convict.

JELF, J.—I am also of opinion that this appeal must be allowed. The question before us is a mixed question of law and fact, and raises the old difficulty of "drawing the line." Whether or not the corporation are right in refusing to take away this stuff depends on the question whether it is, as they contend, "trade refuse," or whether it is, as the appellants contend, "house refuse." That, again, is to be decided on the application of s. 141 of the Public Health (London) Act, 1891. A good deal of stress has been laid upon the words "but does not include trade refuse." I think all that means is this, that, inasmuch as those words which go to define "house refuse" are somewhat general, the legislature, before giving the meaning of "trade refuse," meant in effect to say this. If those words might be taken to include what is really "trade refuse," then the generality of those words is to be controlled by this expression, that it is not to include "trade refuse."

The question which the magistrate leaves to us is this, as I understand it—whether or not, according to the principle which ought to guide the court and which has been the subject of decision, this particular refuse described in this case is "house refuse" or "trade refuse." It has been suggested for the respondents that the magistrate has stated the appellants out of court because he has found as a fact that the refuse was not "house refuse," but was "trade refuse." But that is not the way I read the Case. He says that he was of opinion on the facts that the premises were not a "house" within the meaning of the judgment in *Westminster Corpn. v. Gordon Hotels, Ltd.* (1), and that the refuse was not "house refuse." What I understand him to mean by that is this: "I submit to the court the facts which I do find; those are my findings, and they are contained in a paragraph of the Case." Then he asks for the directions of the court as to whether he is right on the mixed question of law and fact in coming to the

A conclusion that the refuse in question was "trade refuse" and not "house refuse." Turning to the words in the Case, dealing with the details of the refuse, it is obvious that it raises a question which has to be looked at closely, and there are numerous cases which fall distinctly on one side of the line or on the other. For example, in a carpenter's shop the sawdust and the shavings which come from the operations of the carpenter, the snippings from a tailor's work, and the hair which
B is cut from the heads of people in a hairdresser's shop, are all clearly "trade refuse," and one might illustrate that by many examples. On the other hand, there are certain things which one would think are quite clearly not "trade refuse." For instance, apart from the question as to the nature of the house or the premises, there are certain contingencies to which every building of every sort which has any opening into it is subjected. Wind blows in dust, smoke comes in, people walk
C into the place with dirty boots and leave dirt which afterwards turns into dust upon the floor. Those are all things which, unless we are bound by the distinction which my Lord has dealt with as to the difference between a house and a shop, and which was the chief line of contention for the respondents, are obviously things general and common to "house refuse" and to "trade refuse" also. Those are clearly on the other side of the line. The great difficulty is to apply this section
D and this distinction made in this interpretation clause to the particular facts of each particular case.

Here we have got a description of many things which are clearly merely "house refuse," and of certain other things which may be said to be "trade refuse." That is why I asked the question during the argument whether quantity has anything to do with the matter. I think that in this case, as in many other cases, the question
E arises, what substantially was the character of this stuff? It is impossible to dissect each of the particles from the other particles, and therefore we have to look at the question of substance, and after the finding that between one-half and two-thirds of the bulk was general sweepings and ashes—I think the word "general" is important there—it seems to me in this case that dealing with the character of the stuff alone, as distinct from the place in which it is produced, the line as to
F trade refuse is exceeded, and that this is a case in which the stuff is not "trade refuse," but is "house refuse." The quantity to a certain extent may come in, because in the illustration I put, a restaurant, especially a large restaurant, produces a vast number more crumbs than a mere ordinary house; but these are crumbs which fall from the table in both cases. In the case of a small quantity from a
G house, nobody would doubt that that is part of the house refuse. But in the case of a restaurant it is part undoubtedly of the residual product of the trade or business which is carried on. Here again I think we have to apply a rule of common sense and look at the substance of the matter. I cannot help thinking that upon this finding in this case, and especially having regard to the cases to which my Lord has so clearly called attention, this is clearly over the line of "trade refuse," and is "house refuse." In these circumstances I think the appeal should be
H allowed.

SUTTON, J.—I think the Act draws a distinction, and a marked one, between "trade refuse" and "house refuse," first of all, by the definition clause; and, secondly, by the fact that whatever falls within s. 30 does not fall under s. 33. As regards "trade refuse," it is clear that that means the residue of the manufacture,
I and does not include all matters necessary to carry the manufacture on. This case seems to me almost in all respects the same as that of a lock-up shop; and I think the magistrate has fallen into an error in regarding it as necessary, as he seems to have thought, that a person should sleep and reside in the house. That, I think, is wholly wrong, and therefore the appeal must be allowed.

Appeal allowed.

Solicitors: *Stanley, Woodhouse & Hedderwick; Sir Homewood Crawford.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

THOMPSON v. McKENZIE

[KING'S BENCH DIVISION (Lord Alverstone, C.J., A. T. Lawrence and Sutton, JJ.),
February 12, 13, 1908]

[Reported [1908] 1 K.B. 905; 77 L.J.K.B. 605; 98 L.T. 896; 72 J.P. 150;
24 T.L.R. 330; 52 Sol. Jo. 302; 21 Cox, C.C. 620]

*Licensing—Offence—Permitting drunkenness—Person admitted as lodger in hotel
when drunk—Admission during closing hours—Licensing Act, 1872 (35 & 36
Vict., c. 94), s. 13—Licensing Act, 1902 (2 Edw. 7, c. 28), s. 4.*

The appellant was licensed for the sale of intoxicating liquors by retail at his hotel. One night, during closing hours, a man came to the hotel and engaged a bedroom. The man was then drunk, and his drunkenness was observed by the appellant's manager, who nevertheless accepted him as a lodger and admitted him to the hotel, where he was soon afterwards found drunk by a police constable.

Held: as the appellant was not bound to admit the man, but could have refused to do so owing to his condition, he had not proved that he or persons employed by him had taken "reasonable steps for preventing drunkenness on the premises" under s. 4 of the Licensing Act, 1902, and, therefore, he was liable to be convicted of the offence of permitting drunkenness on the premises under s. 13 of the Licensing Act, 1872, notwithstanding that the premises were closed to the public at the time.

Notes. Sections 13 and 18 of the Licensing Act, 1872, and s. 4 of the Licensing Act, 1902, have been replaced by the Licensing Act, 1953, ss. 136 (1), (3), and (4), 138, and 136 (2) respectively.

Considered: *Lawson v. Edminson*, ante p. 323; *Young v. Gentle*, [1914-15] All E.R. Rep. 1200.

As to provisions to counter drunkenness, see 22 HALSBURY'S LAWS (3rd Edn.) 680 et seq., and for cases see 30 DIGEST (Repl.) 94 et seq. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142 et seq.

Cases referred to:

- (1) *Warden v. Tye* (1877), 2 C.P.D. 74; 46 L.J.M.C. 111; 35 L.T. 852; 41 J.P. 120, D.C.; 30 Digest (Repl.) 94, 706.
- (2) *Lester v. Torrens* (1877), 2 Q.B.D. 403; 46 L.J.M.C. 280; 41 J.P. 821; 25 W.R. 691, D.C.; 30 Digest (Repl.) 111, 808.
- (3) *R. v. Pelley*, [1897] 2 Q.B. 33; 66 L.J.Q.B. 519; 76 L.T. 467; 61 J.P. 373; 45 W.R. 504; 13 T.L.R. 319; 41 Sol. Jo. 455; 18 Cox, C.C. 556, D.C.; 30 Digest (Repl.) 111, 809.

Also referred to in argument:

- Kessack v. Smith* (1905), 7 F. (Ct. of Sess.) 75, J.; 30 Digest (Repl.) 96, *386.
- Hope v. Warburton*, [1892] 2 Q.B. 134; 61 L.J.M.C. 147; 66 L.T. 589; 56 J.P. 328; 40 W.R. 510; 36 Sol. Jo. 489, D.C.; 30 Digest (Repl.) 94, 708.
- R. v. Rymer* (1877), 2 Q.B.D. 136; 46 L.J.M.C. 108; 35 L.T. 774; 41 J.P. 199; 25 W.R. 415; 13 Cox, C.C. 378, C.C.R.; 29 Digest 9, 108.
- Lamond v. Richard*, [1897] 1 Q.B. 541; 66 L.J.Q.B. 315; 76 L.T. 141; 61 J.P. 260; 45 W.R. 289; 13 T.L.R. 235; 41 Sol. Jo. 292, C.A.; 29 Digest 6, 58.
- Sealey v. Tandy*, [1902] 1 K.B. 296; 71 L.J.K.B. 41; 85 L.T. 459; 66 J.P. 19; 50 W.R. 347; 18 T.L.R. 38; 20 Cox, C.C. 57, D.C.; 30 Digest (Repl.) 114, 831.

R. v. Ivens (1835), 7 C. & P. 213; 29 Digest 7, 76.

Case Stated by justices on an information preferred by the respondent under s. 13 of the Licensing Act, 1872, against the appellant for that he on July 28, 1907, at the city of Cardiff, then being a person licensed for the sale of intoxicating liquors

A by retail in his house and premises known as "Elliott's Family Hotel" there situate, did unlawfully permit drunkenness to take place on his licensed premises.

On the hearing of the information the following facts were proved. On July 28, 1907, the appellant was a person licensed for the sale of intoxicating liquors of all kinds by retail at his house and premises called "Elliott's Family Hotel," an inn situated in St. Mary's Street, Cardiff. At 11.20 p.m. on July 28, 1907 (a Sunday), B two police officers visited the appellants licensed premises, and found seven or eight men in the smoking-room of the licensed premises, one of the men, William John Thomas, was asleep in a chair. He was awakened and was found to be drunk. William John Thomas was a person lodging in the house, he having engaged a bedroom earlier that evening—namely, at 10.30 p.m. He was drunk when he entered the hotel at 10.30 p.m., and his condition of drunkenness was then C observed by the "boots" who booked the room, and by the appellant's manager who was in charge of the licensed premises. The manager accepted Thomas as a lodger, and took no step to eject him or to have him forthwith conducted to his sleeping apartment, but allowed him to go into the smoking-room and remain there with other lodgers for fifty minutes—namely, from 10.30 p.m. until 11.20 p.m.—without D taking any step to remove him, eject him, or prevent his remaining in a drunken condition in a room, the smoking-room, which was a public room to the other lodgers on the premises. In the city of Cardiff, premises licensed for the sale of intoxicating liquors by retail, are required by law to be closed during the whole of Sunday, except as to bona fide travellers, persons lodging in the house, and private friends bona fide entertained by the licensed person at his own expense.

E The magistrate was of opinion that s. 4 of the Licensing Act, 1902, being general in terms and containing no exemption, was applicable to proceedings for permitting drunkenness under s. 13 of the Licensing Act, 1872, in respect of all persons (except the licensed person himself, *Warden v. Tye* (1)) found drunk on licensed premises, and that on proof that any person (excepting only the licensed person himself) was drunk on such premises, it became incumbent on the licensed person to prove that F he and his servants took all reasonable steps for preventing drunkenness on the premises. And inasmuch as the appellant's manager, knowing Thomas to be drunk, had admitted him to the licensed premises although not bound so to do, having accepted Thomas as a lodger had omitted forthwith to conduct him to his sleeping apartment, and had permitted Thomas, whilst in a drunken condition to remain for fifty minutes with other lodgers in the smoking room, the magistrate was of opinion G that the appellant's manager had not taken all reasonable steps for preventing drunkenness, and accordingly, the appellant having failed to discharge the burden of proof incumbent on him, he convicted the appellant.

By the Licensing Act, 1872 :

H "Section 13. If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds. Any conviction for an offence under this section shall be recorded on the licence of the person convicted, unless the convicting magistrate or justices shall otherwise direct. . . . Section 18. Any I licensed person may refuse to admit to and may turn out of the premises in respect of which his licence is granted any person who is drunken, violent, quarrelsome, or disorderly, and any person whose presence on his premises would subject him to a penalty under this Act. Any such person who upon being requested in pursuance of this section by such licensed person, or his agent or servant, or any constable, to quit such premises, refuses or fails so to do shall be liable to a penalty not exceeding five pounds, and all constables are required on the demand of such licensed person, agent, or servant to expel or assist in expelling every such person from such premises, and may use such

force as may be required for that purpose. The court committing any person to prison for nonpayment of any penalty under this section may order him to be imprisoned with hard labour."

By s. 4 of Licensing Act, 1902 :

"Where a licensed person is charged with permitting drunkenness on his premises, and it is proved that any person was drunk on his premises, it shall lie on the licensed person to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises."

John Sankey for the appellant.

Ivor Bowen for the respondent.

LORD ALVERSTONE, C.J.—This case raises a question of great difficulty and nicety, and I do not feel at all clear as to the judgment I am about to give. I think that reasons almost equally cogent may be given on both sides. On one side it may be said, as counsel for the appellant has contended, that the appellant did not permit drunkenness at all, but that he simply allowed a man who was drunk to come into his premises. On the other side it may be said that the object of this statute was to prevent drunkenness on licensed premises as far as it was possible to do so, and that if a licence-holder permitted a drunken person to be on his licensed premises, although he may not have contributed to his drunkenness, an offence had been committed. Between these two considerations on the one side and on the other we have to express our opinion. If I thought that the licensed person could have refused admission to the man Thomas, who was subsequently found drunk on the premises, then I should think the conviction ought not to be quashed. But if, on the other hand, having regard to the character of the inn or to what actually happened, the appellant was bound to admit the man, then I think it could not be rightly said that the appellant had permitted drunkenness on his premises. In order to decide the matter we have to look carefully at the sections of the Acts and the decisions which had been given upon them.

In the first place, we have s. 12 of the Licensing Act, 1872, which provides that

"Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty. . . ."

It is quite clear that licensed premises are not there treated as a public place or as part of a public place, because the words "licensed premises" are added in addition to the words "public place." Then s. 13 provides that

"If any licensed person permits drunkenness . . . to take place on his premises . . . he shall be liable to a penalty. . . ."

Then s. 18 provides that

"any licensed person may refuse to admit to and may turn out of the premises in respect of which his licence is granted any person who is drunken . . . and any person whose presence on his premises would subject him to a penalty under this Act."

That section is wanted in order to prevent actions of trespass on the part of a drunken person who has been turned out of licensed premises, and the section also applies to the case of a refusal to admit a drunken person, in which case there would be no trespass at all. Then s. 25 of the Act provides that if, during any period during which any premises are required under the provisions of the Act to be closed, any person is found on such premises he shall, unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a bona fide traveller, or that otherwise his presence on the premises was not in contravention of the Act, be liable to a penalty. Then s. 4 of the Licensing Act, 1902, provides that

"where a licensed person is charged with permitting drunkenness on his premises, and it is proved that any person was drunk on his premises, it shall

A lie on the licensed person to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises."

It is to be noted that that section does not limit its provisions to open hours. It applies in certain circumstances to the premises during closing hours, and the intention of the legislation was that the licensed person should prevent drunken people from coming into his premises at all, unless he was obliged to admit them by some paramount authority. From its being an offence for a person to be drunk on licensed premises, and its being an offence for a licensed person to permit drunkenness on his premises, and from the licensed person being entitled to refuse admission to a person in a state of intoxication, it follows that it is an offence for the licensed person to permit a drunken lodger to be on the premises. That is supplemented by the provision that the licensed person is bound to take all reasonable precautions for preventing drunkenness on the premises, and that the onus is on him to prove that he has done so.

As to the decided cases, it was decided in *Warden v. Tye* (1) that a licensed person could not be convicted of permitting drunkenness under s. 13 of the Licensing Act, 1872, by reason of getting drunk on his own premises, and in *Lester v. Torrens* (2) it was decided that the term "licensed premises," as used in s. 12 of the Licensing Act, 1872, means licensed premises while they are open to the public for the purposes of the licence; and that consequently a licensed person who is found drunk on licensed premises in his own occupation after licensed hours and when the premises are closed to the public is not liable to a penalty under s. 12. Therefore we have those two cases which recognise that if a person is, so to speak lawfully on the licensed premises after licensed hours, and is found drunk there after those hours, that is not sufficient to constitute the offence of being drunk on the premises, and that is really involved in the judgments in *R. v. Pelly* (3), where Hawkins, J., decided that a customer, not being an inmate or lodger, who is found drunk in a public-house after the closing hour, and after the premises are, in fact, closed may be convicted under s. 12 of the Licensing Act, 1872, of being found drunk on licensed premises. Counsel for the appellant rightly relied on that case as showing that if the person found drunk on the premises in that case were on the premises either as landlord or as lodger, there would not have been sufficient to support a conviction. The point that the landlord was not bound to admit this man Thomas at all, was not taken before the magistrate; but it is found in the Case that

G "Thomas was a person lodging in the house, having engaged a bedroom earlier that evening—namely, at 10.30 p.m."

I at first thought that that was before he was admitted, but that was not so, as appears from the next paragraphs, which say that he was drunk when he entered the hotel at 10.30 p.m., and his condition of drunkenness was then observed by the "boots" who booked the room, and by the appellant's manager, who was in charge of the licensed premises; that the manager accepted Thomas as a lodger, and took no step to eject him, or to have him forthwith conducted to his sleeping apartment.

In these circumstances I think we must find that there was no obligation upon this licensed person to permit this man Thomas to come into the house; that he might have refused to admit him under s. 18 of the Licensing Act, 1872, and that if without any previous contract a licensed person does admit a drunken person to his premises, even after the closing hour, it would be an offence against s. 13 of that Act. The learned magistrate gives as one of the reasons for his opinion that an offence had been committed, that the manager had omitted to conduct Thomas forthwith to his sleeping apartment; but I am not sure that that is a good reason, as he might have refused to admit him at all. The case is very near the line, but having regard to the fact that he need not have admitted the man at all, but did

admit him, I am not prepared to say that the magistrate came to a wrong conclusion when he said that the appellant had not discharged the onus cast upon him by s. 4 of the Licensing Act, 1902. I therefore think that the appeal ought to be dismissed.

A. T. LAWRENCE, J.—I am of the same opinion, though I have felt great difficulty in coming to this conclusion, to which I certainly should not have come if it had not been for the finding of the magistrate that the appellant was not bound to admit this man. I think the magistrate was justified in that finding because at common law the appellant was not bound to receive the man as he was drunk, and he appears to have been under no contract to receive him because he was not a lodger in the house at the time when he presented himself at 10.30 p.m. to be taken in. That being so, the question is whether it was not an offence under s. 13 of the Licensing Act, 1872, to receive him as lodger when in a drunken condition. That section is directed rather to the conduct of a licensed person than to the management of his house. It says that if any licensed person permits drunkenness to take place on his premises he shall be liable to a penalty. I have had great doubt whether admitting a man in a condition of drunkenness is permitting drunkenness to take place on the premises; but s. 4 of the Licensing Act, 1902, seems to show that it is. That section seems to construe the words as having that meaning, because it says that where a licensed person is charged with permitting drunkenness on his premises, it shall lie on him to prove that he took all reasonable steps "for preventing drunkenness on the premises," but it does not say "for preventing persons becoming drunk on the premises." Consequently, with some doubt, I come to the conclusion that this conviction must be upheld.

SUTTON, J.—My own opinion is clear that the fact of the appellant having the power to refuse admission to the man and having declined to exercise it, was evidence in itself that he permitted drunkenness on the premises.

Appeal dismissed.

Solicitors: *Windybank Samuel, Lawrence*, for *Lewis Morgan & Box*, Cardiff; *Smith, Rundell, & Dods*, for *Joseph L. Wheatley*, Cardiff.

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

Re RUDDOCK. NEWBERRY v. MANSFIELD

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), February 2, 3, 1910]

[Reported 102 L.T. 89]

Trustees—Apportionment of trust funds among beneficiaries—Unreasonable delay—Application to obtain such apportionment—Costs of application—Payment by trustees personally—R.S.C. Ord. 65, r. 1.

Although there may be cases in which there are such difficulties that trustees ought not to be called upon to exercise their power of apportionment of trust funds among the beneficiaries entitled thereto except with the sanction of the court, yet, unless that state of circumstances exists, trustees are not justified in refusing to sell or appropriate the trust securities, and they will be held to have acted unreasonably and improperly in so refusing, and be ordered to pay the costs under Ord. 65, r. 1, of an application to the court on behalf of the beneficiaries to obtain such apportionment.

Notes. As to liability of trustees as to costs of legal proceedings, see 33 HALSBURY'S LAWS (2nd Edn.) 313 et seq., and for cases see 43 DIGEST 827 et seq., and 976 et seq.

Cases referred to in argument :

Re Wright's Trusts (1857), 3 K. & J. 419; 69 E.R. 1173; 43 Digest 759, 2021.

Re Nickels, Nickels v. Nickels, [1898] 1 Ch. 630; 67 L.J.Ch. 406; 78 L.T. 379; 46 W.R. 422; 42 Sol. Jo. 414; 24 Digest (Repl.) 649, 6399.

Turner v. Hancock (1882), 20 Ch.D. 303; 51 L.J.Ch. 517; 46 L.T. 750; 30 W.R. 480, C.A.; 43 Digest 831, 2763.

Appeal from a decision of WARRINGTON, J.

By his will, dated Aug. 4, 1897, William Ruddock appointed four persons (of whom one was a solicitor) executors and trustees thereof, and devised and bequeathed to them his real estate and his residuary personal estate on trust for sale and conversion as therein mentioned, and directed them to levy and raise (inter alia) three several legacies of £15,000 each and one legacy of £10,000; and as to and concerning one of the three several legacies of £15,000 and the stocks, funds, and securities representing the same the testator declared that his trustees should pay the interest, dividends, and income thereof unto Ellen B. Newberry (one of the four children of the testator's late wife) during her life without power to anticipate; and, after the death of Ellen B. Newberry, should stand possessed of such legacy of £15,000 and the stocks, funds, and securities representing the same and the interest, dividends, and income thereof in trust for her children and issue as therein mentioned. And as to and concerning the legacy of £10,000 and the stocks, funds, and securities representing the same the testator declared that his trustees should pay the interest, dividends, and income thereof to Marianne Mansfield (another of the four children of the testator's late wife) without power to anticipate; and, after the decease of Marianne Mansfield, should stand possessed of such legacy of £10,000 and the stocks, funds, and securities representing the same and the interest, dividends, and income thereof in trust for her children and issue as therein mentioned. And in case there should be no child or issue who should acquire a vested interest in the legacies of £15,000 and £10,000, the testator directed that the same should fall into and form part of his residuary estate as therein mentioned. By a codicil dated Feb. 27, 1899, the testator declared that in case there should be no child or issue of Marianne Mansfield who should acquire a vested interest in the legacy of £10,000, the same should not fall into or form part of his residuary estate, but should as to one moiety or equal half part thereof be held by the trustees upon the

same trusts and be paid and applied in the same manner as if the same had formed part of the legacy or sum of £15,000 given to William Wall Mansfield for his life and after his death to his children or issue; and as to the remaining moiety or half part thereof the same should be held by the trustees upon the same trusts and be paid and applied in the same manner as if the same had formed part of the legacy of £15,000 given to Ellen B. Newberry for her life and after her death to her children or issue.

The testator died on May 9, 1903. Ellen B. Newberry died on Feb. 7, 1907, leaving five children only surviving her—viz., William J. Newberry, Francis J. Newberry, Violet E. Newberry, and Anne M. Newberry, all of whom had attained the age of twenty-one years, and Dorothy K. Newberry, who was an infant and unmarried. Anne M. Newberry was of weak mind, and, by an order dated July 5, 1907, receivers were appointed of her estate under the provisions of the Lunacy Acts. Marianne Mansfield died on Oct. 21, 1907, without ever having been married, whereupon the legacy of £10,000 fell in under the provisions of the testator's will and codicil, and the five children of Ellen B. Newberry each became entitled to one fifth share of a moiety of such legacy or the stocks, funds, and securities representing the same. At the date of the death of Marianne Mansfield the funds representing the legacy were invested in various trust investments, including a mortgage for £1,500 on freehold property, and a railway company's preference stock. Another part of the trust funds was invested in Consols and similar securities. In the early part of 1909 lengthy correspondence and negotiations took place between some of the adult beneficiaries and the solicitor-trustee (who was the solicitor acting on behalf of the trustees of the will) as to the distribution of the funds. In consequence of the continued delay in obtaining such distribution, an originating summons was taken out on behalf of the adult beneficiaries against the trustees asking that the defendants as trustees of the will might be ordered forthwith to pay or transfer to the three adult beneficiaries, William J. Newberry, Francis J. Newberry, and Violet E. Newberry, respectively and pay or transfer into court to the credit of Anne M. Newberry, the lunatic beneficiary, their several shares of and in the legacy less such sums as the court might think fit to allow the defendants to retain so as to be available for payment of their taxed costs, charges, and expenses; and that the defendants might be ordered to pay the costs of the application.

By R.S.C., Ord. 65, r. 1 :

"Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for good cause, otherwise order."

The summons was adjourned into court and came on to be heard before WARRINGTON, J., on Oct. 19, 1909, when his Lordship decided that the trustees had acted unreasonably and improperly in refusing to distribute the funds. Accordingly his Lordship made an order for payment or transfer as asked by the originating summons, and directed the defendants to pay the costs of the application. The trustees appealed as to the latter part of the order.

Levett, K.C., and *Boome* for the trustees.

Maugham, for the adult beneficiaries.

- A SIR HERBERT COZENS-HARDY, M.R.**—This is a most unfortunate case, but it is one in which I do not entertain the smallest doubt that the order of WARRINGTON, J., was perfectly right. The case is really a very simple one. There was a legacy of £10,000, which was divisible in moieties, the moieties belonging, in the events which have happened, in the one case to certain persons with whom we are not here concerned, and in the other case to a class of five persons, the tenant for life being dead. Of those five persons, three are adults and *compos mentis*; the fourth is adult but non *compos mentis*; and the fifth is an infant. The legacy of £10,000 was invested in an exceedingly simple manner. There was a £1,500 mortgage which everybody admits to be a good mortgage. Nobody suggests that that should not be retained as an investment. The other investments consisted of Consols, National Loan Debt—which, again, is a good security—and two sums of Great Eastern Preference Stock, one a preference stock of 1890, and the other of 1893. On the death of the tenant for life three of the adult persons who were *compos mentis* and interested in three-fifths of the moiety were naturally anxious to get paid, and they applied to the trustees. I have no intention of going through the terribly long correspondence which thereupon took place, but I must indicate some aspects of the case.
- D** First of all, it was suggested that the trustees should sell enough to give those beneficiaries their respective shares—either the £1,500 mortgage alone, which was a good mortgage, or, if they liked, the whole of the investments. It was admitted that there would be something due to the legal personal representatives of the deceased tenant for life, but it was suggested that the dividends which had since been received were more than enough for that. The trustees' costs would also
- E** have to be provided for, but those, it was said, could be taken out of the income which the trustees had in hand, and they were asked not to complicate the matter by those considerations. Then there was a request made that the trustees should execute a formal agreement which was sent by the trustees to the three adults or their solicitors. The agreement in that shape was certainly a thing which they were not bound to execute, any more than they were bound to execute a release.
- F** But it was an agreement proceeding on the footing that a sufficient sum of the Stock Exchange securities should be realised in order to pay the shares of the persons who were absolutely entitled to three-fifths of the moiety. The correspondence went on, and a draft release was sent to and received by the beneficiaries. It was only a release, as of course one understands it must have been, by the three adult beneficiaries who were *compos mentis*. It did not, and of course could not, have
- G** asked for a covenant of indemnity against any claim which might be made by, or on behalf of, the beneficiary who is of unsound mind, or the infant beneficiary; but it was a demand for a release under seal in a case of this simplicity. The three beneficiaries said, and they were perfectly justified in saying, that they were not going to the expense of that release, which would have to be paid for out of their three-fifths of the moiety. They asked the trustees to send their accounts and the beneficiaries would approve them. "We will," they said, "sign at the foot of the accounts that we do approve, and we will take the money in full settlement of our shares." That was arranged. Then this claim was made by the trustees: "We will not part with any portion of this fund until you get our accounts approved by the person of unsound mind, and by the infant." That was again protested against. Then it was suggested that there was some slight difference—it might be only a difference of a few shillings—in the accounts which were proposed. Then
- I** the beneficiaries said, quite reasonably, that they accepted the accounts; not minding the small difference therein. Whereupon the trustees said that the beneficiaries did not explain whether they agreed with the view that the original accounts were inaccurate to that small extent. The beneficiaries said that they did not care, and that they would take the trustees' figures asking them to divide the fund. The trustees went one step further. Not only would they not divide the fund in that way, but they said also that they would not divide it at all unless they could get

the accounts settled and approved by all the beneficiaries, including the person of unsound mind and the infant, and that they would ask for an indemnity against any claim by those persons. This sort of thing was going on from the end of 1908 until July, 1909. After reams of correspondence had thus passed between the parties, after many letters had been written by the trustees' solicitors (which I may say I hope will not be allowed as costs, charges, and expenses properly incurred by the trustees when they come to be taxed) the patience of the beneficiaries was exhausted, and they took out an originating summons asking that their shares of the moiety might be paid, and the trustees might be ordered to pay the costs of the summons.

That the court has jurisdiction to make the trustees pay those costs cannot, of course, be disputed for one moment. Order 65, r. 1 of the Rules of Court makes all such costs of proceedings within the discretion of the court. The only proviso is that

"nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs. . . ."

The argument which we have heard is of the most extraordinary character. It is said that, given a case in which there are adult beneficiaries and one infant, the trustees cannot be required either to sell securities and pay the adults their shares or to apportion the trust funds so as to give the adults their shares. What does that mean? It means that in every case the trustees would be entitled to throw the estate into court in order to get the apportionment approved by the court. I entirely protest against any such doctrine. There is an implied power for trustees to appropriate, and that is quite settled and definite. There may be many cases in which the funds are of such a nature that the apportionment is perfectly easy, and it is proper for the trustees to realise the whole and give the aliquot proportion to the adults. There may be other cases in which the investments are of such a nature that the apportionment is perfectly easy and perfectly proper.

In the present case we are dealing with trustee investments, a mortgage of undoubted value, and we are dealing with Stock Exchange securities which have a well-known and ascertained value. In such a case the trustees have a power to appropriate, and they ought to appropriate. I certainly will be no party to the doctrine that trustees can say that they will neither sell so as to pay the beneficiaries in cash, nor will they appropriate so as to give the beneficiaries that which the trustees have the power to give them, except under an order of the court. Let me not be supposed to say for a moment that there may not be estates of such a complicated character, and containing so many highly speculative investments, and investments which have not, many of them, a settled quotation on the Stock Exchange, or a quotation at all on the Stock Exchange, in which the trustees would be acting with, I think, ordinary prudence, and in which they ought to be protected by the court, if they say in those circumstances "There are such difficulties here that we ought not to be called upon to exercise our power of apportionment except with the sanction of the court." But unless that state of circumstances exists, I am clearly of opinion that trustees are not justified in saying that they will neither sell nor will they appropriate, but will drive the beneficiaries into court. That really, I think, is the whole of this case. The learned judge in the court below has said that the trustees here acted unreasonably and improperly in demanding the release that they did and in refusing to pay the adults their shares unless proceedings were taken by virtue of which they might get a discharge for the lunatic's share, and unless such proceedings were taken to bind the infant's share, which could only be bound by proceedings in court. I think that if ever there was a case in which trustees have acted unreasonably and improperly, and in which they ought to be mulcted in costs, that is this case.

A I confess that I have had considerable doubt in my mind whether this is not a case in which we ought to have directed, and ought to have proceeded—as we could in the matter of the solicitors—and have got the trustees' solicitors to appear to show cause why they should not be ordered to pay the costs which the defendants have been ordered to pay both in the court below and here. Having regard, however, to what counsel for the trustees has said, that what the solicitors did was with the approval and with the consent of the trustees themselves, and having regard to the fact that counsel for the beneficiaries does not ask it, I hesitate whether we ought to take a step of that kind. I can only say that I hope that when this matter comes before the taxing master he will, in taxing the costs, charges, and expenses properly incurred, have regard to the view that this court has expressed as to the unreasonable nature of this correspondence and of the steps which the trustees have taken. In my opinion this appeal must be dismissed with costs.

C **FLETCHER MOULTON, L.J.**—I agree.

BUCKLEY, L.J.—There are in this case three surviving trustees. One of them is a solicitor and a member of the firm of solicitors who were acting for the trustees, and to the perusal of whose letters we have just been listening. The only point in this case which has given me any concern is as to whether the court ought to part with this application without having called upon that firm to show cause why they should not pay these costs. That the trustees by these letters have been guilty of such misconduct as to deprive them of any right to costs, and expose them to the liability to pay the costs, seems to me so plain as to require no argument at all. I have hesitated, however, very much, as I say, as to whether we ought to part with this summons without taking that course. But counsel for the beneficiaries was asked whether he was content with the order as against the trustees themselves, and he said that he was. So far so good. But that does not discharge the court of its responsibility. The only ground upon which I can concur in the course which is proposed is on the ground that one of the counsel for the trustees has informed the court that the acts of the solicitors were approved by the trustees. If that is so, I do not know that we can go behind that and see whether the solicitors were acting—as the solicitor-trustee may have been—in order to make costs because he is the solicitor entitled under the will to charge costs. If the trustees were authorising and directing their solicitors to take this course that is another matter, and upon that ground alone I am content to stop without directing that this summons be amended and be entitled a matter in the Solicitors Act, and calling upon the solicitors to show cause why they should not pay costs.

Appeal dismissed.

Solicitors: *Champion & Henderson; Crossman, Prichard, Crossman & Block.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re SWAIN. PHILLIPS v. POOLE

[CHANCERY DIVISION (Joyce, J.), July 2, 31, 1908]

[Reported 99 L.T. 604; 24 T.L.R. 882]

Perpetuity—Indefinite gift of income to non-charitable organisation—No intention to give corpus.

An indefinite gift of income to a voluntary organisation which is not charitable will be void for perpetuity where there is no intention express or implied that the donee is to take the corpus or capital.

A testator by his will made in 1899 gave a life interest to his wife in all his real and personal estate. On her demise he gave "the same income to the chess club at Penzance for the support and furtherance of chess and the perpetuity of the club of that town . . . and in case the said chess club shall have ceased to exist by the time this my bequest shall have come into effect, then I give the same income to the Penzance Library." In chambers the gift to the chess club was decided to be void for perpetuity.

Held: on the construction of the will the income only was intended to pass, and the gift was void for perpetuity.

Notes. Considered: *Re Levey, Barclays Bank, Ltd. v. Board of Guardians and Trustees for the Relief of the Jewish Poor*, [1960] 1 All E.R. 42.

As to the rule against perpetuities in relation to charities, see 4 HALSBURY'S LAWS (3rd Edn.) 300 et seq., and for cases see 8 DIGEST (Repl.) 437 et seq.

Cases referred to:

- (1) *Carne v. Long* (1860), 2 De G.F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 6 Jur. N.S. 639; 8 W.R. 570; 45 E.R. 550, L.C.; 8 Digest (Repl.) 437, 1278.
- (2) *Cocks v. Mannors* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 325, 88.
- (3) *Re Allsopp's Estate, Gell v. Carver*, [1884] W.N. 196; sub nom. *Re Allsopp, Gell v. Carver*, 1 T.L.R. 4; 8 Digest (Repl.) 346, 274.

Also referred to in argument:

- Re Dutton, Ex parte Peake* (1878), 4 Ex.D. 54; 48 L.J.Q.B. 350; 40 L.T. 430; 27 W.R. 398; sub nom. *Re Dutton, Ex parte Tunstall Athenæum Trustees*, 43 J.P. 6; 8 Digest (Repl.) 437, 1281.
- Re Bristol Athenæum* (1889), 43 Ch.D. 236; 59 L.J.Ch. 116; 61 L.T. 795; 38 W.R. 396; 6 T.L.R. 83; 1 Meg. 452; 8 Digest (Repl.) 650, 2.
- Re Clarke, Clarke v. Clarke*, [1901] 2 Ch. 110; 70 L.J.Ch. 631; 84 L.T. 811; 49 W.R. 628; 17 T.L.R. 479; 45 Sol. Jo. 484; 8 Digest (Repl.) 356, 352.
- Re Wilkinson's Trusts* (1887), 19 L.R. Ir. 531; 8 Digest (Repl.) 429, *429.
- Re Amos, Carrier v. Price*, [1891] 3 Ch. 159; 60 L.J.Ch. 570; 65 L.T. 69; 39 W.R. 550; 7 T.L.R. 559; 8 Digest (Repl.) 437, 1283.
- Thomson v. Shakespear* (1860), 1 De G.F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur. N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.J.J.; 8 Digest (Repl.) 391, 843.
- Mannox v. Greener* (1872), L.R. 14 Eq. 456; 27 L.T. 408; 23 Digest (Repl.) 514, 5780.

Originating Summons to determine what interest, if any, passed to the Penzance Library under the will of a testator.

Henry Thomas Swain by his will, dated June 1, 1899, after directing that his debts and funeral and testamentary expenses should be paid, gave to his wife, C. G. Swain, for her life, the income from all his real and personal estate, and on her demise the will continued:

"I give the same income to the chess club at Penzance for the support and furtherance of chess and the perpetuity of the club of that town in the manner

A its committee shall from time to time determine, and in case the said chess club shall have ceased to exist by the time this my bequest shall have come into effect, then I give the same income to the Penzance Library now occupying a house in the Public Morrab Gardens."

The testator appointed Charles Phillips sole executor of his will. H. T. Swain died on Sept. 30, 1905, and his will was duly proved by C. Phillips on Mar. 20, 1906. C. G. Swain survived the testator, and was one of the plaintiffs to this summons. At the time of his death the testator was possessed of personal property of the amount of £1,080, and was seised of eight freehold houses, Nos. 8 to 15, Marchwood Road, Berrywood, Millbrook, of the value of £1,271.

B
C
D JOYCE J., decided in chambers that the gift to the chess club was void on the face of it as creating a perpetuity. The Penzance Library was founded in 1818, and principally supported by the subscriptions of the members and life members and subscribers. It was managed by officers, consisting of a president, treasurer, secretary, and librarian, a committee of management, and a sub-librarian, elected annually. The management of all its affairs was vested in the committee. The legal ownership in all books and property belonging to the library was vested in the officers for the time being, who were made trustees for the members, and r. 32 provided:

E "The institution shall not be broken up as long as ten members remain, but whenever the number shall be reduced below ten all donations shall be returned to the donors, and the remaining books and other articles shall be forthwith sold by public auction and the proceeds appropriated to the foundation or support of some scientific institution in the town of Penzance to be determined by a majority of the remaining members."

F By an order dated Nov. 25, 1907, the court appointed C. Phillips and E. A. De Ridder trustees of the will. Under these circumstances the two trustees so appointed and C. G. Swain, the widow, took out this summons to determine whether any interest in the testator's real and personal estate passed to the Penzance Library. The defendant W. H. Julyan was the secretary of the Penzance Library, and as such was sued on behalf of himself and all other the members of the Penzance Library.

L. W. Byrne for the plaintiffs.

C. J. W. Farwell for the Penzance Library.

Cur. adv. vult.

G July 31, 1908. **JOYCE, J.**, read the following judgment.—In this case the testator bequeathed to his wife for her own use,

H "all the income accruing from my estate and effects both real and personal whatsoever and wheresoever and what nature and quality soever, and on her demise I give the same income to the chess club at Penzance for the support and furtherance of chess and the perpetuity of the club of that town in the manner its committee shall from time to time determine, and in case the said chess club shall have ceased to exist by the time this my bequest shall have come into effect, then I give the same income to the Penzance Library now occupying a house in the Public Morrab Gardens."

I The class of gift to this library has already been the subject of judicial decision in *Carne v. Long* (1). When this case originally came on the gift to the chess club was determined to be void on the face of it as creating a perpetuity, and I so decided. The library was not then represented; at all events, the question with regard to the library stood over. The fact of the gift to the chess club being void does not in itself prevent the gift of the legacy to the library. I am only dealing with personal estate taking effect in the event which has happened—namely, the ceasing of this chess club to exist during the lifetime of the widow—because it is not a remainder on a void limitation, but is an alternative gift. The

cases, in my opinion, show that a gift to a voluntary association of a legacy which is to go into its coffers and may be spent with its other funds as income is valid. This is involved in *Cocks v. Manners* (2), and is dealt with in WICKEN, V.-C.'s, judgment.

There is also another case which seems not to be much known, *Re Allsopp's Estate, Gell v. Carver* (3). That was a case of a sacred harmonic society established for the practice of choral singing and performance of oratorios and similar works, and supported by the subscriptions of the members and receipts from the concerts; and all it says in the report in the WEEKLY NOTES is that it was held not to be a charity so as to be within the disabilities imposed by the Charitable Uses Act, 1735. I have had the record of that case looked up. I do not know that it is very material to this case, but I will state what the result is. It was a case on further consideration in an administration action before CHITTY, J., on Oct. 27, 1884. The court declared :

"That the Nottingham Sacred Harmonic Society in the said will mentioned is not a charity, and is entitled to one third part or share of the testator's residuary, real, estate and of such portions of his residuary personal estate as have arisen from or are connected with any interest in land respectively devised and bequeathed by the codicil to the said will; but this court doth declare that the Nottingham School of Art and the Castle Museum, Nottingham, in the said will mentioned are respectively charities, and that the devise and bequest between them of the remaining two third parts or shares of the said residuary real estate and of such portions of the testator's residuary personal estate as have arisen from or are connected with any interest in land are void as being within the intent and meaning of the above-mentioned Act," and so on.

I can mention other cases in which gifts to societies have been supported, and it is not necessary, in my opinion, to the validity of such a gift that it must be in accordance with the rules of the society, or be possible under the rules to distribute the money as or by way of bonus to the individual members. In the present case all that is expressed in the will is a gift of income out of the estate to this society. Now, an indefinite gift of income ordinarily amounts to a gift of the corpus or capital, but that is only so where there is no intention express or implied that the donee is not to take more. In the present case, looking at the circumstances and reading the whole will, I am of opinion, on the terms of the will itself, that nothing more was intended to be given to this society than the annual rents, dividends, and profits. Therefore, in my opinion, that is a perpetuity or tends to perpetuity on the face of it, and the gift is void.

Solicitors : Mackrell, Maton, Godlee & Quincey.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

HUMPHRIES v. HUMPHRIES

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.J.J.),
June 13, 23, 1910]

[Reported [1910] 2 K.B. 531; 79 L.J.K.B. 919; 103 L.T. 14]

Res Judicata—Action for rent due under alleged agreement for lease—Defence of no concluded agreement—No plea of non-compliance with Statute of Frauds—Second action for further rent due—Availability of defence of no note or memorandum in writing—Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 4.

An action was brought by the plaintiff to recover arrears of rent due under an alleged agreement for a lease made between the plaintiff and the defendant. As a defence to that action the defendant set up that no agreement had been concluded, but raised no defence under s. 4 of the Statute of Frauds. Judgment was entered for the plaintiff. A subsequent action was brought by the plaintiff to recover further arrears of rent which had accrued due since the first judgment. The defendant thereupon raised the defence that there was no memorandum or note in writing of the agreement sufficient to satisfy the requirements of s. 4 of the Statute of Frauds.

Held: as the defendant had not availed himself of the defence under the Statute of Frauds in the first action, he was estopped from doing so in the second.

Howlett v. Tarte (1) (1861), 10 C.B.N.S. 813, considered.

Notes. Section 4 of the Statute of Frauds, 1677 (4 HALSBURY'S STATUTES (2nd Edn.) 658) now applies solely to contracts of guarantee. The part of the section relating to "any contract or sale of lands hereditaments or any interest in or concerning them" has been repealed and replaced by the Law of Property Act, 1925, s. 40 (20 HALSBURY'S STATUTES (2nd Edn.) 500), and the rest of the section (apart from contracts of guarantee) has been repealed by the Law Reform (Enforcement of Contracts) Act, 1954, s. 1 (34 HALSBURY'S STATUTES (2nd Edn.) 97).

Applied: *Cooke v. Rickman*, [1911-13] All E.R. Rep. 152. Referred to: *Hoystead v. Taxation Comr.*, [1925] All E.R. Rep. 56; *Lindsay v. Lindsay*, [1934] All E.R. Rep. 149; *British and French Trust Corpn. v. New Brunswick Rail. Co.*, [1937] All E.R. 516.

As to estoppel by *res judicata*, see 15 HALSBURY'S LAWS (3rd Edn.) 184 et seq., and for cases see 21 DIGEST 174 et seq.

Cases referred to:

(1) *Howlett v. Tarte* (1861), 10 C.B.N.S. 813; 31 L.J.C.P. 146; 9 W.R. 868; 142 E.R. 673; 21 Digest 146, 96.

(2) *Leaf v. Tuton* (1842), 10 M. & W. 393.

(3) *Re Hilton, Ex parte March* (1892), 67 L.T. 594; 9 Morr. 286; 21 Digest 177, 293.

(4) *Shoe Machinery Co., Ltd. v. Cutlan*, [1896] 1 Ch. 667; 65 L.J.Ch. 314; 74 L.T. 166; 40 Sol. Jo. 336; 13 R.P.C. 141; 21 Digest 179, 302.

(5) *Irish Land Commission v. Ryan*, [1900] 2 I.R. 565; 21 Digest 146, s.

Also referred to in argument:

Boileau v. Rutlin (1848), 2 Exch. 665; 12 Jur. 899; 154 E.R. 657; 21 Digest 165, 233.

Leroux v. Brown (1852), 12 C.B. 801; 22 L.J.C.P. 1; 20 L.T.O.S. 68, 100; 16 Jur. 1021; 1 W.R. 22; 138 E.R. 1119; 12 Digest (Repl.) 182, 1241.

Davis v. Hedges (1871), L.R. 6 Q.B. 687; 40 L.J.Q.B. 276; 25 L.T. 155; 20 W.R. 60; 21 Digest 176, 287.

Hindley v. Haslam (1878), 3 Q.B.D. 481; 27 W.R. 61, D.C.; 21 Digest 171, 266.

Jewsbury v. Mummery (1872), L.R. 8 C.P. 56; 21 W.R. 270; sub nom. *Jewesbury v. Mummery*, 42 L.J.P.C. 22; 27 L.T. 618, Ex.Ch.; 21 Digest 177, 292.

Newington v. Levy (1870), L.R. 6 C.P. 180; 40 L.J.C.P. 29; 23 L.T. 595; 19 W.R. 473, Ex.Ch.; 21 Digest 177, 291.

Re Hoyle, Hoyle v. Hoyle, [1893] 1 Ch. 84; 62 L.J.Ch. 182; 67 L.T. 674; 41 W.R. 81; 87 Sol. Jo. 46; 2 R. 145, C.A.; 12 Digest (Repl.) 146, 921.

Sanders v. Coward (1845), 15 M. & W. 48; 3 Dow. & L. 281; 15 L.J.Ex. 97; 10 Jur. 186; 153 E.R. 756; sub nom. *Saunders v. Coward*, 6 L.T.O.S. 414; 32 Digest 396, 759.

Hunter v. Stewart (1861), 4 De G.F. & J. 168; 31 L.J.Ch. 346; 5 L.T. 471; 8 Jur. N.S. 317; 10 W.R. 176; 45 E.R. 1148, L.C.; 21 Digest 201, 442.

Caird v. Moss (1886), 33 Ch.D. 22; 55 L.J.Ch. 854; 55 L.T. 453; 35 W.R. 52; 2 T.L.R. 665, C.A.; 21 Digest 172, 267.

Carter v. James (1844), 2 Dow. & L. 236; 13 M. & W. 137; 13 L.J.Ex. 373; 3 L.T.O.S. 183; 8 Jur. 912; 153 E.R. 57; 21 Digest 170, 257.

Heath v. Weaverham Overseers, [1894] 2 Q.B. 108; 63 L.J.M.C. 187; 70 L.T. 729; 58 J.P. 557; 42 W.R. 478; 10 T.L.R. 414; 38 Sol. Jo. 400; 10 R. 274, D.C.; 21 Digest 179, 301.

Re South American and Mexican Co., Ex parte Bank of England, [1895] 1 Ch. 37; 64 L.J.Ch. 189; 71 L.T. 594; 43 W.R. 131; 11 T.L.R. 21; 39 Sol. Jo. 27; 12 R. 1, C.A.; 21 Digest 147, 103.

Henderson v. Henderson (1843), 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313; 21 Digest 174, 276.

Bunning v. Odhams Brothers, Ltd. (1896), 75 L.T. 602; 13 T.L.R. 65, H.L.; 12 Digest (Repl.) 195, 1345.

Clarke v. Callow (1876), 46 L.J.Q.B. 53, C.A.; 12 Digest (Repl.) 194, 1336.

Buttermere v. Hayes (1839), 5 M. & W. 456; 9 L.J.Ex. 44; 3 Jur. 704; 151 E.R. 193; 31 Digest (Repl.) 437, 5652.

Appeal by defendant from a decision of a Divisional Court (PHILLIMORE and BUCKNILL, JJ.), reported [1910] 1 K.B. 796.

Maddocks for the defendant.

Joy for the plaintiff.

Cur. adv. vult.

June 23, 1909. **FARWELL, L.J.**, read the following judgment of the court.—We are of opinion that the decision of the Divisional Court, affirming the county court judge, was right. The law on this subject is thus stated by WILLIAMS, J., in *Howlett v. Tarte* (1) (10 C.B.N.S. at p. 826):

“If the defendant [to a second action] attempted to put on record a plea which was inconsistent with any traversable allegation in the former declaration [i.e., in the first action] there would be an estoppel.”

The first action in the present case was for rent down to June 24, 1908, of a dwelling-house known as Providence House, Toll End Road, Tipton, under an agreement for a lease dated Oct. 29, 1907. The second action was for rent due on Sept. 29, 1909, for the same premises under the same agreement. Each action therefore raised two issues of fact: (i) The existence of the specified agreement for a lease; and (ii) the amount due for rent thereunder on the specified dates. The allegation of the existence of the agreement raises the issue which the plaintiff has to prove—viz., the existence of that specific agreement as an agreement binding and valid at law, i.e., complying, among other things, with the requirements of the Statute of Frauds. This is the issue that was raised by the plaintiff and was traversable by the defendant; and such an issue is not the less traversable because the defendant fails to traverse it either wholly or in part, whether such failure arises from neglect to comply with rules of court requiring notice of reliance on the statute to be given or from omission properly to argue a point—e.g., that the documents tendered in evidence omitted a material provision required by the statute. It is clear that this was the fact to be alleged by the plaintiff.

A Under the old law a bill for specific performance of a contract for the sale of land was demurrable if it omitted to state that the contract was in writing; and at common law as it stood in 1842 a plea of the statute was demurrable on the ground that it was a mere argumentative denial of the contract (*Leaf v. Tuton* (2)), the general issue being "itself a denial that the requisites of the Statute of Frauds had been complied with." And the abolition of demurrers is a mere matter of pleading which does not affect the principle. The rule laid down in *Howlett v. Tarte* (1) is confined to allegations which the defendant could have traversed, and does not extend to pleas which confessed and avoided, or to matters which were not raisable by traverse, but by special plea, necessitating proof on the part of the defendant, such as fraud, gaming, release, or infancy—allegations which do not amount to denial, but to confession and avoidance of the contract: (*Leaf v. Tuton* (2), 10 M. & W. at p. 398). It is, we think, clear that WILLIAMS, J., intended his question in *Howlett v. Tarte* (1) (10 C.B.N.S. at p. 821) to be answered, as counsel answered it, in the negative. This is in accordance with justice, for, while interest reipublicæ is that litigation should cease so far as the matters directly adjudicated upon are concerned, it is not expedient that litigants should be deprived of independent defences through oversight, when the matter can again be properly raised in court.

D It is argued that the decision of the Divisional Court in the present case is in contravention of the Statute of Frauds. But estoppel is merely a rule of evidence, and if the plaintiff can object to the reception of evidence on a particular fact because it is an issue which was properly raised by him and was, or could have been, traversed by the defendant in a former action, and has been determined in the plaintiff's favour in such action, there is no reason for disallowing the objection. If, however, there was not such definite issue, then the objection will fail. The cases of *Re Hilton, Ex parte March* (3) and *Shoe Machinery Co. v. Cultan* (4) are instances of cases where the issues raised by the plaintiff were traversable and the objection prevailed. *Irish Land Commission v. Ryan* (5) is a case where there was no issue raised with sufficient precision to operate as an estoppel. In the first action judgment went by default, and the only estoppel was that the sum of £9 11s. rentcharge for which judgment had been given was properly recovered. It was attempted to estop the defendant from setting up in a second action which sought to recover the rentcharge against certain lands the defence that such lands were not liable, because the allegation admitted by default in the first action was that the rentcharge therein recovered issued out of "certain lands in the parish of Glenkein." But it was clear that such an allegation lacked the precision necessary to create an estoppel in respect of any particular parcel of land. The application of the ordinary rules of evidence to cases arising under the Statute of Frauds is not any greater interference with the statute than the application of Ord. 19, r. 15; nor is such application otherwise than in accordance with the true meaning of the Act, which is to prevent fraud and perjury. It may well be expedient to avoid the risk of fraud and perjury when there is no written evidence of a contract relating to land by refusing to allow any evidence of such a contract to be given. But where the evidence has actually been taken and the contract has been proved by parol to the satisfaction of the court, the reason for refusing it has disappeared and a refusal to allow the contract to be sued upon would be an encouragement to dishonesty without any corresponding advantage to the public.

I This appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: T. D. Jones & Co., for J. L. Clark, West Bromwich; Murr, Rusby & Archer, for Sharpe & Darby, Dudley.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

R. v. DYSON

[COURT OF CRIMINAL APPEAL (Lord Alverstone, C.J., Lawrance and Ridley, JJ.), May 22, 25, 1908]

[Reported [1908] 2 K.B. 454; 77 L.J.K.B. 813; 99 L.T. 201; 73 J.P. 303; 24 T.L.R. 653; 52 Sol. Jo. 535; 21 Cox, C.C. 669; 1 Cr. App. Rep. 13]

Criminal Law—Manslaughter—Death within a year and a day—Misdirection by judge.

Criminal Law—Appeal—Dismissal—No substantial miscarriage of justice—Court not entitled to substitute their opinion for that of jury—Application of proviso to s. 4 (1), Criminal Appeal Act, 1907 (7 Edw. 7, c. 23).

On the trial of an indictment for manslaughter the prisoner was convicted, the jury having been directed to find a verdict of Guilty if they thought that the death was caused by injuries which the prisoner had inflicted more than twelve months previous to the death.

Held: (i) unless the death occurred within a year and a day of the infliction of the injuries a person charged could not be convicted of manslaughter, and the jury had, therefore, been misdirected; (ii) although on a proper direction the jury would in all probability have convicted there was no certainty that they would have done so, and the court could not dismiss the appeal under the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, on the ground that no substantial miscarriage of justice had arisen, because they were not entitled to substitute their opinion for that of a jury.

Notes. Referred to: *R. v. Stoddart* (1909), 73 J.P. 348; *R. v. Ellsom* (1911), 76 J.P. 38; *R. v. Haddy*, [1944] K.B. 442.

As to death after a year and a day, see 10 HALSBURY'S LAWS (3rd Edn.) 706; and as to appeals against conviction, see *ibid.* 535 et seq. For cases see 15 DIGEST (Repl.) 937-938, and 14 DIGEST (Repl.) 650 et seq. For the Criminal Appeal Act, 1907, s. 4 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 929.

Cases referred to:

- (1) *R. v. Morris* (1867), L.R. 1 C.C.R. 90; 36 L.J.M.C. 84; 16 L.T. 636; 31 J.P. 516; 15 W.R. 999; 10 Cox, C.C. 480, C.C.R.; 14 Digest (Repl.) 383, 3736.
- (2) *R. v. Martin* (1832), 5 C. & P. 128; 15 Digest (Repl.) 934, 8954.
- (3) *Makin v. A.-G. for New South Wales* [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, 4094.

Appeal against a conviction by LORD COLERIDGE, J., at Manchester Assizes.

The prisoner, Albert Edward Dyson, was indicted for the manslaughter of his daughter Lily, an infant of the age of eighteen months. He was tried at Manchester Assizes on April 27, 1908, before LORD COLERIDGE, J., found guilty, and sentenced to ten years' penal servitude. From the facts proved at the trial it appeared that the prisoner was married on Mar. 25, 1905, and the child Lily was born on Aug. 6, 1906. The prisoner's wife, in her evidence for the prosecution, described the nature of the cruelty to which the child had been subjected. She stated that at about ten o'clock on the night of Nov. 13, 1906, the prisoner, the baby, and herself were all in bed together. The child was fretful and started to cry, whereupon the prisoner, making use of an indecent expression, seized hold of it by the two legs, flung it down upon the bed, put a pillow over its head, and commenced to thump it. She rescued the baby, in an unconscious condition, from the prisoner, and slept with it on the sofa for the remainder of that night. Next morning she found that the child was black all down the right side of its face, and, being frightened, took it at once to a doctor, who advised its removal to an

A infirmary. The baby was found to be seriously injured, having sustained a fracture of the skull. After about three weeks the child was discharged from the infirmary, returning to its mother's care. In May, 1907, the prisoner, who had disappeared, came back to live with his wife and child. According to the wife's evidence, from the moment of the prisoner's return, he began, once again, cruelly to ill-treat the baby. Other evidence was given in corroboration to prove that on Dec. 29, 1907, **B** the prisoner went upstairs to the child, heavy slapping was heard, and on the next day the baby was found to be black on both sides of its face. It was sent to the hospital suffering from meningitis, and died on Mar. 5, 1908.

J. W. J. Cremlin for the prisoner.

T. Shepherd Little for the Crown.

Cur. adv. vult.

C May 25, 1908. **LORD ALVERSTONE, C.J.**—This case has caused us considerable difficulty and anxious consideration. The prisoner was indicted for manslaughter, and it has been proved that throughout the eighteen months of the child's life it has been treated by him with very considerable cruelty. There are two occasions to which reference is specially made. There were injuries inflicted upon the child in November, 1906, resulting in serious consequences, followed **D** by other injuries in December, 1907. The question raised by the appeal is whether the learned judge misdirected the jury in leaving it to them so that they might find the prisoner guilty if they came to the conclusion that he had caused the child's death by the injuries inflicted in November, 1906.

E In our opinion, the direction was not a proper one, for it is without qualifying words of any kind, the meaning of the learned judge being contained in two passages, and set out very clearly. The first of these, referring to what was said by counsel for the defence, runs as follows :

“He also, if I understood it right, argued that the death was not accelerated, but was caused by the fracture of the skull which took place on Nov. 13, 1906; and therefore, if that be the contention of the prisoner, we need not **F** trouble ourselves with inquiring into what exact amount of acceleration of death may be attributed to recent and subsequent injuries apart from and as if this had never occurred.”

That, in our opinion, was not a right direction, because the only question that was very properly raised by the prosecution was whether the death had been accelerated by the injuries received in December, 1907. The second passage **G** contained in the summing-up was the one to which counsel for the prisoner had referred :

“He [the doctor] comes to the conclusion that the child died from this meningitis, the result of an external injury. It does not matter, it seems to me, whether that took place in 1906 or whether it took place in 1907. If it was caused **H** by the prisoner, he was as guilty of what he did in 1906 as he was in 1907, although the immediate effect of his conduct did not take place until a much later date.”

This is the most serious part of the direction. These two passages taken together amount to a direction to the jury that they might find the prisoner guilty of causing the child's death by the injuries which he inflicted in November, 1906. **I** Counsel for the prosecution has said very properly that he cannot support that direction. Perhaps on account of the evidence as to cruelty being so overwhelming, the learned judge had in this case overlooked a somewhat recondite provision of our law. In 3 CO. INST., c. 7, p. 47; 1 HAWKIN'S PLEAS OF THE CROWN, c. 31, s. 9; 1 EAST'S PLEAS OF THE CROWN, c. 5, s. 112; RUSSELL ON CRIMES (6th Edn.), vol. 3, at p. 34, it is clearly stated that unless the death occurred within a year and a day of the time when the injuries causing it were inflicted, the person charged could not be convicted of manslaughter, and this is the law of England today.

The difficult question now arises as to what we ought to do in this case. Under s. 1 (3) of the Prevention of Cruelty to Children Act, 1904, [repealed] the prisoner might have been convicted by the jury and punished on this indictment for cruelty to his child; but he had already been summoned and convicted before the magistrates for that offence. Had there been a proper direction, the fact that he had been summarily convicted for an assault would have been no bar to a conviction of manslaughter when death had ultimately ensued: (*R. v. Morris* (1)). But that conviction, standing as it does, makes it impossible for us to act under s. 5 (2) of the Criminal Appeal Act, 1907. Under that section the court could have substituted a conviction for cruelty to his child for the conviction of manslaughter, but that was now impossible, because the prisoner had already been punished for the lesser offence.

There yet remains the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, to be considered. By that proviso, although the point raised by the appeal was decided in the appellant's favour, yet the court may dismiss the appeal, if they are of the opinion that no substantial miscarriage of justice had arisen. The proper question to have left to the jury was whether the prisoner was guilty of accelerating the death by the injuries he inflicted on the child in December, 1907: (*R. v. Martin* (2)). We are of the opinion that we cannot act under the proviso, for the reason that we ought not to substitute this court for the jury. Unfortunately, the court does not possess the power to order a new trial, and therefore, although there has been a miscarriage of justice, we are unable to interfere. In all probability, had the right direction been given, the jury would have found the prisoner guilty of the offence which the prosecution suggested had been committed; but, having regard to some of the evidence, it is not certain that they would have so decided, and consequently it is too doubtful a case to enable us to act under the proviso. In *Makin v. A.-G. for New South Wales* (3) LORD HERSCHELL, L.C., said ([1894] A.C. at p. 70):

"Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them."

If for "invited . . . matters" be read the words "have been told by the judge they might find a verdict of guilty on matters which ought not to have been submitted to them," the cases are very similar. The conviction must be quashed.

Conviction quashed.

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by G. DODSON, Esq., Barrister-at-Law.]

A

CLISSOLD v. CRATCHLEY

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.), April 14, 1910]

B

[Reported [1910] 2 K.B. 244; 79 L.J.K.B. 635; 102 L.T. 520;
26 T.L.R. 409; 54 Sol. Jo. 442]

Execution—Wrongful execution—Trespass—Seizure of goods under writ of fieri facias—Writ issued after judgment satisfied by payment.

C

A writ of execution cannot lawfully be issued on a judgment which has been paid or satisfied, and, if execution is levied, an action of trespass will lie against the judgment creditor and his solicitor who has directed the execution to be levied.

Notes. Applied: *Cubitt v. Gamble* (1919), 35 T.L.R. 223. Referred to: *Re A Debtor* (No. 30 of 1956), *Ex parte The Debtor v. Harman*, [1957] 2 All E.R. 216.

As to wrongful execution, see 16 HALSBURY'S LAWS (3rd Edn.) 36 et seq., and for cases see 21 DIGEST 457 et seq.

D

Cases referred to: .

- (1) *Tebbutt v. Holt* (1844), 1 Car. & Kir. 280, N.P.; 33 Digest 486, 237.
- (2) *Blanchenay v. Burt* (1843), 4 Q.B. 707; 3 Gal. & Dav. 613; 12 L.J.Q.B. 291; 1 L.T.O.S. 169; 7 Jur. 575; 114 E.R. 1064; 21 Digest 468, 490.
- (3) *Huffer v. Allen* (1866), L.R. 2 Exch. 15; 4 H. & C. 634; 36 L.J.Ex. 17; 15 L.T. 225; 12 Jur. N.S. 930; 15 W.R. 281; 21 Digest 458, 399.
- (4) *Barker v. Braham and Norwood* (1773), 3 Wils. 368; 2 Wm. Bl. 866; 95 E.R. 1104; 21 Digest 467, 485.
- (5) *Gibson v. Chaters* (1800), 2 Bos. & P. 129; 126 E.R. 1196; 21 Digest 457, 392.

E

Also referred to in argument:

F

Parsons v. Loyd (1772), 3 Wils. 341; 2 Wm. Bl. 845; 95 E.R. 1089; 21 Digest 467, 484.

Bates v. Pilling (1826), 6 B. & C. 38; 9 Dow. & Ry. K.B. 44; 5 L.J.O.S.K.B. 40; 108 E.R. 367; 21 Digest 458, 394.

Brooks v. Hodgkinson (1859), 4 H. & N. 712; 21 Digest 580, 1564.

Lee v. Rumilly (1891), 55 J.P. 519; 7 T.L.R. 303, C.A.; 21 Digest 549, 1237.

G

Morris v. Salberg (1889), 22 Q.B.D. 614; 58 L.J.Q.B. 275; 61 L.T. 283; 53 J.P. 772; 37 W.R. 469; 5 T.L.R. 376, C.A.; 21 Digest 549, 1236.

Jackson v. Burleigh (1799), 3 Esp. 34, N.P.; 33 Digest 487, 253.

Appeal by the plaintiff from a decision of the Divisional Court (DARLING and PHILLMORE, JJ.), reported [1910] 1 K.B. 374, reversing the judgment of the county court judge.

H

The plaintiff brought this action in the county court to recover damages from the defendants for improperly levying an execution under a writ of fieri facias, or, in the alternative, for damages for trespass caused by the defendants or their agents entering the plaintiff's premises and improperly levying execution. In certain litigation between the plaintiff and the defendant Cratchley an order was made in the High Court that the plaintiff should pay the costs of the defendant Cratchley. Those costs were taxed at £27 12s. 4d., and the time for carrying in objections expired on Dec. 14, 1908. No objections were carried in, and the certificate of the taxing master was given. On Dec. 15, 1908, the defendant Richards, who was the solicitor for the defendant Cratchley and had an office in London and also in the country, being in London, wrote to the London agents of the plaintiff's solicitor requesting payment of the amount of the taxed costs before 11 a.m. on Dec. 16. About noon on Dec. 16 the plaintiff's solicitor went to the office of the defendant Richards in the country, and there paid the amount of

I

the taxed costs to a clerk of Richards, who gave a receipt. The county court judge found that this clerk had authority to receive the money and to give a valid receipt for it. On the same day, Dec. 16, the defendant Richards, not having been informed of the payment made in the country, took out a writ of fieri facias in London at 3.45 p.m., and, having indorsed it with a direction to the sheriff to levy the amount of the taxed costs, as required by Ord. 42, r. 16, he delivered it to the sheriff. On Dec. 17, 1908, the sheriff levied execution upon the goods of the plaintiff, and remained in possession until the following day, when he withdrew upon receiving instructions from Richards to do so. The learned county court judge found as a fact that neither of the defendants had acted maliciously, but he held that they were liable for trespass, and gave judgment for the plaintiff for £15 damages. The defendants appealed, and the Divisional Court (DARLING and PHILLIMORE, JJ.), held that the action would not lie without proof of malice, and allowed the appeal. The plaintiff appealed with leave.

H. M. Sturges and S. L. Porter for the plaintiff.

W. G. Hawtin for the defendants.

VAUGHAN WILLIAMS, L.J.—I am of opinion that this appeal must be allowed. I do not know that the law upon which I will base my judgment is in any way controverted by the judgments in the Divisional Court. It seems to me, when I read the judgments of DARLING and PHILLIMORE, JJ., in the court below, that both the learned judges recognise the distinction between an action on the case and an action of trespass. They recognise that, if the action is an action on the case for maliciously suing out process, the allegation of malice is an allegation of fact which must be proved in order to entitle the plaintiff to succeed; and they quite recognise that, if the action is not an action on the case, but is an action of trespass, malice is in no way essential to the maintenance of that action. I am not quite sure how, having recognised that distinction, they decided this case on the basis that the action would not lie without proof of malice.

This action is brought, alternatively, for damages for maliciously levying execution or for damages for trespass. The learned county court judge in terms recognises that fact when delivering his judgment, and gives his judgment for the plaintiff as in an action of trespass. Having arrived at the conclusion that this is an action of trespass and that it is quite unnecessary in such an action to give any evidence of malice, there is nothing to show that the judgment for damages in this action as an action of trespass was wrong. It has been suggested that the judgment was still in force when the writ of fieri facias was issued notwithstanding the fact that the whole amount had in fact been paid to and a receipt given by the person entitled or his agent having authority to receive payment. It has been argued that nevertheless there was an existing judgment which would support a writ of execution; and that the judgment existed and continued in force. Common sense, apart from authority, tells one that, when the total amount which the judgment orders to be paid has been paid, the judgment is not any longer to be in force. But, as it has been argued in this case that the writ of execution was a good writ of execution so long as the judgment had not in law been set aside, it is convenient to know that there is authority upon the question. In *Tebbutt v. Holt* (1) PARKE, B., said (1 Car. & Kir. at p. 289):

“The law also is that, if the debt and costs are paid or satisfied, the judgment is at an end.”

In my opinion this judgment was at an end. Again, in BULLEN AND LEAKE, PRECEDENTS OF PLEADING (3rd Edn.), p. 353, it is stated:

“An action will not lie for an arrest on final process upon a subsisting unsatisfied judgment (*Blanchenay v. Burt* (2); *Huffer v. Allen* (3)); but if the party arrested can get the judgment set aside for irregularity or on any other ground, or can show that the judgment was satisfied by payment or otherwise before

A the arrest, he may then maintain an action: the arrest in such case would in general support an action of trespass."

And of course it would equally support an action for trespass to goods. The cases which have been cited before us of *Barker v. Braham* (4) and other cases were all cases where the action was on the case for maliciously issuing process. We have not been shown any authority which supports the proposition that a judgment which has been satisfied still exists as a judgment in force for the purpose of issuing a writ of fieri facias. If the judgment was not in force, it is manifest that the writ of execution issued upon it was void ab initio, and that the person issuing the writ was liable to an action of trespass. I am, therefore, of opinion that the judgment of the county court judge was right, and that this appeal must be allowed.

C **FLETCHER MOULTON, L.J.**—I am of the same opinion. In this case the act complained of was clearly a trespass, and it lay upon the defendants to justify that act. The sole defence relied upon is that there was an order for payment of costs, which was equivalent to a judgment, and that the writ of execution was issued upon it. The answer to that is that, prior to the issue of the writ of execution, that order had been obeyed and the whole amount paid. I am satisfied that after payment that order was dead for all purposes, and that process issued upon such an order, as upon a satisfied judgment, was void ab initio. Therefore, in my opinion, this was an undefended action of trespass. The learned judges in the Divisional Court do not seem to have realised the great distinction between cases where the action is brought for maliciously doing something, or is an action on the case where malice is alleged, and cases where the action is an action of trespass. I am satisfied that not one of the cases which has been cited contravenes the proposition that a writ of execution issued upon a satisfied judgment of is null and void and cannot justify an act complained of as a trespass. I agree, therefore, that this appeal must be allowed.

F **FARWELL, L.J.**—I am of the same opinion. No writ of execution can lawfully issue on a judgment which has been paid or satisfied before issue of the writ of execution; there is no judgment left upon which to base the writ, and the writ is void ab initio, and trespass will lie against the satisfied creditor and his solicitor who have put the sheriff in motion. That proposition seems to me to be so plain and unarguable that I think we must consider whether the judgments of the learned judges in the Divisional Court were not given under a misapprehension as to the real nature of this action. **DARLING, J.**, said ([1910] 1 K.B. at p. 381):

H "It is contended, however, that the plaintiff is entitled to maintain an action of trespass. That contention is based upon this, that Richards indorsed upon the writ of fi. fa. a direction to the sheriff to levy the amount specified therein as being due and payable, whereas in fact it was not then due and payable, and that such direction to the sheriff to levy execution when no debt existed made Richards, who gave the direction, and his client trespassers. I was at first rather captivated by that argument, and thought that perhaps the plaintiff might maintain an action of trespass, but I have upon further reflection come to the conclusion that, before he can do so, he must distinguish the present case from *Gibson v. Chaters* (5). I do not think that he has succeeded in distinguishing that case."

I The learned judge seems to have overlooked the fact that that case was merely an action on the case for malicious arrest on a writ of capias. Then the learned judge went on to say (*ibid.* at p. 382):

"It was not suggested in *Gibson v. Chaters* (5) that an action of trespass would lie if the action on the case was not maintainable. Therefore I am of opinion that that case is not distinguishable, and that the plaintiff cannot maintain this action for trespass."

But it would have been idle in 1800 for a plaintiff to suggest that he could turn an action on the case for maliciously proceeding into an action of trespass. He would have been bound by the form of his action. Then PHILLIMORE, J., said (*ibid.* at p. 383):

"All the cases of the kind are actions on the case, and it has been laid down that malice must be averred and proved. If it were trespass, no proof of malice would be necessary."

Having correctly so stated the law, I cannot understand how the learned judge came to the conclusion at which he arrived. I agree, therefore, that the decision of the learned county court judge was right, and that this appeal must be allowed.

Appeal allowed.

Solicitors: *Walker & Rowe*, for *J. Lapage Norris*, Stroud; *H. Powell Richards*.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

JAYES *v.* HARRIS

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Sutton, JJ.), May 28, 1908]

[Reported 99 L.T. 56; 72 J.P. 364; 21 Cox, C.C. 639]

Gaming—Betting—Using licensed premises—One act of user—Betting Act, 1853 (16 & 17 Vict., c. 119)—Licensing Act, 1872 (35 & 36 Vict., c. 94), s. 17.

To constitute the offence under s. 17 of the Licensing Act, 1872 [now Licensing Act, 1953, s. 141, as amended by Betting and Gaming Act, 1960, Sched. 4, para. 8], of using licensed premises in contravention of the Betting Act, 1853, there must be evidence of more than one act of user.

Notes. The Licensing Act, 1872, s. 17, has been repealed. See now the Licensing Act, 1953, s. 141 (2), as amended by the Betting and Gaming Act, 1960, s. 29 (1), and Schedule IV, para. 8.

As to prohibition of gaming on licensed premises, see 22 HALSBURY'S LAWS (3rd Edn.) 685, 686, and for cases see 25 DIGEST 444, 445. For the Licensing Act, 1953, s. 141, see 33 HALSBURY'S STATUTES (2nd Edn.) 269, and for the Betting and Gaming Act, 1960, s. 29 and Sched. IV, see 40 HALSBURY'S STATUTES (2nd Edn.) 361, 379.

Cases referred to in argument:

Martin v. Benjamin, [1907] 1 K.B. 64; 76 L.J.K.B. 81; 96 L.T. 197; 71 J.P. 30; 23 T.L.R. 53; 51 Sol. Jo. 50; 21 Cox, C.C. 378, D.C.; 25 Digest 458, 465.

R. v. Davies, [1897] 2 Q.B. 199; 66 L.J.Q.B. 513; 76 L.T. 786; 13 T.L.R. 405; 41 Sol. Jo. 511; 18 Cox, C.C. 618, C.C.R.; 25 Digest 422, 254.

Case Stated by justices.

At a court of summary jurisdiction, the respondent, Henry Harris, a sergeant of police, preferred an information charging the appellant that he, being a licensed person for the sale of intoxicating liquors, unlawfully used his licensed house and premises, the Bush Inn, Albrighton, for the purpose of betting with persons resorting thereto, in contravention of the Betting Act, 1853. It was proved or admitted that a person named Whiting went to the Bush Inn, Albrighton, about 9 a.m. on Oct. 30, 1907, and went into the house and saw the appellant. He gave the appellant 2s., and asked him, as a favour, whether he would put 1s. each way on Lady Hasty for him for the Cambridgeshire race if he (the appellant) was going

A to Wolverhampton. Whiting got no ticket or receipt for the money. This was the only transaction which took place between the appellant and Whiting in the house or premises. Whiting had had five or six bets in all with the appellant, some in the alley by the side of the Bush Inn leading to the allotments, in the village of Albrighton. Whiting stated that he thought he won on one occasion, and the appellant paid him. In cross-examination, he said he might have had five or six or seven or eight like transactions with the appellant, but that previous transactions had been outside the house. The respondent spoke to the appellant on Dec. 7, 1907, and told him that he saw in the newspapers that the appellant had had a betting case at Birmingham Assizes. The appellant replied that he had lost, but was badly advised, that he had not been making a book, but had only received money and slips for a bookmaker at Wolverhampton.

C It was contended on behalf of the appellant that there was no case to answer. The justices held that there was, and counsel for the appellant then contended that the information was laid and the summons issued under the first part of s. 1 of the Betting Act, 1853; that the two branches of that section created distinct offences, and that, on the evidence given, there was no offence disclosed or proved against the appellant under such part of the section; that the facts proved only that the appellant agreed to take the money to Wolverhampton as a favour to Whiting, and there might or might not make a bet with the bookmaker; that no ticket was given, no price fixed, and no contract entered into by the appellant to make a bet with the bookmaker; that such an act did not constitute a bet, and that, if such act were an offence at all, it was under the latter half of the section, but that in fact it was not an offence under either part of the section. The appellant further contended that there was no evidence of user of the premises; that only one transaction took place in the house or premises; that the word "use" implied the occurrence of a particular event on more than one occasion; that there was no evidence of persons resorting to the premises for the purpose of betting; that only one person (Whiting) was proved to have had a transaction with the appellant on the premises, and on only one occasion; that such evidence did not support the charge of resorting; and that, with respect to the receipt of money by the appellant as referred to in the evidence of the respondent, there was no evidence connecting the place where such money was received with the Bush Inn. It was contended on behalf of the respondent that the charge was laid under s. 17 of the Licensing Act, 1872, and not under the Betting Act, 1853, that the information as laid was good in form, and that the justices were not confined to the wording of the first part of s. 1 of the Act of 1853 as contended by the appellant; that the reference to the Betting Act, 1853, in s. 17 of the Licensing Act, 1872, had reference to the whole of the Betting Act, 1853; and that the evidence proved that the appellant had used his licensed premises and house for the purpose of betting with persons resorting thereto in contravention of the Betting Act, 1853.

H The justices found that the respondent had proved that the appellant had used his licensed house and premises for the purpose of betting with persons resorting thereto, in contravention of the Betting Act, 1853, and they, therefore, convicted the appellant of unlawfully using his licensed house and premises for the purpose of betting with persons resorting thereto in contravention of the Betting Act, 1853, contrary to s. 17 of the Licensing Act, 1872.

I By s. 17 of the Licensing Act, 1872 :

"If any licensed person—(1) suffers any gaming or any unlawful game to be carried on on his premises; or (2) opens, keeps, or uses, or suffers his house to be opened, kept or used in contravention of the Betting Act, 1853, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offences twenty pounds."

Avory, K.C., and *G. Milward* for the appellant.

The respondent did not appear and was not represented.

LORD ALVERSTONE, C.J.—It seems to me that, giving full effect to the evidence, there is only evidence of one user. The Case states that Whiting went into the house and gave the appellant 2s., and asked him as a favour whether he would put 1s. each way on Lady Hasty for him for the Cambridgeshire race if he was going to Wolverhampton. That is no evidence of the user of the house, and was only evidence of the appellant being willing to help his friend to make a bet. The Case also states "Whiting had had five or six bets in all with appellant, some in the alley by the side of the Bush Inn leading to the allotments, in the village of Albrighton. Whiting stated that he thought he won on one occasion, and appellant paid him. In cross examination he said he thought he might have had five or six or seven or eight like transactions with the appellant, but that previous transactions had been outside the house." That raised some doubt in my mind, for, of course, if there had been a statement in the Case which led the justices to believe that the man came in, and the appellant went out to avoid being inside the house, some question might have arisen. But, as the Case is stated, the only evidence with reference to the inside of the house is with regard to one occasion. When we are asked to draw the inference that the other cases were a colourable going outside the house, there ought to have been some facts to support it. There is no evidence that the appellant was keeping and using his house for the purpose of betting, contrary to the Betting Act, 1853.

DARLING, J.—I agree.

SUTTON, J.—I agree.

Appeal allowed.

Solicitors: *R. A. Willcock & Taylor, Wolverhampton.*

[Reported by W. DE B. HERBERT, ESQ., Barrister-at-Law.]

BISGOOD v. HENDERSON'S TRANSVAAL ESTATES, LTD.

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.J.J.), March 14, 18, 19, 20, April 3, 1908]

[Reported [1908] 1 Ch. 743; 77 L.J.Ch. 486; 98 L.T. 809; 24 T.L.R. 510; 52 Sol. Jo. 412; 15 Mans. 163]

Company—"Objects"—Purposes by which company seeks to earn profit—Exclusion of acts to be done after end of corporate life—Distribution of assets on liquidation not concern of company—Winding-up—Voluntary winding-up—Sale of property of company—Acceptance of shares in new company—Article depriving dissentient shareholder of statutory rights—Validity of scheme—Companies Act, 1862 (25 & 26 Vict., c. 89), s. 161.

The "objects of the company" which must be stated in the memorandum of every company [see now s. 2 (1) (c) of the Companies Act, 1948] mean the objects which the company during its corporate life is to pursue, the purposes by the fulfilment of which it is to seek to earn profit. The definition of the objects is the definition of what is generally called the undertaking of the company. The "objects" have no relation to acts to be done after the corporate life has come to an end. So soon as the company passes into liquidation the distribution of its assets is a matter which concerns the company not at all, but only its creditors and contributories. It is no part of the function of the memorandum of association to define under the objects of the company the distribution of the assets after the life of the company is over. No doubt, within proper limits the memorandum and articles of association of a company may

A provide how, as between corporators, the corporate assets shall be dealt with after liquidation, but in this matter there are limits imposed by statute. Accordingly, where a company was proposed to be wound-up voluntarily,

Held: that s. 161 of the Companies Act, 1862 [now s. 287 of the Companies Act, 1948] contained provisions which defined rights in the members of the company which could not be excluded by any clause in the memorandum or articles of association, and, therefore, an article providing that on a sale of the property of the company by the liquidator in a winding-up a dissentient shareholder should not have the rights given him by s. 161, and a scheme made under that article for the sale of the property of the company in return for shares in another company, were ultra vires.

C *Cotton v. Imperial and Foreign Agency and Investment Corp., Ltd.* (1), [1892] 3 Ch. 454, and *Fuller v. White Feather Reward, Ltd.* (2), [1906] 1 Ch. 823, overruled.

Notes. Considered: *Etheridge v. Central Uruguay Northern Extension Rail. Co.*, [1913] 1 Ch. 425. Distinguished: *Re Anglo-Continental Supply Co.*, [1922] 2 Ch. 723. Considered: *Dibble v. Wilts. and Somerset Farmers*, [1923] 1 Ch. 342; *Agricultural Wholesale Society v. Biddulph and District Agricultural Society*, [1925] Ch. 769. Referred to: *Re Jewish Colonial Trust (Juedische Colonial Bank)*, [1908] 2 Ch. 287; *Hickman v. Kent or Romney Marsh Sheep Breeders' Association*, [1914-15] All E.R. Rep. 900; *Re Aramayo Francke Mines*, [1917] 1 Ch. 451; *Re Guardian Assurance Co.*, [1917] 1 Ch. 431; *Re Wilts. and Somerset Farmers*, [1928] Ch. 809.

E As to a sale of a company's undertaking in a voluntary winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 776-782, and for cases see 10 Digest (Repl.) 1084 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (3rd Edn.) 452.

Cases referred to:

- (1) *Cotton v. Imperial and Foreign Agency and Investment Corp., Ltd.*, [1892] 3 Ch. 454; 61 L.J.Ch. 684; 67 L.T. 342; 8 T.L.R. 777; 10 Digest (Repl.) 1087, 7525.
- F (2) *Fuller v. White Feather Reward, Ltd.*, [1906] 1 Ch. 823; 75 L.J.Ch. 393; 95 L.T. 404; 22 T.L.R. 400; 13 Mans. 137; 10 Digest (Repl.) 1090, 7538.
- (3) *Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122; 67 L.J.Ch. 77; 77 L.T. 505; 46 W.R. 198; 14 T.L.R. 86; 42 Sol. Jo. 96; 4 Mans. 398, C.A.; 10 Digest (Repl.) 875, 5773.
- G (4) *Welton v. Saffery*, [1897] A.C. 299; 66 L.J.Ch. 362; 76 L.T. 505; 45 W.R. 508; 13 T.L.R. 340; 41 Sol. Jo. 437; 4 Mans. 269, H.L.; 10 Digest (Repl.) 1010, 6946.
- (5) *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80; 68 L.J.Ch. 429; 80 L.T. 739; 47 W.R. 564; 15 T.L.R. 366; 43 Sol. Jo. 494; 6 Mans. 430, C.A.; 10 Digest (Repl.) 1094, 7565.
- H (6) *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308; 82 L.T. 44; 48 W.R. 325; 16 T.L.R. 135; sub nom. *Paine v. Cork Co.*, 69 L.J.Ch. 156; 7 Mans. 225; 10 Digest (Repl.) 1048, 7266.
- (7) *Re Hestor & Co., Ltd.*, [1875] W.N. 179; 44 L.J.Ch. 757, L.J.J.; 10 Digest (Repl.) 1092, 7546.
- (8) *New Zealand Gold Extraction Co. (Newbery-Vautin Process), Ltd. v. Peacock*, [1894] 1 Q.B. 622; 63 L.J.Q.B. 227; 70 L.T. 110; 9 R. 669, C.A.; 9 Digest (Repl.) 712, 4721.
- I (9) *Manners v. St. David's Gold and Copper Mines, Ltd.*, [1904] 2 Ch. 593; 73 L.J.Ch. 764; 91 L.T. 277; 20 T.L.R. 729; 11 Mans. 425, C.A.; 10 Digest (Repl.) 1089, 7535.
- (10) *Bisgood v. Nile Valley Co., Ltd.*, [1906] 1 Ch. 747; 75 L.J.Ch. 379; 94 L.T. 304; 54 W.R. 397; 22 T.L.R. 317; 50 Sol. Jo. 290; 13 Mans. 126; 10 Digest (Repl.) 1089, 7536.

- (11) *Doughty v. Lomagunda Reefs, Ltd.*, [1903] 1 Ch. 673; 72 L.J.Ch. 331; 88 L.T. 337; 51 W.R. 564; 47 Sol. Jo. 384; 10 Mans. 189, C.A.; 10 Digest (Repl.) 1088, 7529.

Also referred to in argument :

Burdett-Coutts v. True Blue (Hannan's) Gold Mine, [1899] 2 Ch. 616; 68 L.J.Ch. 692; 81 L.T. 29; 48 W.R. 1; 43 Sol. Jo. 672; 7 Mans. 85, C.A.; 10 Digest (Repl.) 1091, 7540.

Mason v. Motor Traction Co., Ltd., [1905] 1 Ch. 419; 74 L.J.Ch. 273; 92 L.T. 234; 21 T.L.R. 238; 12 Mans. 31; 10 Digest (Repl.) 1090, 7537.

Re Lake View Extended Gold Mine (Western Australia), Ltd., [1900] W.N. 44; 10 Digest (Repl.) 1099, 7597.

Wall v. London and Northern Assets Corpn., [1898] 2 Ch. 469; 67 L.J.Ch. 596; 79 L.T. 249; 47 W.R. 219; 14 T.L.R. 547, C.A.; 10 Digest (Repl.) 1088, 7528.

Griffith v. Poget (1877), 5 Ch.D. 894; 46 L.J.Ch. 493; 25 W.R. 523; 10 Digest (Repl.) 1099, 7596.

Re City and County Investment Co. (1879), 13 Ch.D. 475; 49 L.J.Ch. 195; 42 L.T. 308; 28 W.R. 933, C.A.; 10 Digest (Repl.) 1098, 7587.

Re Bank of Hindustan, China and Japan, Ltd., Higg's Case (1865), 2 Hem. & M. 657; 6 New Rep. 327; 12 L.T. 669; 13 W.R. 937; 71 E.R. 619; 10 Digest (Repl.) 1091, 7542.

Postlethwaite v. Port Phillip and Colonial Gold Mining Co. (1889), 43 Ch.D. 452; 59 L.J.Ch. 201; 62 L.T. 60; 38 W.R. 246; 6 T.L.R. 130; 2 Meg. 10; 10 Digest (Repl.) 1087, 7523.

Nicholl v. Eberhardt Co. (1889), 59 L.J.Ch. 103; 61 L.T. 489; 5 T.L.R. 464; 1 Meg. 402, C.A.; 10 Digest (Repl.) 1087, 7522.

Re Borax Co., Foster v. Borax Co., [1901] 1 Ch. 326; 70 L.J.Ch. 162; 83 L.T. 638; 49 W.R. 212; 17 T.L.R. 159; 45 Sol. Jo. 138, C.A.; 10 Digest (Repl.) 776, 5046.

Re H. H. Vivian & Co., Ltd., Metropolitan Bank of England and Wales, Ltd. v. H. H. Vivian & Co., Ltd., [1900] 2 Ch. 654; 69 L.J.Ch. 659; 82 L.T. 674; 48 W.R. 636; 44 Sol. Jo. 530; 7 Mans. 470; 10 Digest (Repl.) 782, 5078.

Booth v. New Afrikander Gold Mining Co., Ltd., [1903] 1 Ch. 295; 72 L.J.Ch. 125; 87 L.T. 509; 51 W.R. 193; 19 T.L.R. 67; 47 Sol. Jo. 91; 10 Mans. 56, C.A.; 10 Digest (Repl.) 1088, 7530.

Salomon v. Salomon & Co., Salomon & Co. v. Salomon, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, 11.

Appeal by the plaintiff from a decision of Eve, J., on a motion for an injunction.

The plaintiff, Gerald Cecil Bisgood, who was the holder of fifty fully-paid shares of £1 each in the defendant company, suing on behalf of himself and all other shareholders, commenced an action against the company and then moved for an interlocutory injunction to restrain the company from acting upon or carrying into effect a reorganisation scheme submitted to a general meeting of shareholders on Feb. 13, 1908, or from carrying into effect the scheme or the resolutions passed at the meeting in so far as they authorised the liquidator to deal with the assets without making proper provision for payment to the plaintiff of his distributive share in the assets.

The defendant company was incorporated on Aug. 10, 1894, as a company limited by shares with a memorandum of association, which included among the objects of the company :

"(m) To sell any property of the company for shares, whether fully paid or not; (o) to amalgamate with any other company by sale or otherwise (for shares or otherwise) of the undertaking; (p) to sell the whole or any part of the undertaking, business, and property of the company for shares and to distribute

A any of the property of the company among the members in specie; and (q) to promote companies for the purpose of acquiring the properties of the company and to take and hold shares in such companies."

Each of the clauses (m), (o), (p) and (q) extended to companies registered in South Africa. The articles of association included (art. 131) a provision that in winding-up, the liquidator might, with the sanction of an extraordinary resolution, divide assets among the contributories in specie, and (art. 132) a provision that in case of a sale under s. 161 of the Companies Act, 1862, a dissentient should not have the rights given to him by that section. In November, 1907, the issued capital of the company consisted of 1,770,386 shares of £1 each, fully paid. The company was financially at the end of its resources, and a scheme for obtaining further working capital by the issue of debentures was unsuccessful. A reorganisation scheme was started on Jan. 16, 1908, with the object of providing funds for debentures which were falling due on Mar. 31, and for working capital, and on Feb. 13 a meeting, which had been convened for Jan. 24, and adjourned to that day, met and passed resolutions which were shortly as follows: (i) Approving an agreement proposed to be made between the company and a new company which had been incorporated in Rhodesia on Jan. 21; (ii) approving the reorganisation scheme as amended; (iii) resolving to wind-up voluntarily; (iv) authorising and requiring the liquidator to offer 1,770,386 shares of the new company of £1 credited with the 17s. 6d. receivable under the agreement presently mentioned for distribution among the shareholders at the rate of one new share for each share in the defendant company; (v) authorising and requiring the liquidator to use his best endeavours to sell shares which the members should not accept within a time to be limited (not less than fourteen days), and to hold the net proceeds of sale upon trust to distribute them among the non-accepting members. On Feb. 14 the writ in this action was issued by the plaintiff. On Feb. 20 the agreement contemplated by the first resolution of Feb. 13 was executed between the defendant and the new companies. That agreement recited that the defendant company was empowered by its memorandum to sell its undertaking and to accept payment in shares, and provided: (i) That the defendant company should sell and the new company should purchase all the undertaking, business, etc., of the defendant company; (ii) that the new company should pay the debts and pay the premiums on the debentures issued by the defendant company which, but for the liquidation of such company, would be payable by them on Mar. 31, 1908; (iii) that the new company should, if the defendant company within six months should wind-up, pay the costs of the winding-up; (iv) that the new company should allot to the defendant company or at the defendant company's option, to its nominees 1,770,386 shares of £1 each in the new company credited with 17s. 6d.; (v) that the defendant company should apply or find substantial nominess who should within six months apply for and accept an allotment of those shares and pay 6d. on application and agree to pay 6d. on allotment; and (vi) that in the event of the defendant company failing to comply with art. 5 with regard to any of the shares, the shares unapplied for should be at the disposal of the purchasing company, and the defendant company should not be under any liability to become a member of the new company in respect of any of those shares. On Mar. 6 the motion came on to be heard before EYE, J., who held that the plaintiff was not entitled to an injunction either in respect of the agreement or in respect of the distribution of the proceeds of the sale of the shares of dissentient members. He made no order on the motion, except that the costs were to be costs in the action. From that decision the plaintiff appealed.

P. Ogden Lawrence, K.C., and Beebee for the plaintiff.

Gore-Browne, K.C., and Stewart-Smith, K.C. (with them H. E. Wright), for the defendant company.

April 3, 1908. **BUCKLEY, L.J.**, read the following judgment.—This is a case of the first importance. The question involved is whether by clauses even in the memorandum of association of a company limited by shares the limit upon the shareholder's liability can be raised—whether the constitution of the company can provide that the majority may impose upon the minority a scheme under which the member must either come under an increased liability or accept such compensation as the scheme offers him. Section 161 of the Companies Act, 1862, protects the dissentient member by securing him the value of his interest to be determined by arbitration or agreement. The purpose of schemes such as that here in question is to evade or escape the provisions of that section. Their object is to impose upon the shareholders what is generally called an assessment—to require that in a limited company after the shares are fully paid the shareholders must either come under liability to make further contributions to capital or submit to take, not the value of their interest to be determined by arbitration or agreement, but such satisfaction as the scheme offers them. That satisfaction commonly means, and in substance means in this case, the surrender of their interest in the company.

[His LORDSHIP stated the facts as above set forth, and continued:] The question is whether the reorganisation scheme contained in the agreement and resolutions is *intra vires*. The argument is that it is because it is justified by clauses in the memorandum of association. Under the Companies Act, 1862, the incorporation of a company is effected by the registration of a memorandum of association which is to state the "objects for which the proposed company is to be established." To my mind that means the objects which the corporation during its corporate life is to pursue, the purposes by whose fulfilment it is to seek to earn profit. The definition of the objects is the definition of what is generally called the undertaking of the company. The modern practice is to add, but I think erroneously, an enumeration of powers for carrying those objects into effect. But, however that may be, the words "objects for which the proposed company is to be established" have, in my opinion, no relation to acts to be done after the corporate life has come to an end. So soon as the company passes into liquidation the distribution of its assets is a matter which concerns the corporation not at all, but its creditors and contributories only. In my judgment, it is no part of the function of the memorandum of association to define under the corporate objects the distribution of the assets after the corporate life is over. The purpose of the memorandum and articles, however, is not confined to defining and limiting the purposes of the corporation; it extends also within proper limits to defining and ascertaining the rights of the corporators. I have no doubt that within proper limits the memorandum and articles may provide how, as between the corporators, the corporate assets shall be dealt with after liquidation. But in this, as in many matters, there are limits imposed by the statutes.

There are matters in respect of which the constitution of the company cannot provide that the corporator shall not enjoy rights and immunities which the statute gives him. For instance, s. 82 of the Companies Act, 1862, empowers a contributory to present a winding-up petition. His right in that respect cannot be excluded by the articles: *Re Peveril Gold Mines, Ltd.* (3). The issue of shares at a discount is illegal, and this not only in the sense that a less sum than 20s. in the pound cannot be limited to the injury of the creditor, but that as between shareholders provisions in the articles for the issue of shares at a discount remain illegal even after all creditors have been paid. In winding-up, a call may be made ultra the discount amount of the share for the adjustment of the rights of contributories amongst themselves: *Welton v. Saffery* (4). **LORD MACNAGHTEN** said:

"These companies are the creature of statute, and by the statute to which they owe their being they must be bound in regard to shareholders, as well as in regard to creditors, in all matters coming within the condition of the

A memorandum of association. Shareholders in these companies require protection just as much as creditors—perhaps even more.”

Upon a like principle the articles cannot exclude a shareholder from his right of dissent under s. 161 of the Companies Act, 1862: *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate* (5); *Payne v. Cork Co., Ltd.* (6).

B It is, therefore, not necessarily true that, because there are found in the memorandum and articles clauses such as those upon which the question here arises, that the corporators as individuals are contractually bound by them. The question is not whether each individual corporator can bind himself in respect of his distributive share in the assets. The question is whether, consistently with the statutes, the constitution of the corporation can be such that every corporator shall in the matter of distribution—or a fortiori of distribution and further liability—be bound by the vote of the majority. The company quâ company have no power to agree to provisions which reduce the shareholder's liability, even inter socios below the nominal amount of the share: *Welton v. Saffery* (4); nor, in my opinion, to provisions which increase his liability above that amount. The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, not to bind him in his capacity as an individual. The definition of his position as shareholder must be a definition consistent with the statutes. A perusal of the opinions of the learned Lords in *Welton v. Saffery* (4), and particularly those of LORD HALSBURY, LORD MACNAGHTEN, and LORD DAVEY, will show that these statements are well founded. In the matter of liability upon his shares the statute in plain terms by s. 38 (4) provides that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount unpaid on his shares. In my opinion, any attempt so to define the constitution of the company as that the member shall in an event be liable for a larger sum is in breach of the statute and is ultra vires. Any clauses which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum or of being dispossessed of his status as shareholder upon terms which he is not bound to accept are, I think, ultra vires. When liquidation ensues, the scheme of the Act shortly is that the assets are to be turned into money, the contributions of the contributories enforced as far as need be, the debts paid, and the balance divided amongst the contributories according to their rights.

G Section 161 of the Act of 1862 introduces a modification. That is a section which speaks not only after liquidation, but when the company is proposed to be, as well as when it is in the course of being, wound-up. The special resolution may be passed antecedently to or concurrently with the resolution for winding-up. It is a section which enables the liquidator instead of converting the assets into money to exchange them for shares or like interests for the purpose of distribution among the members, but it safeguards the dissentient member by providing for the purchase of his interest at a price to be determined as mentioned in the Act of Parliament. The dissentient member being thus in a position, by taking proper steps, to obtain the value of his interest in the company, there is no hardship upon him in any of the following arrangements within reasonable limits: (i) That the shares for distribution be partly-paid shares, or (ii) that, if he wants the shares, he must apply for them within a limited time, or (iii) that shares unapplied for are to be at the disposal of the new company, or (iv) that shares unapplied for may be sold and the member who does not assent shall take the proceeds (for this is giving him something more than that to which he would be otherwise entitled), or (v) that the shares shall not go to the company and be assets of the company, but shall go direct to the members. It has accordingly been held that all these are legitimate in sales under that section. On the other hand, if there are dissentient members unpaid, the company may be put under an undertaking not to part with the assets until provision is made for them: *Re Hester & Co., Ltd.* (7). Further,

the creditors are not injured, for under the last words of the section the sale is invalid if within a year a winding-up order be obtained.

But none of these things is true if the sale be made, not under s. 161, but under clauses in the memorandum such as are here relied upon, for when the shareholder cannot obtain the value of his interest all the above are a hardship upon him. In substance he is placed in the position that he must either take the shares with the liability, take them within a limited time and so on, or else find himself dispossessed of his proportionate share of the assets of the old company. And the creditor is injured, for the distribution of the shares direct to the members before the debts are paid leaves the creditor with nothing to look to but such part of the assets, if any, as goes to non-assenting members. Under s. 161 the creditor can stop the sale under the last words of the section—under the memorandum of association he cannot. Moreover, if the creditor resorts, as he naturally will in the first instance, to the last-mentioned assets, the non-assenting members will see those swept away by the creditors, while the assenting members have received and gone away with their shares. All this is wholly at variance with the right of the members who is not minded to take the new shares with the liability upon them. His right is to have the assets including the shares in the new company realised and applied first in payment of the debts, and then to have his proportionate share of the balance.

These considerations lead irresistibly to the review of CHITTY, J.'s, decision in *Cotton v. Imperial and Foreign Agency and Investment Corp., Ltd.* (1). He there held that a company might by proper clauses in its memorandum of association evade or escape the operation of s. 161. It is true that the agreement there was dated May 2, and the special resolution for liquidation was passed on May 4, but the notice of the meeting for May 4 must necessarily have been current on May 2, and the company must on May 2 have been one which, within the language of s. 161, was "proposed to be wound-up voluntarily." The decision cannot fairly, I think, be regarded as resting in any way upon the difference between the dates of May 2 and 4. The decision affirmed that under clauses in the memorandum of association the company might sell its whole undertaking—meaning by that expression not merely all its assets at the moment, but all its present and future business—and might under the authority of special resolutions divide the proceeds of sale among the members without the safeguards provided by s. 161. With the greatest respect to that very learned judge I am unable to agree with this decision. Sale of even all the property at a particular moment may be, but sale of the whole undertaking and division of the proceeds cannot be, a corporate object. Under a clause in its memorandum of association a single steamship company may no doubt sell its only steamship with the whole of its equipment and with the proceeds buy another. But under a clause in its memorandum of association it cannot, in my opinion, sell its only steamship and all its undertaking and divide the proceeds. Distribution of capital (except in reduction of capital) can only be made in winding-up. An agreement for sale may be a corporate act of the going company and within its objects, but an agreement for sale and distribution can only be valid when the company "is proposed to be wound-up" or is in course of being wound-up. When the company is proposed to be wound-up or is in course of being wound-up, s. 161 contains provisions which, in my judgment, define rights in the members which cannot by any clauses in the memorandum and articles of association be excluded. If the company is proposed to be wound-up and the transaction is a sale and distribution, then, in my opinion, the statute provides that sale by conversion into money may be replaced by exchange for shares upon the terms, but only upon the terms, of complying with the provisions of s. 161. It has been decided as mentioned above that part of s. 161—viz., the right of the member to dissent, cannot be excluded by the articles, but the argument before us is that whole of s. 161 may be excluded. I think not. In my judgment, the basis and reasoning of the decision in *Cotton v. Imperial, etc., Investment Corp., Ltd.* (1), cannot stand

A consistently with principle or with the reasoning of the subsequent decision of the House of Lords in *Welton v. Saffery* (4).

We have been referred to some cases in the Court of Appeal since 1892 in which the decision in *Cotton v. Imperial, etc., Investment Corpn., Ltd.* (1) was referred to; and there are others. In none of them did the question of the correctness of the decision really arise, and in none of them was that case adopted or affirmed by the Court of Appeal. Counsel for the defendant company pressed us with DAVEY, L.J.'s, words in *New Zealand Gold Extraction Co. (Newbery-Vautin Process), Ltd. v. Peacock* (8). The answer is easy. The action was for calls, and all that was decided was that the old company possessed and had validly exercised its power to make a call. The scheme did not impose upon Peacock the liability to pay more than the 20s. payable upon his shares. The only question was whether his executors were right in saying that he was not liable to pay so much. It is only fair to say that in *Cotton v. Imperial, etc., Investment Corpn., Ltd.* (1), the shares in the new company were fully paid shares, so that the particular iniquity of using the memorandum for the purpose of imposing an assessment did not arise. Had the case contained that additional feature it may be that CHITTY, J., would not have gone as far as he did. But apart from that feature and upon the general question, I cannot agree with the decision. Moreover, it is, I think, inconsistent in principle with the subsequent cases, such as *Re Peveril Gold Mines, Ltd.* (3) and *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate* (5), in this court, and with *Walton v. Saffery* (4) in the House of Lords. It has never been considered and approved in this court, and, on the contrary, *Manners v. St. David's Gold and Copper Mines, Ltd.* (9) is, I think, inconsistent with it. That case is an authority for the proposition that an agreement, whose effect is that, if the member does not choose to accept a further liability, his share of the assets shall be forfeited and handed over to the purchasing company, is ultra vires; that any device which compels the member to find further money or to forfeit his interest is bad. KEKEWICH, J., in *Bisgood v. Nile Valley Co., Ltd.* (10) followed the same principle. I think *Bisgood v. Nile Valley Co., Ltd.* (10) was rightly decided. It follows that *Fuller v. White Feather Reward, Ltd.* (2), in my opinion, was wrong. In *Doughty v. Lomagunda Reefs, Ltd.* (11), I followed, as I was bound as a judge of first instance to follow, *Cotton v. Imperial, etc., Investment Corpn., Ltd.* (1). In so doing, I said all I properly could to invite an appeal, hoping that the Court of Appeal might see its way to do what I could not do and consider whether *Cotton v. Imperial, etc., Investment Corpn., Ltd.* (1) was rightly decided. Unfortunately, the appeal went off on another point, and my decision, to my regret, was affirmed without argument. In the present case, it is necessary to say whether *Cotton v. Imperial, etc., Investment Corpn., Ltd.* (1) was rightly decided or not. I feel bound to express the opinion that it was not.

I prefer to decide this case upon the broad ground and not upon any detail in the particular facts of the scheme in this case. At the same time there is here an additional feature which should not be left without mention. The new company is one formed in Rhodesia under the Rhodesia Company Ordinance. So that under this scheme the corporator in the English company is to find himself a corporator with an increased liability in a company formed and residing, not in this country, but in South Africa, and under another law. The fact that cl. (m), (o), (p), and (q) of the memorandum of association extended to companies registered in South Africa does not wholly cover this point. The plaintiff is a person who, as the holder of fully-paid shares, finds that he must either take the like number of shares in the Rhodesian company with a liability of 2s. 6d. upon them or accept such benefit, if any, as comes to him under the agreement and resolutions. The company, it is true, have issued the allotment letters in such form as that the shareholder could sell his right to an allotment and put forward the name of a purchaser if he found one. And the defendant company could within the language of the agreement sell the shares which are not applied for, and under the fifth resolution the proceeds

would be distributable among the non-assenting members. Shortly stated, the scheme is one under which the shareholder is told that he may take the share in the new company with its liability or sell the share in the new company with its liability, but he shall have nothing but the share in the new company or its proceeds—that he must be assessed or find someone who will take the new share with the assessment or take his chance that the liquidator may find someone who will do so, but that he shall have nothing else. In my opinion, this is ultra vires. The plaintiff is, in my judgment, entitled to an injunction to restrain the defendants from carrying out the reorganisation scheme.

SIR HERBERT COZENS-HARDY, M.R.—I have read the judgment delivered by BUCKLEY, L.J. I agree with it, and I do not feel that I can with advantage add anything to it.

FLETCHER MOULTON, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors: *Hatchett-Jones, Bisgood & Marshall; Parker & Richardson; Ashurst, Morris, Crisp & Co.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

WINSTANLEY v. NORTH MANCHESTER OVERSEERS

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Macnaghten, Lord James of Hereford, Lord Atkinson, Lord Collins and Lord Shaw), July 15, 16, November 18, 1909]

[Reported [1910] A.C. 7; 79 L.J.K.B. 95; 101 L.T. 616; 74 J.P. 49; 26 T.L.R. 90; 54 Sol. Jo. 80; 8 L.G.R. 75]

Rates—Rateable occupation—Burial ground—Fees and charges received by rector—Liability of rector to be rated.

The freehold of a burial ground was vested by statute in the rector of the parish church, who received burial fees and other special charges in respect of burials therein.

Held: the rector was liable to be rated in respect of the burial ground since he was in beneficial occupation of it and the fees and other charges were incidental to his ownership and occupation of it, and not to his office.

Notes. Explained: *Liverpool Corpn. v. Chorley Union Assessment Committee*, [1911-13] All E.R. Rep. 194. Applied: *Solihull Corpn. v. Gas Council*, [1961] 1 All E.R. 542. Referred to: *West Kent Main Sewerage Board v. Dartford Union Assessment Committee* (1911), 104 L.T. 357; *Poplar Metropolitan Borough Assessment Committee v. Roberts*, [1922] All E.R. Rep. 191; *Harper v. Hedges*, [1923] 2 K.B. 314; *Ilford Corpn. v. Mallinson* (1932), 96 J.P. 185; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K.B. 585; *Bertram v. Wightman*, [1936] 2 All E.R. 487; *Associated Cinema Properties, Ltd. v. Hampstead Borough Council*, [1943] 2 All E.R. 696; *Re London and North Eastern Rail. Co.'s Appeal*, [1946] K.B. 27.

As to rateable occupation, see 32 HALSBURY'S LAWS (3rd Edn.) 16 et seq; and for cases, see 38 DIGEST (Repl.) 476 et seq.

A Cases referred to :

- (1) *Beckwith v. Harding* (1818), 1 B. & Ald. 508; 106 E.R. 187; 7 Digest (Repl.) 562, 133.
- (2) *Greenslade v. Darby* (1868), L.R. 3 Q.B. 421; 9 B. & S. 428; 37 L.J.Q.B. 137; 18 L.T. 463; 32 J.P. 437; 16 W.R. 898; 19 Digest (Repl.) 283, 489.
- (3) *Frances v. Ley* (1615), Cro. Jac. 366; 79 E.R. 314; sub nom. *Day v. Beddingfield*, Noy, 104; 7 Digest (Repl.) 556, 74.
- (4) *Dean and Chapter of Exeter's Case* (1707), 1 Salk. 334; 91 E.R. 294; 7 Digest (Repl.) 566, 177.
- (5) *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.*, [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818; 59 J.P. 566; 11 T.L.R. 132; 11 R. 98, H.L.; 38 Digest (Repl.) 470, 7.

C

- (6) *R. v. London Corpn.* (1790), 4 Term Rep. 21; 100 E.R. 872; 38 Digest (Repl.) 476, 10.
- (7) *Hare v. Putney Overseers* (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 29 W.R. 721, C.A.; 38 Digest (Repl.) 480, 38.

D

- (8) *Lambeth Overseers v. L.C.C.*, [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; 46 W.R. 79; 13 T.L.R. 527; sub nom. *St. Mary, Lambeth (Churchwardens and Overseers) v. L.C.C.*, 61 J.P. 580, H.L.; 36 Digest (Repl.) 351, 13.
- (9) *Ex parte Blackmore* (1830), 1 B. & Ad. 122; 109 E.R. 732; sub nom. *R. v. St. Aubyn, Ex parte Blackmore*, 8 L.J.O.S.K.B. 384; 7 Digest (Repl.) 560, 112.

E

- (10) *R. v. Coleridge* (1819), 2 B. & Ald. 806; 1 Chit. 588; 3 Phillim. 337, n.; 106 E.R. 559; 7 Digest (Repl.) 558, 93.
- (11) *Nevill v. Bridger* (1874), L.R. 9 Exch. 214; 43 L.J.Ex. 147; 30 L.T. 690; 22 W.R. 740; 7 Digest (Repl.) 560, 114.
- (12) *Greig v. Edinburgh University* (1868), L.R. 1 Sc. & Div. 348; 32 J.P. 627, H.L.; 38 Digest (Repl.) 553, 436.

F

- (13) *Lincoln Corpn. v. Holmes Common Overseers* (1867), L.R. 2 Q.B. 482; 8 B. & S. 344; 36 L.J.M.C. 73; 16 L.T. 739; 31 J.P. 645; 15 W.R. 786; 38 Digest (Repl.) 544, 385.
- (14) *R. v. Sudbury Corpn.* (1823), 1 B. & C. 389; 2 Dow. & Ry. K.B. 651; 1 Dow. & Ry. M.C. 343; 107 E.R. 145; 38 Digest (Repl.) 543, 384.

G

- (15) *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H.L. Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur. N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, 395.
- (16) *Morgan v. Crawshay* (1871), L.R. 5 H.L. 304; 40 L.J.M.C. 202; 24 L.T. 889; 35 J.P. 596; 20 W.R. 554, H.L.; 38 Digest (Repl.) 558, 474.

H

- (17) *Hamilton v. Baker, The Sara* (1889), 14 App. Cas. 209; 58 L.J.P. 57; 61 L.T. 26; 38 W.R. 129; 5 T.L.R. 507; 6 Asp. M.L.C. 413, H.L.; 42 Digest 668, 786.

Also referred to in argument :

Bryan v. Whistler (1828), 8 B. & C. 288; 2 Man. & Ry. K.B. 318; 6 L.J.O.S.K.B. 302; 108 E.R. 1050; 7 Digest (Repl.) 560, 108.

I

Anon. (1671), 1 Vent. 127; 86 E.R. 87; 19 Digest (Repl.) 303, 726.
Marriott v. Tarpley (1838), 9 Sim. 279; 7 L.J.Ch. 245; 2 Jur. 464; 59 E.R. 365; 19 Digest (Repl.) 312, 871.
R. v. Twiss (1869), L.R. 4 Q.B. 407; 10 B. & S. 298; 38 L.J.Q.B. 228; 20 L.T. 522; 33 J.P. 516; 17 W.R. 765; 19 Digest (Repl.) 345, 1316.
Robson v. Hyde (1783), Cald. Mag. Cas. 310; 38 Digest (Repl.) 484, 65.
Wright v. Ingle (1885), 16 Q.B.D. 379; 55 L.J.M.C. 17; 54 L.T. 511; 50 J.P. 436; 34 W.R. 220; 2 T.L.R. 143, C.A.; 26 Digest (Repl.) 557, 2261.

- Beswick v. Alker* (1872), L.R. 8 C.P. 265; 2 Hop. & Colt. 36; 42 L.J.C.P. 26; 27 L.T. 423; 37 J.P. 151; sub nom. *Berwick v. Alker*, 21 W.R. 72; 19 Digest (Repl.) 552, 3929.
- Wolfe v. Surrey County Council Clerk, Reeve v. Surrey County Council Clerk*, [1905] 1 K.B. 439; 74 L.J.K.B. 161; 92 L.T. 114; 69 J.P. 22; 53 W.R. 264; 21 T.L.R. 153; 3 L.G.R. 407; 1 Smith, Reg. Cas. 378, D.C.; 19 Digest (Repl.) 277, 419.
- R. v. Christopherson* (1885), 16 Q.B.D. 7; 55 L.J.M.C. 1; 53 L.T. 804; 50 J.P. 212; 34 W.R. 86; 2 T.L.R. 85, C.A.; 38 Digest (Repl.) 591, 711.
- Wood v. Headingley-cum-Burley Burial Board*, [1892] 1 Q.B. 713; 66 L.T. 90; 56 J.P. 326; 40 W.R. 390; 8 T.L.R. 217; 36 Sol. Jo. 201, D.C.; 19 Digest (Repl.) 275, 402.
- McGough v. Lancaster Burial Board* (1888), 21 Q.B.D. 323; 57 L.J.Q.B. 568; 52 J.P. 740; 36 W.R. 822; 4 T.L.R. 679, C.A.; 7 Digest (Repl.) 574, 249.
- Putney Overseers v. London and South Western Rail. Co.*, [1891] 1 Q.B. 440; 60 L.J.Q.B. 438; 64 L.T. 280; 55 J.P. 422; 39 W.R. 291; 7 T.L.R. 271, C.A.; 11 Digest (Repl.) 109, 52.
- Gilbert v. Buzzard* (1821), 2 Hag. Con. 333; 3 Phillim. 335; 161 E.R. 761; 7 Digest (Repl.) 558, 94.
- De Romana v. Roberts*, [1906] P. 332; 7 Digest (Repl.) 559, 101.
- Maidman v. Malpas* (1794), 1 Hag. Con. 205; 161 E.R. 526; 7 Digest (Repl.) 557, 82.
- Young v. Kingston-on-Thames, Surbiton, New Malden, and Coombe Joint Burials Committee*, [1907] 1 K.B. 416; 76 L.J.K.B. 382; 96 L.T. 134; 71 J.P. 121; 23 T.L.R. 218; 5 L.G.R. 481, C.A.; 7 Digest (Repl.) 578, 278.
- Spry v. Gallop* (1847), 16 M. & W. 716; Cripps' Church Cas. 28; 16 L.J.Ex. 218; 12 J.P. 233; 153 E.R. 1378; 7 Digest (Repl.) 567, 188.
- Bruce v. Willis* (1840), 11 Ad. & El. 463; 3 Per. & Dav. 220; 9 L.J.M.C. 43; 113 E.R. 491; sub nom. *Bath River Navigation Co. v. Willis*, 2 Ry. & Can. Cas. 7; sub nom. *Bristol and Bath River Navigation Co. v. Willis*, 4 J.P. 152; 38 Digest (Repl.) 600, 785.
- Bute v. Grindall* (1786), 1 Term Rep. 338; 1 Bott, 155; 99 E.R. 1127; affirmed (1793), 2 Hy. Bl. 265; 38 Digest (Repl.) 504, 185.
- R. v. Bell* (1798), 7 Term Rep. 598; 1 Bott, 189; 101 E.R. 1152; 38 Digest (Repl.) 504, 186.
- Heath v. Haynes* (1857), 3 C.B.N.S. 389; K. & G. 99; 27 L.J.C.P. 50; 30 L.T.O.S. 134; 21 J.P. 760; 4 Jur. N.S. 664; 6 W.R. 52; 140 E.R. 791; 20 Digest 19, 109.
- St. Giles, Camberwell Vestry v. London Cemetery Co.*, [1894] 1 Q.B. 699; 63 L.J.M.C. 74; 70 L.T. 734; 58 J.P. 382; 42 W.R. 446; 10 T.L.R. 270; 38 Sol. Jo. 254, D.C.; 7 Digest (Repl.) 599, 435.
- R. v. Capel* (1840), 12 Ad. & El. 382; 4 Per. & Dav. 87; 9 L.J.M.C. 65; 4 J.P. 378; 4 Jur. 886; 113 E.R. 857; 38 Digest (Repl.) 680, 1285.
- Bishop of Ely v. Gibbons and Goody* (1833), 4 Hag. Ecc. 156; 162 E.R. 1405; 19 Digest (Repl.) 323, 1033.
- Rich v. Bushnell* (1827), 4 Hag. Ecc. 164; 19 Digest (Repl.) 277, 422.
- R. v. Cheshunt Inhabitants* (1818), 1 B. & Ald. 473; 106 E.R. 174; 37 Digest 289, 862.
- Seager v. Boule* (1823), 1 Add. 541; 162 E.R. 191; 7 Digest (Repl.) 562, 136.
- Allan v. Liverpool, Inman v. Kirkdale* (1874), L.R. 9 Q.B. 180; 43 L.J.M.C. 69; 30 L.T. 93; 38 J.P. 261; 22 W.R. 330; 38 Digest (Repl.) 499, 165.
- R. v. Melladew*, [1907] 1 K.B. 192; 76 L.J.K.B. 262; 96 L.T. 189; 71 J.P. 125; 23 T.L.R. 207; 51 Sol. Jo. 169; 5 L.G.R. 177; 2 Konst. Rat. App. 530, C.A.; 38 Digest (Repl.) 477, 15.
- Lancashire Justices v. Cheetham* (1867), L.R. 3 Q.B. 14; 8 B. & S. 548; 37 L.J.M.C. 12; 32 J.P. 181; 16 W.R. 124; 38 Digest (Repl.) 490, 105.

A *L.C.C. v. Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee, Westham Parish (Churchwardens, etc.) v. L.C.C., St. George's Union Assessment Committee v. L.C.C.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; sub nom. *L.C.C. v. Erith Overseers, L.C.C. v. West Ham Union, L.C.C. v. Woolwich Union, L.C.C. v. St. George's Union, Ryde, Rat. App.* (1891-93) 382, H.L.; 38 Digest (Repl.) 481, 47.

B *Oxford Poor Rate Case* (1857), 8 E. & B. 184; 120 E.R. 68; sub nom. *Re Oxford University and City of Oxford Poor Rate*, 27 L.J.M.C. 33; 3 Jur. N.S. 1249; sub nom. *R. v. Oxford University (Vice Chancellor)*, 29 L.T.O.S. 343; 21 J.P. 644; 5 W.R. 872; 38 Digest (Repl.) 553, 435.

C *R. v. Llanfaethly (Inhabitants)* (1853), 2 E. & B. 940; 2 C.L.R. 230; 23 L.J.M.C. 33; 22 L.T.O.S. 117; 18 J.P. 8; 17 Jur. 1123; 2 W.R. 61; 118 E.R. 1018; 37 Digest 291, 880.

R. v. Ellis (1842), 2 Dowl. N.S. 361; 12 L.J.M.C. 20; 7 J.P. 179; 7 Jur. 108; 16 Digest (Repl.) 376, 1583.

D Appeal from a decision of the Court of Appeal (the EARL OF HALSBURY, SIR GORELL BARNES, P., and BIGHAM, J.), reported [1908] 1 K.B. 835, reversing a decision of the King's Bench Division (LORD ALVERSTONE, C.J., RIDLEY and DARLING, JJ.), reported [1907] 1 K.B. 27, upon a Case stated by the Recorder of Manchester on an appeal to quarter sessions against a poor rate.

E The appellant was the rector and incumbent of the parish of All Saints, Newton Heath, in the township of North Manchester. In 1855 and 1883 two contiguous pieces of land situated about 300 yards from the church were acquired and consecrated under the statute in that behalf for use as a burial ground for the parish. Fees were charged for burials, and for the purchase of graves and other matters in connection with the burial ground, which, after the payment of expenses, left a net profit of about £100 a year, which was paid to the appellant as rector for his own use. The overseers of the parish assessed the appellant to the poor rate in respect of his occupation of the burial ground.

F Sir A. Cripps, K.C., Macmorran, K.C., Rhodes, K.C., and A. T. Lawrence for the appellant.

E. Sutton and Gordon Hewart for the respondents.

Their Lordships took time for consideration.

G Nov. 18, 1909. The following opinions were read.

H LORD LOREBURN, L.C.—In this case my noble and learned friend LORD ATKINSON has, in an opinion which I have had an opportunity of reading, dealt so fully with the arguments that I need only summarise in a few words my reason for agreeing with the judgment under appeal.

I It is clear that cemetery companies are rateable in respect of their beneficial occupation of cemeteries. In principle I perceive no difference between that case and the case of a parson in beneficial occupation of a churchyard if he be the occupier. And he must, I think, be the occupier, because he has the freehold and the right to direct where deceased persons are to be buried, together with the right to allow special kinds of interment or to permit persons other than parishioners to be there interred. For the exercise of some, at all events, of these rights, he may charge fees. No one else can be said to occupy, and it seems to me impossible, having regard to the use made of the ground for profit, to say that there is no occupation in anyone, or that if it be in the parson it is not beneficial. My only difficulty has been that there is no precedent for thus rating a parson in all the years which have passed since the statute of Elizabeth (43 Eliz., c. 2). When there has been in fact no such rating for so long a time I strongly incline to find, or even to presume, a lawful origin for a long-continued immunity, if the case

admits of it. But this case depends upon statute, not upon common law which is rooted in custom, and there has been no such construction put upon the statute as to preclude a court from interpreting it as it stands, as in any other case. I agree also with LORD ATKINSON in thinking that the profit is incidental to the parson's occupation of the churchyard and not to his office, though but for the office he would not be the occupant, and I can add nothing to the reasons which he advances for this opinion.

LORD ATKINSON.—In this case the appellant is the rector and incumbent of All Saints' Church, in the township of North Manchester, in the city of Manchester. He has been rated "as the owner and occupier of All Saints' Cemetery, situated in Newton Heath, in the parish of North Manchester, same not being agricultural land," in the sum of £83 10s., as the rateable value thereof. This sum has been fixed in respect of certain moneys purporting to have been received by him for "the sale of freehold graves" in the said cemetery. If he be liable there is no dispute as to the amount.

The cemetery, which has been duly consecrated, is vested in the appellant by s. 13 of the Church Building Act, 1845, "for the use of the inhabitants of the place for which the said burial-ground has been acquired"—namely, the said parish of North Manchester. Nothing turns upon the wording of the statute, as counsel for the appellant, as I understood, did not contend on behalf of the appellant that he had any estate or interest in, or right over, this burial-ground more extensive than, or different in nature and character from, those possessed and enjoyed in the ordinary case by the rector of a parish in and over the graveyard attached to his church. The case was argued before your Lordships on that basis, and its difficulty and importance in some degree depend upon that consideration. The question for decision is, therefore, a general one—namely, the rateability of rector of a parish, as the occupier of the parish cemetery in respect of the burial fees claimed and received by him for the interment therein, in places designated by him, of the deceased inhabitants of such parish and others.

That question, in my view, resolves itself into the three questions following, namely: (i) Does the appellant occupy this cemetery for which he is rated? (ii) If he does, is his occupation a beneficial one, that is, a thing of value? (iii) What is the measure of the value? In *Beckwith v. Harding* (1) LORD ELLENBOROUGH, C.J., thus defines the rector's position in relation to the parish graveyard: The freehold of the graveyard is vested in him. By his induction into his living he has full and entire possession of it and can maintain an action of trespass in respect of it. In *Greenslade v. Darby* (2) the contest arose between the lay rector and impropiator of a certain church and the perpetual curate of the same church, who had been duly nominated, licensed, and instituted in the benefice. The lay rector claimed a right to depasture the churchyard with sheep, and the curate instituted an action of trespass against him in respect of the assertion of this right. BLACKBURN, J., in his judgment dealt with their respective rights in the passage following (L.R. 3 Q.B. at p. 429):

"Originally the land was the property of some lay person which, when the rectory was formed, was dedicated to the church and conveyed by him to the rector. Thus the freehold was vested in the rector, and he was entitled to the land, including the grass, herbage, and everything else as fully as the original owner had been; but as the land had been set apart by consecration for the church and churchyard, the right which the rector as owner of the freehold had in the profits was proportionally diminished because he could not desecrate it or use it for any purpose which was inconsistent with it as a graveyard. Nevertheless the enjoyment of the property, so far as could be exercised by one not holding a sacred office, belonged to the rector as owner of the freehold."

A Of the perpetual curate he says (ibid. at p. 431) :

"He must likewise have such possession as is necessary for the performance of his sacred duties, but there is no reason in law why the perpetual curate should now have such a possession as to enable him to take the profits arising from the use of the churchyard for secular purposes."

B And again :

"The perpetual curate is no doubt in possession of the churchyard for ecclesiastical purposes; that is to say, for the purposes of burial and the like."

C The curate and his predecessors had in fact always received, for his and their own use and benefit, fees for brick graves and headstones from time to time opened and put up in the churchyard. It follows, I think, that where the rector is not a layman, but is himself the officiating clergyman, he must have in him the right of both the lay rector and the curate in the above case—that is to say, the full right of the owner of the freehold in actual possession, limited only by three considerations: First, the consideration of the churchyard being consecrated; second, the right of sepulture in it which all the inhabitants of the parish, and possibly all who die there are entitled to; and third, a restriction on cutting trees growing upon it, because these are presumed to have been planted to provide timbers for the repairs of the church. According to some authorities the rector would, however, be entitled not only to the herbage of the churchyard but to timber growing on it if blown down by a storm. In COMYNS' DIGEST, tit. Ecclesiastical Persons, it is stated :

E "The parson is seised in right of his church, and the church, churchyard, and glebe belong to him. The churchwardens or ordinary cannot license to bury within the church, but the parson, for the frank tenement is in him only":

and see *Frances v. Ley* (3) (Cro. Jac. at p. 367). In the *Dean and Chapter of Exeter's Case* (4) it is said :

F "No fee is due for burial of common right, but where a licence is necessary the person may stand upon his own price."

G It is quite true, no doubt, that the ownership of a hereditament does not necessarily imply occupation for the purpose of rating, and a person or company who has no proprietary interest in the soil may be an occupier within the meaning of the statute of Elizabeth: *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (5). But owners in possession are *prima facie* occupiers, unless it be shown that the occupation is in someone else: *R. v. London Corpn.* (6), and *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (5). In the first of these cases LORD KENYON, C.J., apparently considered that a person who had such possession of land as would enable him to bring an action of trespass must be held to be in occupation, unless it was proved that some other person was in occupation. It would therefore appear to me that the appellant is in "occupation" of this graveyard, despite any right of supervision or control which the churchwardens may be entitled to. Whether this occupation is a beneficial occupation—a thing of value within the meaning of the statute of Elizabeth (43 Eliz., c. 2)—or not depends upon whether the occupier is, or is not, by law, debarred from deriving any benefit from it. If it is merely by his own volition, and not by the law, that he is deprived of a benefit which he might have received, then there is a "potential beneficial occupation," and he is liable to be rated in respect of it: *Hare v. Putney Overseers* (7), approved in *Lambeth Overseers v. L.C.C.* (8). It is clear, I think, in the present case that the appellant is not debarred by law from deriving some benefit from his occupation of the graveyard. His occupation of it is, therefore, beneficial. If so, he is rateable in respect of it, at least to some extent.

I The real question, however, remains. Does he receive these burial fees by reason of his occupation? Are they "incidental" to his occupation, and the fruit of it, so that without it he could not exact them? For the purposes of this question

it is, I think, immaterial what the precise legal nature of the right and interest acquired by the so-called purchase of graves may be. Whether it be the ownership of a particular portion of the soil of the churchyard, or an easement of the nature of a perpetual and exclusive right of interment in that portion of the soil, or merely a like easement for a limited time—namely, till the remains of the deceased sink into dissolution and return to earth—is a matter of indifference, provided only that the rector confers those rights for which he receives fees, as “incidental” to his occupation of the burial ground. In *Greenslade v. Darby* (2) BLACKBURN, J., as already pointed out, considered that it was necessary for the perpetual curate to have the right “of possession of the” churchyard for the purposes of burial. The inhabitants of the parish have, according to law, a general right of sepulture in the churchyard, and that right, if denied, will be enforced by mandamus (*Ex parte Blackmore* (9); *R. v. Coleridge* (10)); but the right to select the place of interment is in the rector, and for the permission to be buried in any particular place or apparently in an unusual manner, such as an iron coffin, or in a vault, or with other unusual accompaniments, he can demand a fee. Again, he can permit persons who neither lived nor died in his parish, and were not his parishioners in any sense, to be buried in the churchyard, and can exact a fee beyond the usual burial fee for the privilege: *Nevill v. Bridger* (11). Yet these so-called strangers have no rights in the churchyard, no claims upon the services of the parson; he does not, by virtue of his office, owe them any duty, ecclesiastical or legal. It cannot, therefore, be that it is by virtue of his office that he exacts these fees from them; and if not by virtue of his office it can only be by virtue of his ownership and occupation of the soil. If he should permit these strangers to be buried in the churchyard in such numbers as to trench upon the general right of sepulture belonging to the inhabitants of the parish, he could be restrained by the ordinary, but subject to that he may allow them to be buried there in such numbers as he may deem fit, and exact what fees he pleases. It seems to me impossible to hold that in these cases, at all events, the fees received are not incidental to the occupation of the soil of the graveyard. But though the position of the inhabitant of the parish is differentiated from that of the stranger by the fact that the former has a right of sepulture there and the latter has not, the rector, I think, selects the place of interment and exacts the fee by virtue of the same right and title in the one case as in the other. In *Greig v. Edinburgh University* (12) LORD CAIRNS, L.C., points out that the University received matriculation fees from students who attended in their buildings, which fees would not be paid unless there were buildings of which students could have the benefit for the purpose of receiving instruction, and further that the professors were allowed to receive fees from students who attended their classes, without which the salaries of the professors would presumably have to be increased by the University, that the University thus had the benefit of the fees paid to the professor, but that these fees would not be paid unless there were proper class-rooms in which the professors could deliver these instructions. The University were accordingly held liable to be rated as occupiers of their buildings, the fees being taken into account in estimating the value of the occupation. LORD WESTBURY puts the point of the decision thus (L.R. 1 Sc. & Div. at p. 355):

“But the University of Edinburgh is the occupant of the property in a character and for a purpose which entitles it to receive, and in respect of which it does receive, a certain amount of pecuniary value, which must be regarded as incidental to its occupation.”

It was further urged on behalf of the appellant that the burial-ground was impressed with a trust for the benefit of the inhabitants of the parish, but that has long ceased to be a ground of exemption, unless the terms of the trust are such as to debar the occupier from receiving any benefit or profit from the occupation: (*Lincoln Corpn. v. Holmes Common Overseers* (13); *R. v. Sudbury Corpn.*

A (14); *Jones v. Mersey Docks* (15)). Where the occupation is such that it produces profit it is immaterial whether the profit is retained by the occupier for his own benefit or is paid over by him to others. In the view which I take it is unnecessary to deal with one of the points strongly urged by counsel for the respondents in his lucid and able argument—namely, that the appellant, having purported to sell graves, i.e., part of the freehold of the lands, and received the price, he ought not to be permitted now, in order to escape liability for rates, to say that the soil of the graveyard was inalienable and that what he did was illegal. He clearly had the title and the power to vest some right or interest in the grave which he purported to sell. If he did that by virtue of his ownership and occupation of the ground he is, in my opinion, rateable.

B The last point urged on behalf of the appellant is the absence of all precedent.

C This is not a case, however, like *Morgan v. Crawshay* (16), in which one particular construction has been for many centuries put upon the statute of Elizabeth (43 Eliz., c. 2). As coal mines are the only mines mentioned in that statute it had been uniformly held that it applied to none other. There had been no conflicting decisions one way or the other, as there were in *Jones v. Mersey Docks* (15), and the old construction was adhered to, though its soundness was doubted, on the ground that to disagree with it would shake rights and titles which had been founded through many years on the conviction that this was the true interpretation and would not be departed from. In this case the rateability of the parson has never apparently been the subject of judicial decision, and the dangers referred to in the last case could hardly arise. The point for decision is, in truth, the measure of the parson rateably rather than the construction of the statute of Elizabeth.

D Occupancy in itself is a matter of fact rather than a matter of law. Many reasons may be found for the omission to rate the rector for his graveyard. It may well be, as was suggested, that until recent years the fees received were so small that they escaped attention; but if the practice of allowing him to escape rating be, to use the words of LORD MACNAGHTEN in *Hamilton v. Baker* (17) (14 A.C. at p. 222),

E “really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error.”

F It was, I think, not seriously disputed that the Poor Rate Exemption Act, 1840, left the parson's position as to rateability substantially what it was under the statute of 43 Eliz., c. 2. Much weight seems to have been given in the Court of Appeal to the circumstance that the parson is named in the statute of Elizabeth, but he is only named, I think, as one of the inhabitants—the words are, “every inhabitant, G parson, vicar, and others.” He is made rateable for tithes, but only as an “occupier” of tithes, and I do not think that the fact that he is so named can justify any conclusion that he, any more than any other inhabitant, is rateable on income not derived from, arising out of, or incidental to the “occupation” of a hereditament within the parish. On the whole, therefore, I am, for the reasons H above given, of opinion that the decision of the Court of Appeal was right, and that this appeal should be dismissed with costs.

LORD MACNAGHTEN.—I have had the opportunity of reading the opinion of LORD ATKINSON, and I concur in the conclusion at which he has arrived.

LORD COLLINS and **LORD SHAW** concurred.

I **LORD LOREBURN, L.C.**—**LORD JAMES OF HEREFORD**, who is not able to be present, desires me to express his agreement with the judgment proposed.

Appeal dismissed.

Solicitors: *Rooke & Sons*, for *Orford & Sons*, Manchester; *Chester, Broome & Griffith*, for *Crofton, Craven & Worthington*, Manchester.

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

GRIFFITHS v. FLEMING AND OTHERS

[COURT OF APPEAL (Vaughan Williams, Farwell and Kennedy, L.J.J.), January 21, 22, 23, March 2, 1909]

[Reported [1909] 1 K.B. 805; 78 L.J.K.B. 567; 100 L.T. 765;
25 T.L.R. 377; 53 Sol. Jo. 340]

Insurance—Life assurance—Insurable interest—Interest of husband in life of wife—Presumption—Need to adduce evidence of pecuniary interest—Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 1.

A husband is presumed to have an insurable interest in the life of his wife which need not be proved, and, therefore, it is unnecessary for him in an action on a policy of life assurance to adduce any evidence of his pecuniary interest in his wife's life.

Notes. Section 11 of the Married Women's Property Act, 1882, referred to in the judgments *infra*, was amended by the Law Reform (Married Women and Tortfeasors) Act, 1935: see 11 HALSBURY'S STATUTES (2nd Edn.) 799, 812.

Followed: *Re Gladitz Guaranty Executor and Trustee Co. v. Gladitz*, [1937] 3 All E.R. 173. Referred to: *John Rigby (Haulage), Ltd. v. Reliance Marine Insurance Co.*, [1956] 3 All E.R. 1.

As to insurable interest in life assurance, see 22 HALSBURY'S LAWS (3rd Edn.) 277-281, and for cases see 29 DIGEST 345.

Cases referred to:

- (1) *Halford v. Kymer* (1830), 10 B. & C. 724; 8 L.J.O.S.K.B. 311; 109 E.R. 619; 29 Digest 346, 2792.
- (2) *Wainwright (or Wainwright) v. Bland* (1835), 1 Mood. & R. 481; 29 Digest 345, 2781.
- (3) *Reed v. Royal Exchange Assurance Co.* (1795), Peake, Add. Cas. 70, N.P.; 27 Digest (Repl.) 134, 969.
- (4) *Huckman v. Fernie* (1838), 3 M. & W. 505; 1 Horn. & H. 149; 7 L.J.Ex. 163; 2 Jur. 444; 150 E.R. 1245; 29 Digest 359, 2913.
- (5) *Collett v. Morrison* (1851), 9 Hare, 162; 21 L.J.Ch. 878; 68 E.R. 458; 29 Digest 347, 2809.
- (6) *Motteux v. London Assurance (Governor & Co.)* (1739), 1 Atk. 545; 26 E.R. 343, L.C.; 29 Digest 52, 152.
- (7) *Barnes v. London, Edinburgh and Glasgow Life Insurance Co.*, [1892] 1 Q.B. 864; 8 T.L.R. 143; 36 Sol. Jo. 125, D.C.; 29 Digest 348, 2812.
- (8) *Harse v. Pearl Life Assurance Co.*, [1903] 2 K.B. 92; 72 L.J.K.B. 638; 89 L.T. 94; 19 T.L.R. 474, D.C.; reversed [1904] 1 K.B. 558; 73 L.J.K.B. 373; 90 L.T. 245; 52 W.R. 457; 20 T.L.R. 264; 48 Sol. Jo. 275, C.A.; 29 Digest 346, 2789.
- (9) *Evans v. Richardson* (1817), 3 Mer. 469; 36 E.R. 181, L.C.; 12 Digest (Repl.) 338, 2617.
- (10) *Wilson v. Jones* (1867), L.R. 2 Exch. 139; 36 L.J.Ex. 78; 15 L.T. 669; 15 W.R. 435; 2 Mar. L.C. 452, Ex.Ch.; 29 Digest 116, 709.
- (11) *Hebdon v. West* (1863), 3 B. & S. 579; 1 New Rep. 431; 32 L.J.Q.B. 85; 7 L.T. 854; 9 Jur. N.S. 747; 11 W.R. 422; 122 E.R. 218; 29 Digest 347, 2810.
- (12) *M'Farlane v. Royal London Friendly Society* (1886), 2 T.L.R. 755, D.C.; 29 Digest 345, 2782.
- (13) *Westminster Fire Office v. Glasgow Provident Investment Society* (1888), 13 App. Cas. 699; 59 L.T. 641; 4 T.L.R. 779, H.L.; 29 Digest 337, 2725.
- (14) *Wight v. Brown* (1849), 11 Dunl. (Ct. of Sess.) 459.

A Also referred to in argument :

Dalby v. India and London Life Assurance Co. (1854), 15 C.B. 365; 3 C.L.R. 61; 24 L.J.C.P. 2; 24 L.T.O.S. 182; 18 Jur. 1024; 3 W.R. 116; 139 E.R. 465, Ex.Ch.; 29 Digest (Repl.) 343, 2774.

Appeal by the defendants from a decision of PICKFORD, J., in action tried by him without a jury.

B The plaintiff brought this action to recover from the defendants, the trustees of the United Kingdom Temperance and General Provident Institution, the sum of £500 under a policy of insurance upon the lives of himself and his wife. The policy, which was dated Oct. 8, 1907, provided :

C "This policy witnesseth that the grantees named in the first schedule hereto have become members of the United Kingdom Temperance and General Provident Institution (hereinafter called the institution), and that in consideration of the payment already made of the first premium for the assurance effected by this policy and of the subsequent premiums, if any, payable as provided by the said schedule, the funds of the institution shall be liable to pay, at its principal place of business in London, the sum assured mentioned in the said schedule, to the person or persons to whom the same is therein expressed to be payable, upon satisfactory proof having been received and allowed by the directors of the institution of (1) the happening of the event mentioned in that behalf in the said schedule; (2) the title of the claimant or claimants; and (3) the age of the assured if such age has not been admitted. And it is hereby provided and declared that if the age of the life assured has not been admitted and exceed that stated in the said schedule, there shall be such adjustment as in that case provided by the said schedule, and that (subject to such adjustment, if any) this policy is indisputable unless there be any fraudulent representation or suppression of fact in the proposal and declaration mentioned in such schedule. The said schedule and the second schedule hereto (of privileges) shall both be deemed part of this policy and of the contract between the institution and the grantees.

"FIRST SCHEDULE.

"Name, address, and occupation, if any, of grantees.	{ George Edward Griffiths . . . and Emma Griffiths, his wife, both of . . .
"Name, address, and occupation, if any, of lives assured.	{ The same.
"Date of proposal and declaration, and by whom made.	{ October 3, 1907. The assured.
"Amount.	Five hundred pounds.
"To whom payable.	To the survivor of the grantees.
"Event on which the sum assured by this policy is to become payable.	{ On the death of such of the lives assured as shall first die.
"Premiums. { Amount. How payable and when. Period during which payable.	{ Twenty-one pounds. Annually, October 1 until the death of the first of the lives assured."

I The plaintiff and his wife had each signed a form of proposal for insurance, dated Oct. 3, 1907, in which it was stated that the sum to be assured was "£500 jointly with my wife" and "£500 jointly with my husband" respectively, to be payable at death. In their prospectus and table of rates the institution gave a table of rates for "joint-lives assurances," at the head of which was printed the following statement :

"Policies may be effected on joint lives, the sum being payable, and the

premiums ceasing, on the first death. This form of policy is specially suitable for partners in business, to replace capital withdrawn on the decease of either of them, or to provide for those who may have been dependent on him."

The plaintiff contributed £11, and his wife £10 to the premium of £21. The plaintiff's wife having committed suicide soon after the policy was granted, he claimed payment of the sum assured, and brought this action to recover the amount. He had not obtained a grant of letters of administration to the estate of his wife. The defendants, in their defence, alleged that at the time of the making of the policy the plaintiff had no insurable interest in the life of his wife, as required by the Life Assurance Act, 1774; that the plaintiff's wife committed suicide, being of sound mind; that the directors of the institution had not received satisfactory proof of the title of the plaintiff pursuant to condition 2 contained in the policy; and that the whole of the first and only premium in respect of the policy was paid by the plaintiff. The plaintiff, in his reply, stated that by virtue of the policy, which was issued jointly to him and his wife, the lives of himself and his wife were jointly assured and the sum payable under the policy was to be paid to the survivor of the grantees on the death of such of the lives assured as should first die, and by virtue of such assurance his wife had an insurable interest in his life and he had an insurable interest in his wife's life; that he would contend, alternatively, that by the policy he insured his life in favour of his wife, and his wife insured her life in his favour: and that on the death of his wife the sum assured became payable to him; that no further proof of his title was necessary; and that the premium was paid jointly by him and his wife.

The Life Assurance Act, 1774, provides:

"Section 1. From and after the passing of this Act no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever. Section 2. It shall not be lawful to make any policy or policies on the life or lives of any person or persons or other event or events, without inserting in such policy or policies the person or person's name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote. Section 3. In all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives or other event or events."

The action was tried before PICKFORD, J., without a jury. The defence in respect of suicide was abandoned. The learned judge allowed the plaintiff to amend his claim by alleging that his wife was in fact rendering him services, by doing household duties and by looking after the children, which were a benefit to him and ceased on her death, and the cessation of which occasioned him extra expense in providing a servant. The last facts were admitted. PICKFORD, J., gave judgment for the plaintiff, and the defendants appealed.

Simon, K.C., and *J. B. Porter* for the defendants.

Langdon, K.C., and *F. Cuthbert Smith* for the plaintiff.

Cur. adv. vult.

Mar. 2, 1909. The following judgments were read.

VAUGHAN WILLIAMS, L.J., stated the facts and continued: So far as this case is concerned it does not matter much which contention of the plaintiff is right—that is to say, whether the effect is that the husband had an insurable interest in the life of his wife, or whether, the wife having an insurable interest

A in her own life, the right to the moneys payable under the policy has become vested in him or may become vested on his taking out letters of administration. One way or the other, the court will construe the policy so as to make it effective.

As to the question of the husband's interest in the life of his wife, the case is not covered by authority. In *Halford v. Kymer* (1) LORD TENTERDEN laid down, in the case of a policy effected by a father in his own name on the life of his son,
B that the word "interest" in ss. 1 and 3 of the Life Assurance Act, 1774, means a pecuniary interest, and that, therefore, the policy was void in a case where the father had no pecuniary interest. And s. 3 says

"that in all cases where the insured hath interest in such life or lives, event
C or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives or other event or events."

It would seem from the words of the statute and the decision to which I have referred as if in every case the proof of the pecuniary interest and the extent of it were essential in all cases to the validity of the policy. But there are two classes of cases in which the law presumes the pecuniary interest, and does not go into
D the extent of the sum assured. The one case is that of the interest of a man in his own life. The authority for this is *Wainewright v. Bland* (2), in which LORD ABINGER at nisi prius laid down that in his own life a person's insurable interest is considered to be sufficient to entitle him to recover whatever sum he may have insured it for, and that this is so if the insurance is for a portion of his life only. That case went to the Court of Exchequer upon a motion for a new trial, but the
E motion was disposed of on the ground that the policy was voided by false representations, and this question of the insurable interest of every one in his own life was not raised. The second exception is that a wife making an insurance on her husband's life need not prove that she was interested therein. LORD KENYON, in *Reed v. Royal Exchange Assurance Co.* (3), said:

F "It was not necessary, as it must be presumed that every wife had an interest in the life of her husband."

It is said that a husband is presumed to have such an interest in the life of his wife. I can find no decision that there is or is not a presumption of an interest of a husband in the life of his wife such as there is of the interest of a wife in the life of her husband so as to enable her to insure his life without any proof of
G actual interest or the extent thereof. *Halford v. Kymer* (1) is cited in the text-books—see PORTER'S LAWS OF INSURANCE (5th Edn.), p. 42—as an authority that a husband is not presumed to have an insurable interest in his wife's life. But it does not expressly decide this. Moreover, in *Huckman v. Fernie* (4) the Court of Exchequer, in an action brought by a husband on a policy effected by him on the life of his wife, on a motion for a new trial raised no question as to the husband
H having an interest in his wife's life, though there does not seem to have been any evidence of pecuniary interest. It has been suggested by Mr. MONTAGUE LUSH in his book on HUSBAND AND WIFE (2nd Edn.), p. 213 that, now that the husband and wife are placed on equal terms as to their rights in and powers of disposition over property, it would be reasonable to consider that each party has a presumable interest in the life of the other without the necessity of affirmatively proving it.
I But it is curious that the point has never been raised, although the power of the wife to contract and to acquire and hold and dispose of property was effected by the Married Women's Property Act, 1882. I suppose that the learned author means that, now that a husband may reasonably look for pecuniary aid from his wife, just as formerly she looked for pecuniary aid from him, the husband plainly has a reasonable expectation in case of need of assistance from a wife in case she acquires and holds property, and that in such a case the same reason for not requiring affirmative proof of the existence and extent of the pecuniary interest

arises where the husband is the insurer of his wife's life as arises in the case where the wife insures the husband's life.

It is to be observed that there is a practical reason for construing these joint insurances by husband and wife as insurances by each of the other's life and not as an insurance by each of his or her own life, viz., that these joint insurances in practice are generally effected by partners, so as to afford protection against the loss to the surviving members of the firm likely to arise from the withdrawal of the capital of the deceased partner and in such case the nature of the loss provided against seems to negative the construction which would treat the policy as being on the life of each insuring partner. Nevertheless, it is desirable to consider the question of how things would stand if it were held that the husband has no presumable interest in his wife's life, and the policy were treated as one by the deceased wife on her own life. The question depends on the construction and meaning of s. 11 of the Married Women's Property Act, 1882 :

"A married woman may . . . effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly. A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts."

In my judgment, the effect of this provision, so far as the wife is concerned, is that she may effect a policy on her own life or the life of her husband for her own separate use, and that the same and all benefit thereof will enure accordingly, and that, if such policy is expressed to be for the benefit of her husband or her children or any of them, the policy shall create a trust in favour of the objects therein named. This provision creating a trust is the same in the case of the husband and the wife, and in the case of the husband the obligation to name the objects of the trust seems introduced to protect creditors, and we have to consider whether it can be properly said that this joint policy so names the husband as to make a trust in his favour a trust named within the meaning of the section. I have great doubt as to this, and I think the preferable construction is to treat the policy as by the husband on his wife's life, because I am inclined to think that he has now an interest in his wife's life which ought to be presumed. Treating the policy in this way, I think that it is unnecessary to go into evidence to show any pecuniary interest of the husband, as was done at the trial before PICKFORD, J. I agree with the decision upon the ground that the husband has an insurable interest in the life of his wife which is to be presumed in such a sense that it is unnecessary to give any evidence of his pecuniary interest in the life of his wife. I agree, therefore, that this appeal fails, and must be dismissed.

FARWELL, L.J. (read by **KENNEDY, L.J.**).—The defendants' contention is that the policy sued on is an insurance by the plaintiff on his wife's life and that he had no insurable interest in her life. The two questions to be determined are, therefore—(i) Is the policy an insurance by the husband on the wife's life? and (ii) Had he an insurable interest in her life?

The proposals have been put in and used by both sides, and, although they could not be used in an action on the policy in order to construe the policy, they could, of course, be used in an action to rectify, and both parties desire to have their rights ascertained irrespective of the form of action. Taking, then, the proposals which were accepted by the company, it is plain that the husband proposes to insure his own life and the wife to insure her own life for the benefit in each case of the survivor of them; there is nothing to show any intention to carry these

A intentions out by a single policy unless it be the reference to the table relating to joint policies. It is, however, for the company to prepare the policy, and it is their duty so to prepare it as not to contravene the Act, if the proposals be such as are not necessarily in contravention thereof. In *Collett v. Morrison* (5), TURNER, V.-C., after citing LORD HARDWICKE's decision in *Motteux v. London Assurance (Governor & Co.)* (6), says (1 Atk. at p. 173):

B "This case appears to me fully to establish that, if there be an agreement for a policy in a particular form, and the policy be drawn up by the office in a different form varying the right of the party assured, a court of equity will interfere and deal with the case upon the footing of the agreement and not of the policy."

C If, then, the company are correct in contending that this is a single contract whereby each insures not only his or her life, but also the life of the other, then, in my opinion, this is not in accordance with the proposals, for there is no proposal by either to insure any but his or her own life. The only point in making it a joint policy is to ensure the payment of the aggregate premiums so as not to allow one policy to drop and the other to remain, but this could readily have been accomplished by an express proviso, and the company cannot be allowed to set up the form of policy prepared and tendered by themselves as a ground for defeating their own liability after they have taken the benefit of the premium. There is here no question of any device for enabling a husband to insure his wife's life; each contributed a fair proportion of the premium, the husband, who was three years older than his wife, contributing £11 and the wife £10. If, then, the true effect of the policy is that each spouse insures the other's life as well as his or her own, this is the result of a conveyancing blunder of the company, and not in accordance with the proposals.

Then it is argued that this policy cannot be regarded as an insurance by the wife within the Married Women's Property Act, 1882, inasmuch as it is neither for her own separate use, within the first paragraph of s. 11, nor "expressed to be for the benefit of her husband," within the second, and that apart from the Act she could not insure. I am of opinion that this argument is untenable. The policy on its face provides for payment of the sum assured "to the person or persons to whom the same is therein [i.e., in the first schedule] expressed to be payable." The company have themselves shown what they mean by these words "expressed to be payable" by inserting in the schedule, against the words "to whom payable," the words, "to the survivor of the grantees." I fail to understand why this is not "expressed" to be the husband if he survives his wife. The section is dealing with the creation of trusts, and provides that the insurance "expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects" insured. The distinction between express and implied trusts is well settled, and the Act is simply excluding implied trusts. No one could argue that a trust declared of £1,000 given to trustees by deed or will for the survivor of husband and wife is an implied and not an express trust. The inclusion of children in the Act shows that this is the intention of the Act, for a class of future children cannot be named, and the usual form of trust for children in a marriage settlement is for such as attain twenty-one, or marry under that age.

I I am, therefore, of opinion that this policy should be read distributively as an insurance by the wife on her own life expressed to be for the benefit of her husband contingently on his surviving her, and by the husband on his own life for the benefit of his wife contingently on her surviving him; and that such an insurance is perfectly legal; but inasmuch as the wife's insurance takes effect under s. 11 of the Married Women's Property Act, 1882, the husband would have to take out administration to her estate in order to comply with the section before he can give a valid receipt for the sum assured, if the appeal be decided on this ground.

PICKFORD, J., decided the case in the plaintiff's favour on another ground—namely, that the husband in this case, by reason of the value of his wife's services to him, had an insurable interest in her life. If the case rested on this alone, I should have great difficulty in reconciling it with the older cases, although *Barnes v. London, Edinburgh and Glasgow Life Insurance Co.* (7) is to some extent in favour of the learned judge's view. The Lord Chief Justice in *Harse v. Pearl Life Assurance Co.* (8) appears to have doubted that decision, and I think it difficult to support. But I have come to the conclusion that PICKFORD, J.'s, decision can be supported on a broader ground, and I desire to rest my judgment on it—namely, that a husband has as such an insurable interest in his wife's life. The contrary appears to be stated in some of the text-books, but the proposition is affirmed in *BULLEN AND LEAKE* (2nd Edn.), p. 161. The learned author says :

"The interest in this statute means in general pecuniary interest. The interest of a father in the life of a child is not sufficient alone to support an insurance on the child's life. But a wife may insure her husband's life, and the husband his wife's."

There is no reported case in the books against this; the only reported case is *Huckman v. Fernie* (4), where the husband's interest was assumed to be legal by counsel and court, and this matter is important, because the objection of illegality if it were possible could hardly have been overlooked, and certainly ought to have been taken by the court if they thought it a sound objection: see per LORD ELDON in *Evans v. Richardson* (9), 3 Mer. at p. 470.

But I have come to this conclusion on the construction of the Life Assurance Act, 1774, itself. The Act is expressed to be aimed at "a mischievous kind of gaming," and it forbids an insurance "by any person" on the life of "any person," "wherein the person for whose benefit the policy is made shall have no interest." Section 2 makes it unlawful to effect a policy on the life of "any person" without inserting in the policy the name of the person for whose benefit it is made; s. 3 provides that

"when the insurer hath interest in such life, . . . no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life."

This latter section has been held to mean "pecuniary interest" measured by the loss that would be suffered by the beneficiary if the life dropped at the date of the policy. LORD BLACKBURN says in *Wilson v. Jones* (10) (L.R. 2 Exch. at p. 150):

"I know no better definition of an interest in an event than . . . that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss."

And the interest must be a legal interest, not a mere chance or expectation: *Hebdon v. West* (11), *Halford v. Kymer* (1). It is to be observed that the words of s. 1 are assurance "by any person on the life of any person," not on the life of any other person, and s. 2 applies to an insurance effected by a man on his own life: *M'Farlane v. Royal London Friendly Society* (12). I find it difficult, however, to see what pecuniary interest, in the sense of pecuniary loss arising from the loss of some legal interest, a man can be said to lose on his own death, and it has been held, in *Wainewright v. Bland* (2), that every man is presumed to have an interest in his own life and in every part of it, and that an executor suing on a policy effected by his testator on two years of his life is not bound to show that such testator had any special reason for making such limited assurance. But this must be on the ground that an insurance by a man on his own life is not within the mischief of the Act. A man does not gamble on his own life to gain a Pyrrhic victory by his own death. I cannot persuade myself that such an insurance is of a pecuniary interest, or within LORD BLACKBURN's words, that if the man dies he will gain an advantage, if he lives he will suffer a loss. The loss is in both

A cases his own, being either of his life or of his premiums; the pecuniary gain is his executor's. In *Reed v. Royal Exchange Assurance Co.* (3) LORD KENYON went a step further, and held that a wife, as such, has an insurable interest in her husband's life, and he refused to allow evidence to be given by her that her late husband was entitled to a life interest of large amount. This shows that he regarded the husband and wife in the same position as the individual insured, for he would otherwise have been bound to take the evidence in order to satisfy s. 3 of the Act. B If the wife's insurable interest depended on her right to necessities at her husband's expense, or on the possession by the husband of a life interest, the judge could not of his own motion have excluded all evidence to show the age of the spouses at the date of the insurance, and the value of the interest or necessities according to the station in life of the parties as compared with the sum assured. The case C is very shortly reported, but, in my opinion, LORD KENYON excluded the evidence on the same grounds as those on which evidence of insurable interest in the insurer for his own benefit would be excluded—namely, that the case was not within the mischief of the Act.

If this be so, it follows, in my opinion, that the same principle must be applied to the insurance by the husband of the wife's life; a husband is no more likely D to indulge in "mischievous gaming" on his wife's life than a wife on her husband's. It is not a question of property at all, it is that for this purpose husband and wife stand on the same footing and that the ruling of LORD KENYON a century ago in favour of the wife's claim ought now to be applied in favour of the husband's. Further, the Act of 1774 appears to apply to Scotland as well as to England. The Fires Prevention (Metropolis) Act, 1774, contains provisions which led LORD E SELBORNE and LORD WATSON to doubt whether that Act applied to Scotland: *Westminster Fire Office v. Glasgow Provident Investment Society* (13). It is very desirable that the same interpretation should be put on the Act in both countries. In *Wight v. Brown* (14) it is said (11 Dunl. (Ct. of Sess.) at p. 460, n.):

"The Lord Ordinary does not question the right of husband or wife to make a valid provision for or settlement on each other after death by life assurance. . . . This was just a common insurance, effected by a husband, stante matrimonio, on the life of his wife, the premium of which, for aught that appears, was paid out of the goods in communion."

Again (*ibid.* at p. 461):

G "In this instance the policy was made payable on the death of his wife, of course without any intention to provide for her. There is no difference between such a policy and one opened on the husband's own life. The policy here was entirely at the husband's disposal, and the selection of an insurance on the wife's life seems to create no other peculiarity than might have been founded on if the husband had opened a policy on any other life in which he had an insurable interest."

H It is true that the interlocutor was altered on appeal, but that was on grounds which in no way affect the statements of general law quoted above. LORD MONCRIEF says (*ibid.* at p. 470):

I "He [the husband] by annual payments in fact invests a sum of money in such a form that it can only become payable to himself six months after his wife's death. There is no fraud nor unfairness in such an investment by insurance. But the intention plainly is that, when his wife shall die, a sum of money shall become payable to himself, for his own purposes, after that event. . . . He invests a portion of his funds or gains upon a contingent contract, that, if he shall have the misfortune to lose his wife and be then less able for labour than he has been before, he may have a fund to be paid to him for his support, or for the settlement of his affairs when he himself comes to die. The husband's interest in the wife's life, which renders the insurance legitimate, is that it

shall be preserved; but the event of its failing is that against which he makes the insurance for his own safety. . . . The substance of the transaction is a contingent contract for his own benefit, which can take no effect till after the marriage has been dissolved by the death of the wife. . . . But he had still a deep interest in the life of his wife, . . ."

This interest appears to me to be the personal interest founded on affection and mutual assistance, and not a pecuniary interest. The actual decision in that case was that the policy money belonged to the husband and was not part of the estate in community, but the judges appear to have treated the insurable interest of the husband in his wife's life as clear. On these grounds I am of opinion that the appeal fails and should be dismissed, and as I prefer to put it on the latter ground, the husband need not administer to his wife's estate, because he recovers on his own contract and not on hers.

KENNEDY, L.J.—I concur in the judgment of FARWELL, L.J.

Appeal dismissed.

Solicitors: *Francis Howse & Eve; Isadore Goldman*, for *A. V. Hammond*, Bradford.

[*Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.*]

KIRKWOOD v. GADD

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord James of Hereford, Lord Atkinson, Lord Shaw and Lord Mersey), April 14, 15, June 10, 1910]

[Reported [1910] A.C. 422; 79 L.J.K.B. 815; 102 L.T. 753; 26 T.L.R. 530; 54 Sol. Jo. 599]

Moneylender—Address—Business to be carried on at registered address—Question of fact—Loan on security of bill of sale on furniture—Furniture inspected, inventory checked, and amount of loan paid at borrower's house—Money-lenders Act, 1900 (63 & 64 Vict., c. 51), s. 2 (1) (b).

By the Moneylenders Act, 1900, s. 2 (1) (b) [replaced by Moneylenders Act, 1927, s. 1 (3) (b)]: "A moneylender . . . shall carry on the moneylending business . . . at his registered address or addresses, and at no other address."

Whether or not a moneylender is "carrying on business" at his registered address is a question of fact to be decided in each particular case.

Per LORD ATKINSON: The place at which a merchant or trader must be understood to "carry on" his business is the headquarters of the business or a branch of it, at which the conduct of the business, or of the branch, is regulated, directed, and controlled, and where the transactions which constitute it are recorded. In the case of a moneylender it is not necessary that every important step in the dealing between him and his customer should be carried out at the registered address of the moneylender. It will suffice if such important portions, or such an important portion, of the dealings are, or is, transacted there, by communications verbal or written, as will necessarily reveal to the borrower the identity of the moneylender, the nature of his business, and the registered address at which he purports to carry it on. Whether one isolated transaction carried out by a moneylender from its inception to its completion

A at a place other than his registered address amounts or does not amount to the crime of carrying on business elsewhere than at his registered address within the meaning of the statute must depend on the particular circumstances attending the transaction.

B Per LORD JAMES OF HEREFORD: Some portions of a moneylender's business cannot be transacted at the lender's registered place of business. For instance, when a bill of sale is given as security for a loan the goods assigned must be inspected, a value estimated, and an inventory made. To carry out those objects the lender or his agent must visit the tenement where the goods are. Can it be said that such a visit constitutes a carrying on of business within the statute at any tenement to which such visits are made? If every act connected with the carrying out of a moneylending transaction must take place at the registered address a person unable to travel, from sickness, age, or other incapacity, would be prevented from borrowing.

C A moneylender arranged a loan, all the earlier stages of the transaction being carried out by correspondence addressed to, and written from, the moneylender's address and that of the borrower respectively, and afterwards sent his manager to the borrower's address to check the inventory annexed to the bill of sale given as security for the loan, obtain the execution of the bill of sale, and pay over the money which he had agreed to advance.

D **Held:** in the circumstances of the case there was no contravention by the moneylender of s. 2 (1) (b) of the Act of 1900.

Notes. Considered: *Bowen v. Samuels* (1918), 34 T.L.R. 487; *Cornelius v. Phillips*, [1916-17] All E.R. Rep. 685. Referred to: *Newman v. Oughton*, [1911] 1 K.B. 792; *Peizer v. Lefkowitz*, [1912] 2 K.B. 235.

E As to a moneylender's address, see 27 HALSBURY'S LAWS (3rd Edn.) 29, 30, and for cases see 35 DIGEST 204, 207, 208. For Moneylenders Acts, 1900 and 1927, see 16 HALSBURY'S STATUTES (2nd Edn.) 370, 377.

Cases referred to:

- F (1) *Smith v. Anderson* (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 W.R. 21, C.A.; 9 Digest (Repl.) 70, 270.
 (2) *Erichsen v. Last* (1881), 8 Q.B.D. 414; 51 L.J.Q.B. 86; 45 L.T. 703; 46 J.P. 357; 30 W.R. 301; 4 Tax Cas. 422, C.A.; 28 Digest (Repl.) 259, 1149.
 (3) *Grainger v. Gough*, [1896] A.C. 325; 65 L.J.Q.B. 410; 74 L.T. 435; 60 J.P. 692; 44 W.R. 561; 12 T.L.R. 364; 3 Tax Cas. 462, H.L.; 43 Digest 6, 8.

G Also referred to in argument:

- Staffordshire Finance Co. v. Hunt*, [1907] W.N. 258; 35 Digest 204, 296.
King v. Turnbull (1908), 24 T.L.R. 434; 35 Digest 207, 326.
Blair v. Buckworth (1908), 24 T.L.R. 474, C.A.; 35 Digest 207, 325.
King v. Massey (1908), 24 T.L.R. 710; 35 Digest 207, 329.
H *Lazarus v. Gardner* (1909), 25 T.L.R. 719, C.A.; 35 Digest 207, 328.
Levene v. Gardner and Earl Kilmorey (1909), 25 T.L.R. 711; 35 Digest 207, 334.
Jackson v. Price, [1910] 1 K.B. 143; 79 L.J.K.B. 130; 26 T.L.R. 106; 35 Digest 208, 338.
Sadler v. Whiteman, [1910] 1 K.B. 868; 79 L.J.K.B. 786; 102 L.T. 472, C.A.; on appeal sub nom. *Whiteman v. Sadler*, [1910] A.C. 514; 79 L.J.K.B. 1050; 103 L.T. 296; 26 T.L.R. 655; 54 Sol. Jo. 718; 17 Mans. 296, H.L.; 35 Digest 204, 294.
I *Blaiberg v. Calvert* (1910), 26 T.L.R. 328; 35 Digest 207, 332.
Re Seed, post p. 779; [1910] 1 K.B. 661; 102 L.T. 366; 26 T.L.R. 348; 54 Sol. Jo. 343; 17 Mans. 121; sub nom. *Re Debtor (No. 2), Ex parte Petitioning Creditor*, 79 L.J.K.B. 421, D.C.; 35 Digest 208, 337.

Appeal from a decision of the Court of Appeal (FLETCHER MOULTON and FARWELL, L.J.J.), reported [1909] 2 K.B. 353, allowing an appeal from an order of HAMILTON,

J., refusing to grant an interim injunction to restrain the appellant from trespassing on the house of the respondent and removing therefrom certain goods, the property of the respondent, included in a bill of sale.

Sir R. Finlay, K.C., M. Lush, K.C., M. Shearman, K.C., W. de B. Herbert, and J. B. Matthews for the appellant.

F. Ritter, G. W. H. Jones and Allan Ramsay for the respondent.

Their Lordships took time for consideration.

June 10. The following opinions were read.

LORD LOREBURN, L.C.—In this case an interim injunction has been granted by the Court of Appeal to prevent a moneylender from taking possession under a bill of sale, upon the ground that the agreement for the loan, the advance of the money, and the taking of the security were all transacted, not at the moneylender's registered address, but at the borrower's private residence. It was so in fact, upon the materials before us, but some letters making the appointment at the borrower's residence with a view to arranging the loan were written to and received from the registered address. Your Lordships are asked to say whether or not the arrangement of the loan in this way was contrary to the Moneylenders Act, 1900. I expressly limit my opinion to that point, which alone has been argued before us.

Section 2 (1) (b) of the Act requires that a moneylender

"shall carry on the moneylending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address."

Section 2 (2) [see now s. 1 (3) of the Moneylenders Act, 1927] provides that

"If a moneylender . . . carries on business . . . elsewhere than at his registered address, or fails to comply with any other requirement of this section,"

he shall be liable to a fine, or imprisonment for a second offence, as prescribed. This enactment contains a positive requirement—that the man shall carry on the business at the registered address. It also contains a negative, that he shall not carry on business elsewhere.

What is carrying on business? It imports a series or repetition of acts. Each separate piece of business may consist of many stages and incidents, and the business as a whole comprises many separate pieces. This Act of Parliament cannot mean that every stage and every incident of every piece of the moneylending business is to be transacted at the registered office. That would be impossible, for such things as making inventories or taking possession of furniture under a bill of sale are part of the business, and must be done where the goods are situated. Nor can it be intended to prohibit the employment of clerks and agents, or the transaction outside the registered address of every single thing that could by possibility be transacted within it. That would be needlessly oppressive and would strain the words. We must look at the nature of the mischief disclosed according to the approved canons of statutory construction. The mischief is that this dangerous business may be conducted by persons under false names or a variety of names without the security of an ascertained address, or at places where men may be taken unawares or off their guard. The words, which are in terms general, must be applied accordingly. I do not propose to define what is meant by carrying on business lest I may facilitate evasion. But I do think that if a moneylender really deals with a borrower at his registered address, whether by interview or correspondence, he may, without infringing the Act, transact negotiations or conclude the actual contract elsewhere. If, however, the moneylender employs an agent to frequent markets, or to call upon individuals in order to procure borrowers, and thereupon a moneylending transaction, even a single transaction, goes through without the borrower being brought into communication with the registered address

A till after the transaction is completed, it might amount to carrying on business elsewhere than at his registered address.

There may be many cases betwixt and between. It is always a question of fact, the answer to which depends on the circumstances of the case. I can see that nice points may arise in applying this section of the Act. It must be so inevitably when general language of this kind is used in the Act. But such points are not
B matter of law if there is evidence to support the conclusion. They are points of fact and should be so regarded. I do not think that this is a case in which an interim injunction should be granted. So far as I can see on the materials before us, this piece of business was directed and controlled at the registered address, and the borrower dealt with the lender at the registered address. I do not prejudge it, however, and it must be decided on actual evidence at the trial. As there are
C other matters to be disposed of at the hearing which were not argued here, the parties have agreed to an undertaking, and I move your Lordships to dissolve the injunction, all costs here and below to be costs in the cause.

LORD JAMES OF HEREFORD.—It is necessary in order to determine the question raised by this appeal that the facts controlling the case should be ascer-
D tained and stated.

In February, 1908, the appellant, John Kirkwood, was carrying on the business of a moneylender at Ipswich, and for the purpose of doing so had registered an address, "No. 30, Upper Brook Street, Ipswich." On Feb. 2, 1908, one Dobson, a commission agent, wrote to the appellant stating that the respondent required
E a loan of £100, giving a bill of sale on his furniture as security. In this letter, which was sent to the above address, Dobson assumed that the appellant would send an agent to Ilford, where the respondent resided. After some delay the transaction was carried out. What occurred is apparently correctly stated in the appellant's case as follows :

"In due course the said Herbert Sandoe [the appellant's agent] called upon the respondent at the residence of the respondent, No. 59, Mayfair Avenue, Ilford, in the county of Essex, and the terms of the proposed loan were then
F arranged between the said Sandoe and the respondent, and the said Sandoe, the appellant's agent, drew up the said bill of sale, which was executed by the respondent, and the said Sandoe advanced and paid to the respondent the sum of £100, being the consideration for the said bill of sale."

G The circumstances thus narrated occurred at Ilford, and the respondent's wife also signed a declaration there that she had no interest in the furniture assigned by the bill of sale. In relation to payments under the bill of sale, and other matters, a very voluminous correspondence took place. Throughout it the only address affecting the appellant was the registered Ipswich address. Default was made in fulfilling the terms of the bill of sale, whereupon the appellant took possession of
H the goods assigned by it.

Application was then made by the respondent to HAMILTON, J., to restrain the appellant's proceedings, on the grounds that he had carried on business at an address other than the registered address, and that, therefore, the bill of sale was void. The learned judge refused the application, but on appeal FLETCHER MOULTON and FARWELL, L.JJ., held that the respondent's contention was correct, and granted
I the application. The basis of the judgment so arrived at seems to be that the proceedings at Ilford in February, 1908, amounted to a carrying on of business by the appellant at an address other than 30, Upper Brook Street, Ipswich, and also that such carrying on of business constituted a penal offence within the provisions of s. 2 of the Moneylenders Act, 1900, which enacts that :

"A moneylender as defined by this Act—(a) shall register himself as a moneylender . . . under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on

his business of moneylender, and (b) shall carry on the moneylending business in his registered name and no other name and under no other description, and at his registered address or addresses, and at no other address, and (c) shall not enter into any agreement in the course of his business as a moneylender with respect to the advance or repayment of money, or take any security for money in the course of his business as a moneylender, otherwise than in his registered name . . .”

In order to apply the above provisions, it is advisable to consider what was the object of them. Guided by the words of the Act, I would surmise that the object of the legislature was to preserve the identity of the moneylender so that borrowers might always know with whom they were dealing. To secure that the moneylender should trade in only one name and carry on business at only one address would do much, and has done much, to establish the desired personal identity of the persons with whom borrowers are dealing. It must, however, be noted that by the concluding words of the section certain transactions necessary to the carrying out of a loan are dealt with, and they are specifically required to be effected in the registered name, but not at the registered address, of the moneylender. If these transactions are included in the words “carrying on of business,” these last provisions would be unnecessary. But in whatever spirit the words of the statute are to be read, a construction must be put upon them, and they must be applied to the facts established in this case.

What, then, is the meaning that should be attached to the words “carrying on business”? I decline to formulate any definition of those words. Dangerous consequences might result from doing so, but I accept the responsibility of saying whether it has been shown that the appellant has carried on business at an address other than his registered address. In my opinion, such proof has not been given. The visits to the respondent’s house in February, 1908, and the acts that took place there, were for the purpose of carrying out a particular transaction, and some of the acts were necessarily or more conveniently transacted there. In relation to a moneylender’s business I presume that some portions of it cannot or would not be transacted at the lender’s registered place of business. For instance, when a bill of sale is given as security for a loan the goods assigned must be inspected, and a value estimated, and an inventory made. For carrying out such objects the lender or his agent must visit the tenement where the goods are. Can it be said that such a visit constitutes a carrying on of business within the meaning of the statute at any tenement to which such visits are so made? If such were the case, a moneylender would be prohibited from calling upon a proposed borrower, from testing his position in his home, or from taking the steps mentioned above. Then, again, it may be very advisable that the borrower should be identified, and that the money lent should be paid over to him personally. Can the legislature have intended to say that every act connected with the carrying out of a moneylending transaction, as distinguished from the general carrying on of the business, must compulsorily take place within the four walls of the registered address? If such had been said, in many instances business could not be carried on. Any person unable to travel, from sickness or age or any other incapacity, would be prevented from borrowing from a moneylender. It is true that in this case the bill of sale was executed, and the money lent was advanced, at Ilford. But surely when the lender’s agent and the borrower met at Ilford it would have been somewhat absurd if they were prevented from completing the transaction, and a journey to Ipswich forced upon the borrower. As I have said, I decline to give a definition of the meaning of the words “carrying on business” used in the statute. I repeat that it would be dangerous to do so. Evasion might follow. I can understand an ingenious method of evading or breaking the statute being resorted to, as by a system of canvassing for business from house to house, and a definition may tend to protect such proceedings. But, instead of giving a definition, I suggest

A that each case should be determined as it arises, and thus I decide this case upon the facts presented to your Lordships. In my opinion, as I have said, there is no proof that the appellant has carried on business at any address other than the Ipswich registered address. Certain portions of one transaction were carried out at Ilford, but these could not possibly result in giving to the appellant any right to use the respondent's house as his address. The strict words of the statute, common
B sense, and the necessities of commercial transactions combine to cause me to come to the conclusion that the legislature could not have intended moneylenders who have acted under the conditions of this case to be subjected to the results contended for by the respondent. I therefore am of opinion that this appeal must prevail.

C **LORD ATKINSON.**—The appellant in this case is a moneylender. He is duly registered under the Moneylenders Act. His registered address at Ipswich at the date of the loan hereinafter referred to made by him to the respondent was 30, Upper Brook Street. It is now 64, St. Matthew's Street. His registered name is "The Provincial Union Bank." The appellant has other registered addresses, but this is the only one of which it is material to take note for the purposes of this
D appeal. The respondent, who is a retired bank manager, residing at 59, Mayfair Avenue, Ilford, carrying on the business of an insurance broker in the city of London, in the month of February, 1908, put himself into communication with one Dobson, who is described as a "commission agent" by the appellant's counsel, and as a "moneylender's tout" by the respondent's, to obtain for him a loan of £100, secured by a bill of sale of his furniture. It does not appear whether the respondent
E directed Dobson to deal with the appellant in particular, or whether he was Dobson's selection. The respondent must, however, have furnished Dobson with an inventory of the furniture which was to be included in the bill of sale, and disclosed to him some particulars of his financial position. The negotiation which culminated in the loan and the bill of sale which has been impeached as illegal and void was initiated by the receipt by the appellant at his registered office at Ipswich of a letter from
F Dobson inclosing the inventory, setting forth the particulars above mentioned, and applying on the respondent's behalf for the desired loan. On Feb. 15, 1908, one Herbert Sandoe, the appellant's manager, wrote to the respondent the following letter:

"Provincial Union Bank, 30, Upper Brook Street, Ipswich.—Feb. 15, 1908.—
Mr. A. E. Gadd.—Dear Sir,—With reference to your application for an advance
G per Mr. Dobson, we have instructed one of our officials to call upon you on Monday morning about 11.30, when kindly arrange to be at home, and if you have not already ascertained the exact amount which the Metropolitan Co. will accept in settlement of your bill of sale, please get this information before our official arrives.—Yours truly, Herbert Sandoe, Manager."

H A reply to this letter in the terms following was received by the appellant at his registered address, 30, Upper Brook Street, Ipswich:

"59, Mayfair Avenue, Ilford, Essex.—Feb. 15, 1908.—The Manager, Provincial Union Bank, Ipswich—Dear Sir,—I beg leave to acknowledge the receipt of your favour of yesterday's date, and to say that I will be at home to-morrow (Monday) at 11.30 a.m. to meet your representative as desired.—
I I am, yours faithfully, A. E. Gadd."

It appears that Sandoe was not able to keep this appointment. He accordingly sent to the respondent a letter suggesting an appointment for Feb. 20 dated Feb. 17, 1908, and addressed, as the previous letter had been, from the appellant's registered address, to which the respondent replied by telegraph: "Will be at home.—Gadd, Ilford." This telegram was addressed "Advance, Ipswich," the telegraphic address of the appellant, and was received at 30, Upper Brook Street. Sandoe, accordingly, attended at the respondent's residence on Feb. 20, and brought with him the bill

of sale and the money to be lent. He got the former executed, and handed over the latter, obtaining therefor a receipt, and presumably checked the inventory. In the bill of sale the grantee is described as

"The Provincial Union Bank, 30, Upper Brook Street, Ipswich, of which bank John Kirkwood, of the same place, is sole proprietor."

In view of these facts there is not, and there cannot be, a pretence for suggesting that the identity of the appellant was in any way concealed. The respondent knew his registered name, his registered address, and the nature of the business which he purported to carry on there. These are the very things which it was, in my view, the design and purpose of the Moneylenders Act to have brought home to the knowledge of those who borrow from moneylenders. The special mischief against which that statute was directed does not exist in this case. The borrower, therefore, had all the information which was necessary to enable him to ascertain with certainty who the person was with whom he dealt, and the place where that person purported to exercise his calling. It is quite true that the final stage of the transaction, the handing over of the money, and the perfecting of the security, was completed at the borrower's address, and not at the moneylender's registered address, but all the earlier stages of the transaction were carried out by a correspondence addressed to and written from the borrower's address and the lender's registered address respectively. The whole dealing was brought into touch with the registered address at every stage, and indeed it was, as I understood, admitted by the respondent's counsel in argument that had the money been paid to his client by the appellant's cheque sent by post, and had the draft bill of sale also been sent by post to his client, executed by him at his residence and returned by post to the appellant's registered address, the appellant ought to be held to have carried on his business of moneylending in this instance at his registered address, and the security which he obtained would have been valid and unimpeachable. But it is argued by the same counsel that, because the bill of sale and the money were carried to his client by the appellant's manager, the money handed over and the security executed at the client's residence, the whole transaction is impeachable, the security invalid, and the respondent is guilty of the criminal offence of carrying on business elsewhere than at his registered address, for which offence a fine of £100 might be imposed upon him if it were his first offence, and he might be imprisoned for three months if it were his second offence. It appears to me that in this argument the main purpose of the legislature is lost sight of, and, if it were to prevail, the statute would be reduced to an absurdity.

Your Lordships have not now to decide whether the bill of sale, which the appellant has been restrained by the Court of Appeal from putting into force by seizure of the furniture mentioned in it, has been rendered void: The sole question for decision is whether, by reason of what took place at the respondent's residence on Feb. 20, 1908, the appellant should be held to have "carried on business" elsewhere than at his registered address, and thereby committed the criminal offence mentioned in s. 2 (2) of the Moneylenders Act. The word "business" is used, I think, to designate the business mentioned in the previous sub-section. In one sense every step, every item in a long or complicated financial or commercial transaction may be said to be "business," but I think that it is obvious that in the phrase "carries on his business" employed in this section, as in the phrase "carrying on business" employed in s. 4 of the Companies Act, 1862, the words "carries on" must be held to imply a repetition of acts the sum of which constitutes the "business": see the judgment of BRETT, L.J., in *Smith v. Anderson* (1). The moneylender's trade is in itself a lawful trade, and it is, I think, no more essential in this than in any other trade or business that every act necessary to complete a contract of the class into which it is the purpose and object of the trader to enter and to carry out should be performed at the address of the latter, in order that his trade may be correctly described as being "carried on" at that address. If one

A takes by way of example the case of a house decorator, or of an ordinary retail dealer who delivers at the houses of his customers the goods which he sells, it could scarcely be seriously contended that the former carried on his business at the houses belonging to his customers which he decorates, or the latter at the houses of his customers where he delivers his goods, and I fail to see on what principle the words when applied to a moneylender should be used in a sense and meaning narrower than that which they bear when applied, in the ordinary use of language, to other traders, unless, indeed, it is to be assumed that it was the paramount object of this statute to prohibit all communication between a moneylender and his customer on business matters by post or telegraph, and to oblige the borrower to frequent the registered house or office of the lender, and to carry out there every detail of each transaction, an assumption for which there is, in my opinion, no warrant to be found in its provisions. I think that the contention of counsel for the appellant that if the obtaining, on behalf of a moneylender, of the execution of a bill of sale in the house of a borrower be the "carrying on" by the former of his business in that house, then s. 2 (1) (c) of the Act of 1900 is mere surplusage, because by the previous sub-section it is already provided that the lender can only carry on his business in his registered name. Paragraph (c) obviously applies to an isolated transaction of the kind described, and can only have been introduced because the doing of the thing mentioned in it does not amount to a "carrying on of business" within the meaning of the section.

It is impossible to define with fullness or accuracy what is the precise meaning to be given to the phrase "carrying on business." It is to a large extent a question of fact, to be determined in each case by its own special circumstances. Little assistance can be gained from the authorities. But this much, I think, is clear, that "carrying on business" does not necessarily include carrying out the contracts into which it is the business of the merchant, retailer dealer, or moneylender to enter. In every moneylending transaction in which land, houses, or furniture is mortgaged or pledged as a security, the important step of inspecting, and so verifying the existence of, the property must be carried out elsewhere than at the moneylender's address: see *Erichsen v. Last* (2); approved in *Grainger v. Gough* (3). Neither can it require that those contracts should necessarily be entered into at the address where the business is "carried on," else the acceptance of a tender or offer which completed the contract could not be communicated by post or telegraph. And, without attempting to define fully the meaning of the phrase, I may say that I think that the place at which a merchant or trader must be understood to "carry on" his business is the headquarters, as it were, of the business, or the headquarters of a particular branch of it, at which the conduct of the business, or of the branch, is regulated, directed, and controlled, and where the transactions which constitute it are recorded. In the case of a moneylender it is not, in my view, necessary, as I have said, that every important step in the dealing between him and his customer should be carried out at the registered address of the moneylender. It will, I think, suffice if such important portions, or such an important portion, of the dealing are or is transacted there, by communications verbal or written, as will necessarily reveal to the borrower the identity of the moneylender, the nature of his business, and the registered address at which he purports to carry it on. Whether one isolated transaction carried out by a moneylender from its inception to its completion at a place other than his registered address amounts or does not amount to the crime of carrying on business elsewhere than at his registered address, within the meaning of the statute, must depend upon the particular circumstances attending the transaction. The carrying out of one such transaction does not necessarily amount to an offence, but circumstances are conceivable in which it might amount to it; for instance, if it were proved that a moneylender, either personally or by his agent, held himself out as ready to do business at a particular place, or particular places, other than his registered address, or canvassed for business to be transacted at such place or places, and.

in consequence of that holding out or canvassing, succeeded in getting a borrower to enter there into the isolated transaction impeached, I am inclined to think that he might rightly and justly be held to have carried on his business elsewhere than at his registered address, so as to be guilty of the crime against which the statute is directed. For the reasons already given I am of opinion that the decision of the Court of Appeal was erroneous and should be reversed. I concur with the Lord Chancellor as to the form of order to be made.

LORD SHAW.—I have had considerable doubts in this case. In the opinions to which I have had the pleasure of listening, and have also had the pleasure of reading, I observe that a definition of what is "carrying on business" under this statute is avoided. I observe, further, that certain proceedings will have to be taken in this cause in order that the facts may be more fully investigated. Under those circumstances I most entirely agree with the judgment delivered by LORD JAMES OF HEREFORD. It does appear to me that each case must depend upon its own facts, the elementary principle being kept in mind that the Act is to be enforced in all respects and in no respect evaded.

LORD MERSEY.—The facts of this case are as follows. The appellant, Kirkwood, is a moneylender. His place of business is at 30, Upper Brook Street, Ipswich, and his trade name or description is "The Provincial Union Bank." Both the name and the address are duly registered in accordance with the provisions of the Moneylenders Act, 1900. On Feb. 11, 1908, a man named Dobson wrote a letter to Kirkwood, and sent it to his place of business at 30, Upper Brook Street, Ipswich. The letter inclosed an inventory of some furniture upon which the owner desired to raise a loan. The name of the proposed borrower was not given in this letter, but it was furnished by Dobson a few days later in a telegram, which was also sent to Kirkwood's place of business. The telegram reads as follows: "Alfred Ernest Gadd, 59, Mayfair Avenue, Ilford, Insurance and Mortgage Broker." Having thus received the name and address of the proposed borrower, Kirkwood, by his manager, Herbert Sandoe, wrote to Gadd to say that one of the officials of the so-called bank would call on Gadd with reference to the application for a loan. On this some further correspondence took place between Sandoe and Gadd, of which the outcome was that Sandoe met Gadd at Gadd's house on Feb. 20, and there and then arranged the terms on which Kirkwood should make the loan. Having arranged the terms of the loan he proceeded to check the inventory of the furniture, and drew up a bill of sale which Gadd executed. It is sufficient to say of it that it describes the grantee as

"The Provincial Union Bank, of 30, Upper Brook Street, Ipswich (of which said bank John Kirkwood, of the same place, is the sole proprietor),"

and that the attestation clause describes the document as having been executed by Gadd

"in the presence of Mr. Herbert Sandoe, of 30, Upper Brook Street, Ipswich, manager of the Ipswich branch of the Provincial Union Bank, 30, Upper Brook Street, Ipswich."

Sandoe then paid the amount of the loan to Gadd and took a receipt. The correspondence so far as it consisted of letters written for or by Kirkwood was sent from or bore the address of the Provincial Union Bank, Ipswich, and it was to that place that Gadd sent the letters which he wrote. Dobson was paid a commission by Kirkwood in respect of the introduction of Gadd. This was the only transaction with Gadd, but it appeared that, although it was not usual to do so, the appellant had carried out transactions at the houses of borrowers on several other occasions. The instalments by which the debt was to be paid off fell into arrear, and on May 19, 1909, Kirkwood threatened to seize the furniture under the power contained in the bill of sale. Thereupon Gadd issued a writ claiming an injunction to restrain

A Kirkwood from seizing and also claiming a declaration that the bill of sale was invalid. On the same day Gadd applied ex parte to the judge at chambers (HAMILTON, J.) for an interim injunction and used an affidavit in support. This affidavit contains the following statement :

B "The whole of the transaction was carried out and completed at my private address, 59, Mayfair Avenue, Ilford, the alleged bill of sale being executed there and the money paid over."

C The learned judge refused to make any order. Next day, May 20, 1909, the Court of Appeal granted leave to appeal, and on May 21 the appeal was heard. The facts as I have stated them were either admitted or proved to the satisfaction of the court, and the court thereupon found that the transaction was bad on the ground that it amounted to a carrying on of business by the moneylender elsewhere than at his registered address, in contravention of s. 2 of the Moneylenders Act, 1900. The appeal was, accordingly, allowed, and the court granted an interim injunction until the trial of the action upon the usual undertaking as to damages.

D It is from this decision that the present appeal is brought to your Lordships' House. It is an appeal which raises a question of very serious importance to the appellant, for if the injunction be made perpetual on the grounds mentioned he will not only lose his remedy for the recovery of the money which he has lent, but he will also be liable to conviction and fine for the offence which he has committed, and in the event of conviction will run the risk of imprisonment if he should be again convicted in respect of another similar offence. The real question in the case is this: Do the facts afford any reasonable evidence that the appellant **E** carried on business elsewhere than at his registered address? Not that he did business elsewhere, but that he carried on business elsewhere. The words of s. 2 (1) of the Act are as follows :

F "A moneylender . . . (a) shall register himself as a moneylender . . . under his own or usual trade name, and in no other name, and with the address . . . at which he carries on his business of moneylender, and (b) shall carry on the moneylending business in his registered name, and in no other name . . . and at his registered address . . . and at no other address, and (c) shall not enter into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as a moneylender, otherwise than in his registered name."

G The section further enacts :

H "If a moneylender fails to register himself . . . or carries on business otherwise than in his registered name . . . or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction . . . to a fine not exceeding £100, and, in the case of a second or subsequent conviction, to imprisonment with or without hard labour for a term not exceeding three months."

I On examining this section of the Act, it will be noted that while it prohibits the moneylender from carrying on the moneylending business otherwise than in his registered name, or elsewhere than at his registered address, it contemplates the possibility of the moneylender having to enter into transactions "in the course of his business as a moneylender," and, singling out two—namely, entering into an agreement with respect to the advance and repayment of money, and taking a security for money—it enacts that they shall not be entered into otherwise than in the moneylender's registered name. Not a word is said in this part of the section as to the registered address. It is apparently enough to satisfy the requirements of the Act that the transactions mentioned should be in the registered name.

This, in my opinion, indicates that the carrying on of the business spoken of in the Act of Parliament is something quite different from the carrying out of the

transactions which make up the business. The carrying on must be at the registered address. The carrying out may be wherever convenient. What the moneylender did in the present case was to enter into an agreement "in the course of his business as a moneylender," with respect to the advance and repayment of money, and also to take a security for money "in the course of his business as a moneylender," and he did both in his registered name. He adhered to the spirit and to the very letter of the Act. It is true that he did more. He checked an inventory at the only place at which he could check it—namely, at the borrower's house; and he handed over the amount of the loan there. Why should he not? The only words in the Act which can be invoked to show that he might not are the words which forbid him to carry on his business elsewhere than at his registered address, or otherwise than in his registered name; but if these words are intended to have such an effect as that contended for, it is impossible to understand the necessity of the express provision as to agreements and securities. I think, too, that the interpretation which I give to the statute is the only one which is consistent with business. If "carrying on the business" is to be read as meaning the carrying out of the transactions which go to make up the business, then, unless the borrower can come to the moneylender's registered address, no business can be done. A bedridden man could not have recourse to a moneylender, for he would be physically incapable of going to the moneylender, and the moneylender could not lawfully come to him. This would be a result which the legislature never intended.

But I prefer to put the matter on a broader ground. A man's business is carried on at the shop or office where he keeps his books, his stock, and his cash, and to which his servants or clerks resort either to work or to receive directions as to their work. Some of the work may of necessity or for convenience be done away from the shop or office, but the business is none the less carried on at the office or shop. Take, for instance, the case of a butcher. He has his shop where he keeps the meat which he sells. He sends his servant round in the morning to the houses of his customers to collect orders, and in the afternoon he delivers the meat in fulfilment of the orders. Could it be said that such a man carries on business elsewhere than at his shop? I think not. Then I think that the object with which this statute was passed is to be remembered. It was not passed either to hinder or to prevent moneylending as a business. It was passed merely to defeat the frauds and to correct the abuses which sometimes attend the business, and with that object in view it requires that the moneylender shall not trade under a changing name or at a shifting address. Gadd knew from the first with whom he was doing business and where the moneylender was to be found, and it was for his convenience that the transaction was carried out at his own address. It is also to be remembered that the statute is penal, and that if the injunction stands the moneylender becomes liable to a conviction and a fine. Nothing but plain and unambiguous language in the statute ought to be allowed to lead to such a result. I can find no such language. In my opinion, the acts done by the moneylender in this case neither violated the spirit of the Act nor contravened its terms.

Appeal allowed.

Solicitors : *Windybank, Samuell & Lawrence; John K. Torkington.*

[*Reported by C. E. MALDEN, ESQ., Barrister-at-Law.*]

Re SEED. Ex parte KING

[KING'S BENCH DIVISION (Phillimore and Bucknill, JJ.), March 7, 1910]

[Reported [1910] 1 K.B. 661; 79 L.J.K.B. 421; 102 L.T. 366;
26 T.L.R. 348; 54 Sol. Jo. 348; 17 Mans. 121]

Moneylender—Address—Business to be carried on at registered address—Transaction carried out by lender and borrower wholly through post—Moneylenders Act, 1900 (63 & 64 Vict., c. 51), s. 2 (1) (b).

A moneylending transaction carried out wholly through the post **held** to have been carried on by the moneylender "at his registered address, and at no other address," within s. 2 (1) (b), of the Moneylenders Act, 1900, and is, therefore, a fulfilment by the moneylender of the requirement of that paragraph.

Notes. As to a moneylender's address, see 27 HALSBURY'S LAWS (3rd Edn.) 29, 30, and for cases see 35 DIGEST 204, 207, 208. For Moneylenders Acts, 1900 and 1927 (s. 1 (3) (b) of the latter replaces s. 2 (1) (b) of the Act of 1900) see 16 HALSBURY'S STATUTES (2nd Edn.) 370, 377.

Case referred to :

(1) *Jackson v. Price*, [1910] 1 K.B. 143; 79 L.J.K.B. 130; 26 T.L.R. 106; 35 Digest 208, 338.

Also referred to in argument :

Gadd v. Provincial Union Bank, [1909] 2 K.B. 353; 78 L.J.K.B. 815; 101 L.T. 219; 25 T.L.R. 591, C.A.; reversed sub nom. *Kirkwood v. Gadd*, ante p. 768; [1910] A.C. 422; 79 L.J.K.B. 815; 102 L.T. 753; 26 T.L.R. 530; sub nom. *Gadd v. Kirkwood*, 54 Sol. Jo. 599, H.L.; 35 Digest 207, 324.

Levene v. Gardner and Earl of Kilmorey (1909), 25 T.L.R. 711; 35 Digest 207, 334.

Sadler v. Whiteman (1910), 26 T.L.R. 255; reversed, [1910] 1 K.B. 868; 79 L.J.K.B. 786; 102 L.T. 472; 26 T.L.R. 372; 54 Sol. Jo. 375, C.A.; varied sub nom. *Whiteman v. Sadler*, [1910] A.C. 514; 79 L.J.K.B. 1050; 103 L.T. 296; 26 T.L.R. 655; 54 Sol. Jo. 718; 17 Mans. 296, H.L.; 35 Digest 204, 294.

Appeal from the refusal by the registrar of the county court of Lancashire holden at Preston, to make a receiving order.

The appellant was a registered moneylender trading as J. King, at his registered address at 11, Cork Street, London. In January, 1910, he presented a bankruptcy petition against the debtor in the Preston County Court, the act of bankruptcy being a deed of assignment for the benefit of creditors.

The appellant's debt was £64 alleged to be due on a promissory note given to the appellant by the debtor in consideration for a loan. The loan had been negotiated by the debtor, who lived in Lancashire, entirely by correspondence, induced by the receipt by the debtor of one of the appellant's circulars.

When the terms had been arranged, the appellant sent the promissory note to the debtor for signature; it was then returned by post to the appellant, who sent by post a cheque to the debtor. The appellant sent the whole of the correspondence from his registered address. The registrar dismissed the petition on the ground that the transaction had not been carried out at the registered address of the appellant, and, therefore, by virtue of s. 2 (1) (b), of the Moneylenders Act, 1900, did not constitute a valid debt.

Shearman, K.C., and *T. V. Mansfield* for the appellant.
Hansell for the debtor.

PHILLIMORE, J.—In this case it is said that the debt is not a good petitioning creditor's debt, because it is a debt due to a moneylender and he did not comply

with s. (1) (b) of the Moneylenders Act, 1900. That paragraph requires that a moneylender

"shall carry on the moneylending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address."

For the purpose of the present case we have not to consider what the moneylender generally does, but what he has done in this case. If he generally carries on business at the proper place, but the particular transaction was carried on at an improper place, it will not stand. On the other hand, if he generally carries on business at improper places, but the particular transaction was carried on at a proper place, it will stand. In other words, the section is to be construed to mean that he shall carry on his moneylending business at his registered address. What has happened here? The moneylender had a registered name and a registered address. He sent out a circular inviting people to borrow money from him. I suppose he had an address on that circular which was his registered address, and if the debtor had not written to that registered address the transaction would never have gone through and never would have begun. Having received a reply to his circular he then enters into correspondence, giving as his address his registered address, and eventually a transaction is arrived at and completed, entirely by correspondence. The debtor writes to the moneylender at his place of business, the moneylender from his place of business sends letters stating his terms. On receiving a letter agreeing to his terms he sends a promissory note to be signed by the debtor at his residence, and, when he receives it back, he finally sends a cheque in favour of the debtor to be cashed by the debtor when he has received it at his private address. If this transaction sins against the Act, the result is that no transactions wholly by post would stand. If that were the correct view, the Act of Parliament would be a snare for everybody, but I do not think the legislature could have meant that, and—remembering my brother DARLING's words in *Jackson v. Price* (1), that the result is not merely that the transaction is void, but that the moneylender is subject to a heavy penalty as a criminal—in my opinion, I should be doing very wrong to construe the section in that way. I am of opinion, therefore, that this appeal must be allowed.

BUCKNILL, J.—I agree.

Appeal allowed.

Solicitors: *W. B. Glasier; James Craven & Co., Preston.*

[*Reported by J. A. THEOBALD, ESQ., Barrister-at-Law.*]

A

HOPKINS v. HILLS

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Channell and Bray, JJ.), April 11, 1910]

[Reported [1910] 2 K.B. 29; 79 L.J.K.B. 825; 102 L.T. 574; 74 J.P. 213; 26 T.L.R. 394]

B

Moneylender—Address—Business to be carried on at registered address—Repayment elsewhere than at registered address of loans made at that address—Moneylenders Act, 1900 (63 & 64 Vict., c. 51), s. 2 (1) (b).

C

A moneylender who merely receives repayment of loans at a place other than his registered address **held** not to contravene s. 2 (1) (b) of the Moneylenders Act, 1900, by carrying on business elsewhere than at his registered address.

Per CHANNELL, J.: The carrying on of business at the registered address does not include accepting the repayment of money from a borrower wherever the moneylender happens to find him.

D

Notes. As to a moneylender's address, see 27 HALSBURY'S LAWS (3rd Edn.) 29, 30, and for cases see 35 DIGEST 204, 207, 208. For Moneylenders Acts, 1900 and 1927 (s. 1 (3) (b) of the latter replaces s. 2 (1) (b) of the Act of 1900) see 16 HALSBURY'S STATUTES (2nd Edn.) 370, 377.

Case referred to:

E

(1) *Bradford v. Dawson*, [1897] 1 Q.B. 307; 66 L.J.Q.B. 191; 76 L.T. 54; 61 J.P. 134; 45 W.R. 345; 41 Sol. Jo. 160; 18 Cox, C.C. 473, D.C.; 25 Digest 445, 385.

F

Case Stated on a complaint by the appellant, an inspector of police, under the Moneylenders Act, 1900, s. 2 (1) (b) against the respondent for that she, on Aug. 14, 1909, being a registered moneylender having a registered address at No. 19, Southwark Park Road, did unlawfully carry on business as a moneylender elsewhere than at her registered address, namely, at Grange Road, Bermondsey.

G

On the hearing of the complaint it appeared that the respondent, on Aug. 14, 1909, was a registered moneylender with her registered address at No. 19, Southwark Park Road, Bermondsey, and on that date she went to Grange Road, Bermondsey, for the purpose of receiving sums of money in repayment of loans previously made by her. Between 1.45 and 2.10 p.m. she actually received twelve different sums of money from twelve different women in repayment of such loans. On behalf of the appellant it was submitted that the respondent, by receiving repayments of loans, at a place other than her registered address, had committed the offence alleged, although those loans had been previously made by her at her registered address. The magistrate was of opinion that the Act was passed for the protection of the borrower; that after the loan was made and completed the borrower was no longer in need of protection; and, therefore, the receiving of money in repayment of loans was not part of the "business of a moneylender" within the meaning of the section, and he, accordingly, dismissed the complaint. He called the attention of the court to *Bradford v. Dawson* (1).

H

Bodkin for the appellant.

I

Micklethwaite (S. A. T. Rowlatt with him) for the respondent.

LORD ALVERSTONE, C.J.—In this case the magistrate has refused to convict a moneylender who collected from some number of her debtors money in the street. Whatever may be the extent and true view of the various clauses of the Moneylending Act, it has not, as far as I know, gone so far as to say that acts connected with the transaction which could not be done under ordinary circumstances at the office of the moneylender are a carrying on of the business of the moneylender within the prohibition of the statute. In this case, if the appellant's view were

right, supposing the moneylender had called on six or seven houses in a street to collect money from her various debtors for the purpose of getting payment, she would be guilty of the offence under the Act of carrying on business elsewhere than her registered address. I think we must hold that the view taken by the learned magistrate was right, and the mere receipt of money in the street is not carrying on business within the Moneylenders Act. Therefore, the appeal must be dismissed.

CHANNELL, J.—I think the carrying on of business at the registered address means the carrying on of so much of the business as it is possible to carry on at the registered address, and it does not include accepting the repayment of money from a borrower wherever the moneylender happens to find him. I think the collection of money from the debtor outside his office is not a carrying on of business outside his business address.

BRAY, J.—I agree.

Appeal dismissed.

Solicitors: *Wontner & Sons; Treasury Solicitor.*

[*Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.*]

LEWIS v. RONALD

[KING'S BENCH DIVISION (Darling and Bucknill, JJ.), October 27, 1909]

[Reported 101 L.T. 534; 26 T.L.R. 30; 54 Sol. Jo. 32]

Negligence—Occupier of premises to visitor—Flat—Contract by landlord with tenants to light staircases—Failure to provide lights—Fall by tradesman's assistant delivering goods in dark.

The landlord of a block of flats contracted with the many tenants residing there that he would light the staircases when it was necessary. The plaintiff, a fishmonger's assistant, delivering fish to one of the tenants during the hours of darkness, went down a staircase outside the building and found a doorway with the door open at the bottom. He stepped inside and found himself in total darkness. He took one more step and fell down thirteen stone steps and was injured. There were means of lighting the steps on the premises.

Held: the landlord was not liable to the plaintiff for damages for negligence, since he had not invited the plaintiff to go to the steps whether they were lighted or not, and the plaintiff used them knowing they were in darkness.

Huggett v. Miers (1), ante p. 184, applied.

Notes. Section 4 (1) of the Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 837) now provides that when premises are occupied by any person under a tenancy which places upon the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, just as if he were an occupier of the premises and the persons or their goods were there by his invitation or permission.

Referred to: *Coleshill v. Manchester Corpn.*, [1928] 1 K.B. 776; *Hawkins v. Coulsdon and Purley U.D.C.*, [1953] 2 All E.R. 364.

A As to the common duty of care of the occupier and the owner of premises, see 28 HALSBURY'S LAWS (3rd Edn.) 43, para. 39, and for cases see 36 Digest (Repl.) 12 et seq.

Cases referred to :

- (1) *Huggett v. Miers*, ante p. 184; [1908] 2 K.B. 278; 77 L.J.K.B. 710; 99 L.T. 326; 24 T.L.R. 582; 52 Sol. Jo. 481, C.A.; 31 Digest (Repl.) 102, 2477.
- B** (2) *Indermauer v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur. N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex.Ch.; 36 Digest (Repl.) 46, 246.
- (3) *Wilkinson v. Fairrie* (1862), 1 H. & C. 633; 32 L.J.Ex. 73; 7 L.T. 599; 9 Jur. N.S. 280; 158 E.R. 1038; 36 Digest (Repl.) 12, 39.
- C** (4) *Miller v. Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 41 W.R. 578; 9 T.L.R. 512; 37 Sol. Jo. 558; 4 R. 478, C.A.; 31 Digest (Repl.) 100, 2471.

Appeal against an order of His Honour JUDGE BRAY sitting at Brompton County Court.

D The plaintiff was a fishmonger's assistant who was injured through falling down an unlighted flight of thirteen stone steps at a block of flats, Grove Court, Drayton Gardens, South Kensington, when delivering fish to the sub-tenant of one of the flats at 5.30 p.m. on Nov. 23 when it was dark. He brought an action for damages for negligence against the defendant, who was deemed to be the owner and landlord for the purposes of the action. The county court judge held that there was no case to go to the jury on the plaintiff's evidence and non-suited him. The plaintiff appealed to the High Court.

E *H. H. Curtis Bennett* for the plaintiff.
J. A. Hawke for the defendant.

DARLING, J.—In this case the facts are apparently that the defendant was the landlord of a large building in which many tenants resided, and he entered into an agreement with the tenants that he would light the staircases on the premises when it was necessary. That does not amount to a contract with anybody except the tenants, and I doubt if anybody who was not a party to it could allege that contract as enuring for his benefit. I do not base my judgment on that, but, if it were so, then whether there was negligence or not the case would have been rightly decided in favour of the defendant.

G The plaintiff was employed by a tradesman to deliver goods at this flat. He came in at the proper entrance and walked down a staircase. What was the condition of the staircase at the time? Here is his own evidence in regard to it :

H "I went down a winding staircase outside the building. When I got to the bottom I found a doorway in front immediately at the bottom of the staircase. I stepped inside the doorway—the door was open. When I got inside the doorway I was in total darkness. I put my arm out to feel where I was and then I pitched forward and fell down thirteen stone steps."

In cross-examination he said :

"The passage turns to the right after the bottom of the steps down which I fell. There was nothing to light up the staircase."

I It appears from this evidence that, there being a staircase which was absolutely without light, the plaintiff walked along and fell down a flight of stairs. The law as regards staircases has often been laid down. For example, in *Indermaur v. Dames* (2) BLACKBURN, J., in commenting on *Wilkinson v. Fairrie* (3) said (36 L.J.C.P. at p. 183) :

"It always struck me that that case ought to be supported on the ground that the plaintiff chose to go into the premises and wander about in a way [in the dark according to another report] the defendant could not anticipate."

Those observations apply to the present case. For the plaintiff to succeed it must be shown that the defendant invited him to go to the place where the accident happened. How can it be said here, merely because there were means of lighting this place, that there was an invitation to the plaintiff to go there, whether it was lighted or not? As BLACKBURN, J., said, he chose to go into the dark when the defendant had no reason to anticipate that he would do so.

The county court judge has gone most carefully into all the cases on the point, and in particular he has referred to the observations of SIR GORELL BARNES, P., and FLETCHER MOULTON, L.J., in *Huggett v. Miers* (1). SIR GORELL BARNES, P., said ([1908] 2 K.B. at p. 284):

"In *Miller v. Hancock* (4) the person injured was regarded as using the staircase on the assumption, which he was entitled under the circumstances to make, that it was in a proper state of repair. In the present case the staircase being pitch dark the risk of using it without providing himself with any light was obvious to the plaintiff."

FLETCHER MOULTON, L.J., said (*ibid.* at p. 285):

"There is a very broad distinction between a case like the present and a case of non-repair of a staircase. If a staircase be dark a person using it must obviously be aware that it is in that condition, whereas in the case of a person using a staircase which is out of repair as in *Miller v. Hancock* (4) it may not be obvious to him that it is so."

In the present case the plaintiff's own language shows that he was perfectly aware of the condition of the staircase. That being so, we must take it that he was aware that it was absolutely dark. I can see no invitation to anybody to walk about on the staircase when it is not lighted. As BLACKBURN, J., said in the earlier case, he chose to do it.

The county court judge has given most careful consideration to this case, and I think, having regard to the way the law has been laid down by the present Court of Appeal, that he came to the right conclusion, and the appeal must be dismissed.

BUCKNILL, J.—With very considerable doubt I have come to the same conclusion. The case, to my mind, is a very difficult one, but I think as long as *Wilkinson v. Fairrie* (3) is good law what BRAMWELL, B., said regarding the plaintiff there must apply to this case. He said (7 L.T. at p. 600):

"If it was so dark that he could not see, he ought not to have proceeded without a light; if it was so light that he could see, he might have avoided the staircase."

Here the plaintiff was lawfully on the premises at the invitation of the tenant. He reached a spot on the route indicated to him as the place he had to go to where he could see nothing, and then went forward. It is said he only took one step forward, but I do not think he was entitled to take that step, because, in taking it, he did not know where he was going.

I do not think the present case is anything like *Miller v. Hancock* (4). There it was held that the staircase must be kept by the landlord in such repair that all people frequenting the premises could use it safely, and the reason for that decision was that the landlord must know that people would go up and down the stairs. That is not the present case.

This case is much more like *Huggett v. Miers* (1). In that case, as in the present, a man fell down a dark staircase. Is there any distinction here because the landlord agreed with his tenants to light the staircase? There was a breach of that agreement, and, through the landlord's breach of contract with his tenant, some person lawfully on the premises finds himself in the dark. The question is whether he was entitled to go on. If he did go on, did he do so at his own risk? The judge had held here that there was no case to go to the jury on the plaintiff's evidence.

A I cannot disagree, but I think the case is one of considerable difficulty. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *F. Freke Palmer; Gribble, Oddie & Co.*

[Reported by PHILIP B. DURNFORD, ESQ., Barrister-at-Law.]

STOURCLIFFE ESTATES CO., LTD. v. BOURNEMOUTH CORPORATION

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Buckley and Kennedy, L.J.J.), April 26, 27, 1910]

[Reported [1910] 2 Ch. 12; 79 L.J.Ch. 455; 102 L.T. 629; 74 J.P. 289; 26 T.L.R. 450; 8 L.G.R. 595]

D *Local Authority—Open space—Purchase of land—Covenant by local authority to erect only specified buildings—Proposal to erect unspecified building—Lavatory—Shelter.*

A conveyance of land on the brink of a sea cliff to a municipal corporation for use as a public garden or pleasure ground contained a covenant by the corporation to keep the land as an open space for the enjoyment of the public, "subject to no buildings or erections of any kind being put thereupon except such structures as summer-houses, a bandstand, or shelters not exceeding 12 feet in height for the accommodation and convenience of the public." The corporation proposed to erect on the land a structure with a lavatory at either end and a room or covered space between for use as a shelter.

F **Held:** the vendors were entitled to an injunction to restrain the corporation from erecting the structure, because (i) the covenant was binding on the corporation since it was freely entered into and did not prevent their using the land as a public park or exercising their statutory power of providing public lavatories in appropriate cases, and (ii) the structure was not a "shelter" within the meaning of the covenant, the word "convenience" in the covenant not being descriptive of a building and not importing a public lavatory.

G *Ayr Harbour Trustees v. Oswald* (1) (1883) 8 App. Cas. 623, and *Re South Eastern Rail. Co. and Wiffen's Contract* (2), [1907] 2 Ch. 366, distinguished.

Grounds of the decision in *Re South Eastern Rail. Co. and Wiffen's Contract* (2), criticised.

H **Notes.** Considered: *A.-G. v. Poole Corpn.*, [1936] 3 All E.R. 852. Referred to: *A.-G. v. Poole Corpn.*, [1938] Ch. 23.

As to limitations on a corporation's right to make covenants restricting the exercise of its powers, see 9 HALSBURY'S LAWS (3rd Edn.) 65, and for cases see 13 DIGEST (Repl.) 381 et seq.

Cases referred to:

- I (1) *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623, H.L.; 11 Digest (Repl.) 103, 5.
(2) *Re South Eastern Rail. Co. and Wiffen's Contract*, [1907] 2 Ch. 366; 76 L.J.Ch. 481; 97 L.T. 576; 11 Digest (Repl.) 121, 135.

Also referred to in argument:

A.-G. v. Pontypridd U.D.C., [1906] 2 Ch. 257; 75 L.J.Ch. 578; 95 L.T. 224; 70 J.P. 394; 22 T.L.R. 576; 50 Sol. Jo. 525; 4 L.G.R. 791, C.A.; 11 Digest (Repl.) 122, 143.

Staffordshire and Worcestershire Canal Navigation Proprietors v. Birmingham Canal Proprietors (1866), L.R. 1 H.L. 254; 35 L.J.Ch. 757, H.L.; 38 Digest (Repl.) 447, 973.

Sanderson v. Cockermouth and Workington Rail. Co. (1850), 7 Ry. & Can. Cas. 613; 2 H. & Tw. 327; 19 L.J.Ch. 503; 47 E.R. 1708, L.C.; 38 Digest (Repl.) 324, 225.

A.-G. v. Hanwell U.D.C., [1900] 2 Ch. 377; 69 L.J.Ch. 626; 82 L.T. 778; 48 W.R. 690; 16 T.L.R. 452; 44 Sol. Jo. 572, C.A.; 11 Digest (Repl.) 122, 141.

Mulliner v. Midland Rail. Co. (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 27 W.R. 330; 11 Digest (Repl.) 122, 145.

Manchester, Sheffield and Lincolnshire Rail. Co. v. Anderson, Anderson v. Manchester, Sheffield and Lincolnshire Rail. Co., [1898] 2 Ch. 394; 67 L.J.Ch. 568; 78 L.T. 821; 14 T.L.R. 489; 42 Sol. Jo. 609, C.A.; 11 Digest (Repl.) 157, 322.

Kirby v. Harrogate School Board, [1896] 1 Ch. 437; 65 L.J.Ch. 376; 74 L.T. 6; 60 J.P. 182; 12 T.L.R. 175; 40 Sol. Jo. 239, C.A.; 11 Digest (Repl.) 157, 320.

A.-G. v. Sunderland Corpn. (1876), 2 Ch.D. 634; 45 L.J.Ch. 839; 34 L.T. 921; 40 J.P. 564; 24 W.R. 991, C.A.; 11 Digest (Repl.) 121, 138.

London and Brighton Rail. Co. v. Truman (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 31 W.R. 657, H.L.; 38 Digest (Repl.) 41, 212.

Appeal by the defendant corporation against an order of PARKER, J. (102 L.T. 311), granting an injunction restraining the corporation from erecting a structure comprising lavatories on land purchased from the plaintiff contrary to covenant contained in the conveyance.

Grant, K.C. (with him *J. G. Wood*), for the defendant corporation.

Romer, K.C., and *R. F. MacSwiney* for the plaintiffs.

SIR HERBERT COZENS-HARDY, M.R.—This is an appeal against an order of PARKER, J., and it raises two points. First, what is the construction of a certain deed of conveyance by which a piece of land, containing I think eight acres more or less, was conveyed by the plaintiffs to the corporation of Bournemouth assuming the parties to be competent; and, secondly, whether the covenant is at all binding on the corporation? I think the construction of the deed is perfectly clear. The property is at Southbourne within the borough of Bournemouth. The land is on the brink of the cliff close by the sea. It comprises eight acres immediately adjoining a building estate of the plaintiffs, and by this deed the sites of certain roads on the building estate were conveyed to the corporation, and provision was made for making these roads and giving rights to the parties over the land, and there is also the conveyance of these eight acres to the corporation. The conveyance is in these terms:

“The company as beneficial owners hereby convey unto the corporation the land [describing it] To hold the same unto the corporation in fee simple as regards so much thereof as lies to the north of the slope of the cliff to be devoted to the purposes of a public garden or pleasure ground; and the corporation hereby covenant with the company, their successors and assigns, to preserve and keep the land to be devoted to pleasure-ground purposes as an open space for the enjoyment of the public in such manner and form as the corporation shall think best in the interests of the public, subject to no buildings or erections of any kind being put thereupon except such structures as summer-houses, a bandstand, or shelters not exceeding twelve feet in height for the accommodation and convenience of the public, and subject also to no gravel being dug upon or removed from the said piece of land so to be devoted for

A the purposes of a public garden or pleasure ground except for the purposes of making such garden or pleasure ground."

B We must apply our knowledge of the English language to this deed as to any other deed, and I cannot imagine that anyone accustomed to going to the seaside can have any doubt as to the meaning of a shelter on the edge of the cliff. It is a perfectly well-known kind of structure. It is plainly different from a lavatory. To attempt to describe what is shown on the amended plan as a shelter because there is a room or open space between two adjoining lavatories seems to me to be simply ridiculous. The first plans under which the work so far as it has been done at all has been done were avowedly for lavatories. The tender which was accepted was for those lavatories, and for the corporation to attempt to give the go-by to this deed by saying that they put between the two lavatories a space which they will either wholly or partly cover up and will call that a desirable shelter for people will not bear stating as a proposition. It seems to me that this building is not a shelter or a structure of the same kind as a shelter within the meaning of the covenant; and on that point, therefore, the judgment of PARKER, J., was perfectly correct.

D The second point is this: Is the covenant binding on the corporation? I ask myself: why not? It was a voluntary bargain made between the corporation and the plaintiffs. There is no dedication by Parliament of this particular land to any particular purpose. The purposes are defined by the parties in the deed itself. Can it seriously be contended that the corporation cannot accept as a gift or make a purchase of land for a park subject to any restrictions of any kind such as, a very reasonable and common one, that no intoxicating liquors shall be sold on part of it? Of course, if the argument of counsel for the corporation is right, such a condition would be impossible. But, further, if they have taken this conveyance of this land in terms subject to these restrictive covenants, can they hold it free from those restrictions? That again is a proposition which seems to me to be startling in its monstrosity, I was going to say. If the deed is wholly ultra vires I can understand it; but to suppose that the corporation could be allowed to retain the land and to repudiate the consideration, or part of the consideration, for it is a proposition to which certainly I could not give any adhesion.

But then it is said that the House of Lords has decided this case in principle, and their decision is binding on this court. If the House of Lords had decided anything of the kind we should follow their decision with perfect loyalty. But have they? The case relied on is *Ayr Harbour Trustees v. Oswald* (1), in which an Act of Parliament for public purposes and in the public interest declared that certain land should be purchased by the undertakers who were given compulsory powers for the purpose. That land included Mr. Oswald's land. Not only were they to make a harbour and a quay, but they had power—it was obviously part of the essence of the undertaking—to make over any part of the land so purchased certain warehouses facing a certain road. The parties did not agree as to the price. There was an arbitration, and it was referred to an umpire or oversman, as it is called, and the railway company said that they would have to pay a much larger sum unless they agreed with Mr. Oswald that they would not put any of these erections on the portion of the land adjoining, I think, his land. The oversman, as they call him, made an award giving two figures, the larger one if they purchased the land as the Act of Parliament required that it should be purchased, the smaller one if the purchase was releasing this part of the land from that imposition which in the public interest Parliament had imposed on them. The House of Lords in effect said: "Non constat that Parliament would have given you a right to purchase this land except for the full interest; non constat that Parliament would have sanctioned your purchasing this with a special exception in favour of Mr. Oswald, and we cannot, therefore, allow you to say against Mr. Oswald's wish that you would rather not purchase this land in the form in which Parliament alone has given you

power to purchase it, and you will be very happy to take something less and to pay a less consideration. In those circumstances the House of Lords said, affirming the view of the Scottish court, that that was a transaction which could not stand. But that proceeded really upon this, as LORD BLACKBURN puts it (8 App. Cas. at p. 634):

"Powers conferred on the body empowered to take the land compulsorily are entrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void."

But what has that to do with a case of the kind that is now before us? I can see no analogy to such a case at all. Here the corporation have general powers to purchase land for, inter alia, the purposes of a public park. They may go anywhere they like and may make a contract with anybody who is willing to enter into a contract with them for these purposes. To say that a vendor in those circumstances cannot rely on a restrictive covenant entered into by the purchasers would be to render it practically impossible for a municipal corporation ever to enter into a contract with a landowner for purposes of this kind; for no landowner would be so unwise as to say: "I will convey this land or I will give this land, but, mind you, I cannot impose on you any kind of covenant or restriction however reasonable it may be, because such a covenant will not bind you." In principle *Ayr Harbour Trustees v. Oswald* (1) seems to me to be entirely different.

So far as I am aware, there is no authority whatever to justify the proposition which has been contended for by counsel for the corporation unless it be the decision of NEVILLE, J., in *Re South Eastern Rail. Co. and Wiffen's Contract* (2). There the South Eastern Railway Co. were authorised to acquire land for extraordinary purposes. They were empowered to

"enter upon, take, use, and appropriate, for the purpose of enlarging and extending their stations and siding accommodation and for roads and approaches and for other purposes of and connected with their undertaking, the lands, houses, and buildings hereinafter described or referred to."

Under this power the company in 1889 acquired by voluntary agreement about 2½ acres of land described in the deposited plans, and it was duly conveyed to them. By the conveyance the company covenanted for themselves and their assigns with the vendors, their heirs and assigns, that they, the company, and their assigns would

"for ever hereafter use the said piece of land hereby conveyed with the buildings now or hereafter to be erected thereon as a passenger station for the accommodation of the traffic of their line with the necessary yard and approaches and for no other purpose."

The company did not require the land, and acting under s. 13 of the Lands Clauses Consolidation Act, 1845, in pursuance of the plain and unambiguous provisions of that Act, they agreed to sell. Section 13 runs thus:

"It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner, and for such considerations, and to such persons, as the promoters of the undertaking may think fit."

They entered into a contract for sale and the purchaser required the covenant to be released. The simple answer was that Parliament had said that at any time if the company did not require this land they might sell it, and that being so it was manifest that a covenant that land should only be used as a passenger station for the accommodation of the company's line could not from the necessities of the

A case be in any way binding on the purchaser to whom they were authorised to sell it under the terms of the Act.

NEVILLE, J., held that the covenant was not an objection, and that the purchaser would get a good title. He cited *Ayr Harbour Trustees v. Oswald* (1) and said ([1907] 2 Ch. at p. 369):

"Now, applying that decision to this case, I think the company have undoubtedly purported to deprive themselves of the right to exercise over the land which they acquired under s. 5 any of their powers other than the one specified in the covenant. I think, therefore, that the case falls within the principle of *Ayr Harbour Trustees v. Oswald* (1) and that the covenant is bad."

With great respect to the judge, I think that his decision was perfectly right in that case. But I am unable to follow or adopt the particular chain of reasoning by which he arrived at that decision. In my view this covenant is binding on the municipal corporation; the act they are doing is plainly in contravention of that covenant; and the order made by PARKER, J., granting the injunction was perfectly right, and this appeal must be dismissed, with costs.

BUCKLEY, L.J.—On the first point I hold that the word "shelter" in this deed does not include a urinal or a lavatory. The word "convenience" as descriptive of a building has acquired conventionally, from motives I suppose of delicacy, a secondary meaning and no doubt means a public urinal or lavatory; and the argument which we have heard has really been based on the fact that the word "convenience" occurs in this clause. But it does not occur as a word descriptive of a building; it is used as a word qualifying the word "shelter"—"shelter for the accommodation or convenience of the public." It is descriptive of a purpose, not of a building, in this clause. Now, a shelter at the seaside is a form of structure which is familiar to all of us. It conveys the notion of a building—generally of a somewhat ornamental character—which is intended to protect the visitor from weather in some form. It may be from sun, from wind, or from rain. It is a shelter from the too great insistence of the elements. It does not convey at all any idea of a urinal. The building which is here allowed is a "shelter for the accommodation or convenience of the public." I hold that that does not include a urinal.

On the second point I confess that I feel no difficulty at all either on principle or on authority. First as to principle. This corporation have by virtue of certain statutes power to acquire lands either by agreement or compulsorily for certain purposes. Supposing that they acquire them compulsorily, they do that under s. 176 of the Public Health Act, 1875, and in order to do so they have to state the purposes for which the lands are wanted, and adjoining owners may be heard at an inquiry which has to be held to say that the lands ought not to be given for those purposes. The Local Government Board, in holding the inquiry, may empower the local authority to put in force their power with respect to purchasing the land, either absolutely or with such conditions and modifications as the board may think fit. If the corporation were going to acquire the lands compulsorily, they would have to disclose the purposes for which they wanted them, and they could be limited as regards the way in which they were to use the lands if they acquired them. Then, with regard to the power to take the lands compulsorily, if, for instance, they wanted to acquire lands compulsorily for a public park, it might be made a condition on which they should acquire the lands that they should not have any bands there because they would be an annoyance to the occupiers of the neighbouring buildings; that they should not have urinals there, or that they should close the park at certain hours; or any number of restrictions which it might be reasonable and proper to impose.

This was not a case of acquiring the lands compulsorily. It was a case of acquiring voluntarily. But equally the corporation acquiring it must acquire not for all

and every purpose for which they can acquire lands anywhere, but for some definite purpose, some one of its purposes in respect of which they are entitled to acquire land. If they say that they want these lands for a public park, in which they will have no occasion to put a urinal, I cannot conceive any reason why they should not, by way of bargain with a person from whom they are going to buy, say that they will buy his lands and will bind themselves not to put a urinal there. It is said that that is divesting themselves of some power, because under s. 85 of their local Act of 1892 they could have put a urinal there. That section means that it is not an improper expenditure of money by the corporation among other things to erect urinals in places. But it is not necessary that the corporation should with every piece of land which they buy acquire also the right to put a urinal there. It may say that they do not want the land for that purpose, but will buy it for a less purpose. So that on principle I see no ground whatever why the corporation should not bind themselves by the instrument by which they buy that they will use the land for a limited purpose; that they will use it for the purposes of a park, and a park in which there shall not be any urinal.

Now, is there any difficulty as regards authority? The authority principally relied on is *Ayr Harbour Trustees v. Oswald* (1). It seems to me that that authority does not assist in any way the purpose for which it is cited. The case was the simplest one possible. Where there be a body such as a railway company, or a harbour board, which is entitled compulsorily to take certain scheduled lands which the legislature recognises are wanted for the purposes of its undertaking, and the legislature has empowered that authority compulsorily to take those scheduled lands, and has at the same time conferred on the authority statutory rights to do acts for its public purpose on lands thus acquired, the decision of the House of Lords was that the corporation cannot release part of its powers to the vendor of the land binding itself not to use them and divesting itself and its successors of the right to use those lands which the legislature has said are wanted for its undertaking for some part of the purpose only of its undertaking. It seems to me that that is the whole decision in *Ayr Harbour Trustees v. Oswald* (1), and I fail to see how it has any application at all to the present case. There you find particular lands which the particular authority is authorised to take on the footing that it wants them for its undertaking, and for the purposes of its undertaking the statute has said that it shall have certain powers. The House of Lords only confirmed that as regards the lands thus acquired. It cannot release the powers which the Act of Parliament has attached to those lands. I fail to see how that has any application at all to the case with which we have now to deal. I think that it is quite clear that the corporation were perfectly entitled to acquire these lands subject to the limitation expressed in the covenant to this deed; and that the injunction was rightly granted; and that this appeal should be dismissed.

KENNEDY, L.J.—I am entirely of the same opinion. As has been already pointed out, there are two distinct question, one of construction, and the other of the legality of the particular covenant which was entered into—whether it is one into which the corporation could enter so as to bind themselves not to create a certain structure within the lands bought. On the question of the covenant, I can entertain no doubt that shelters therein mentioned do not include buildings which are, as the building proposed to be erected is, a urinal or lavatory. Then it is said: "Well, if it is a urinal it does not in itself necessarily indicate a urinal or lavatory." The words "such structure or shelter" are wide enough to include as a creation ejusdem generis of a urinal or lavatory. In my opinion it is not a case of ejusdem generis. The structures are so distinct both in their character and in the degree to which they could be disagreeable to other persons as to distinguish such a creation or structure as a lavatory or urinal from anything that could fairly come under the word "such" as it stands in this covenant. Then stress was laid on the word "convenience." No doubt in popular language used

euphemistically the structure such as it is proposed to erect may sometimes be called a convenience. But here, to my mind, it is an entire mistake of reason to draw from the insertion of the word "convenience" in this text as it stands an argument for the inclusion either of the word "such" or the word "shelter," an argument which would give those words the wider meaning of including a lavatory or urinal. The words are "for the accommodation and convenience of the public." To my mind the important words there are "of the public." It is not to be something for the accommodation and convenience of any person except that wide and general class of persons who come there and who are called "the public." They could not erect, for example, something for the accommodation and convenience, I take it of the Astronomer Royal or anything of that kind. It is to be something for the convenience of the public as distinguished from the convenience of persons who do not come within that classification.

The question of the law which has been argued has been so fully dealt with by the MASTER OF THE ROLLS and BUCKLEY, L.J., that I am not going to repeat that in which I entirely concur. The authorities which were cited do not on examination afford any ground, in my opinion, for the reasons which have been already most clearly stated and explained, for the proposition for which counsel for the corporation has so ably contended. I will only say this, that, with regard to the case before NEVILLE, J., of *Re South Eastern Rail. Co. v. Wiffen's Contract* (2), I do concur in the criticism which the MASTER OF THE ROLLS has made. I do think that the reasoning as stated in that judgment affords, at any rate, some colour to the argument counsel for the corporation sought to found on it, and without wishing to throw any doubt on the result of the judgment, I do, with great respect to NEVILLE, J., think that I should feel a difficulty in concurring entirely with him on the grounds on which that decision is found.

BUCKLEY, L.J.—I wish to add that I agree with what the MASTER OF THE ROLLS has said as regards the decision in *Re South Eastern Rail. Co. and Wiffen's Contract* (2). I think that the decision there was right. But I am unable to follow the reasoning on which it was based. I think that the judge overlooked the fact that the purchaser who was the person affected there was not the successor of the person who purchased the lands.

Appeal dismissed.

Solicitors: *Chester, Broome & Griffithes*, for *G. W. Bailey*, Town Clerk, *Bournemouth*; *Soames, Edwards & Jones*.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

R. v. SHOREDITCH ASSESSMENT COMMITTEE.

Ex parte MORGAN

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.J.J.), July 18, 19, 20, 28, 1910]

[Reported [1910] 2 K.B. 859; 80 L.J.K.B. 185; 103 L.T. 262; 74 J.P. 361; 26 T.L.R. 663; 8 L.G.R. 744; Konst. & W. Rat. App. 203]

Rates—Licensed premises—Excise duty—Effect on value—Increase—Prima facie case for reduction of assessment.

The Finance (1909-10) Act, 1910, increased excise licence duties imposed on licensed premises by providing that the duty should be equal to half the annual value of the premises. The effect was to increase the annual duty payable in respect of a licensed house assessed at £260 gross value for rating purposes from £35 to £130, an increase of £95.

Held: the increase in duty was a factor to be taken into account in arriving at the gross value of the licensed premises for rating purposes and afforded a prima facie case for a reduction of the assessment, constituting a cause for the making of a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869.

Notes. The case is reported only on the question of the effect of excise duty on the value of licensed premises for rating purposes. The procedure by way of provisional lists and requisitions for altering valuation lists under the Valuation (Metropolis) Act, 1869, was repealed by the Local Government Act, 1948.

Applied: *Jones v. West Derby Union* (1911), 75 J.P. 375. Considered: *R. v. Islington Assessment Committee, Ex parte L.C.C.*, [1914] 3 K.B. 481. Applied: *Port of London Authority v. Orsett Union Assessment Committee*, [1919] 1 K.B. 84. Referred to: *Wigglesworth v. R.* (1910), 104 L.T. 593; *L.C.C. v. Shoreditch Borough Council* (1911), 105 L.T. 515; *Parrish v. Hackney Corpn.*, [1912] 1 K.B. 669; *I.R. Comrs. v. Fitzwilliam*, [1913] 1 K.B. 184; *Leney & Co. v. Whelan*, [1934] 2 K.B. 511; *Appenrodt v. Central Middlesex Assessment Committee*, [1937] 2 All E.R. 325; *R. v. Westminster Assessment Committee, Ex parte Junior Carlton Club Trustees*, [1940] 3 All E.R. 155; *Yeovil R.D.C. v. South Somerset and District Electricity Co.*, [1947] 1 All E.R. 669.

As to factors affecting the valuation of licensed premises for rating purposes, see 32 HALSBURY'S LAWS (3rd Edn.) 96 et seq., and for cases see 38 DIGEST (Repl.) 670 et seq.

Cases referred to :

- (1) *Cartwright v. Sculcoates Union*, [1900] A.C. 150; 69 L.J.Q.B. 403; 82 L.T. 157; 64 J.P. 229; 48 W.R. 394; Ryde & K. Rat. App. 167; sub nom. *Cartwright v. Sculcoates Union, Wilford v. Same, Walsh v. Same, Robinson v. Same*, 16 T.L.R. 238, C.A.; 38 Digest (Repl.) 670, 1213.
- (2) *R. v. Southwark Assessment Committee*, [1909] 1 K.B. 274; 78 L.J.K.B. 319; 100 L.T. 136; 73 J.P. 75; 53 Sol. Jo. 133; 7 L.G.R. 287; sub nom. *R. v. Southwark Corpn., Ex parte South Eastern and Chatham Rail. Co.'s Managing Committee*, 25 T.L.R. 144; 2 Konst. Rat. App. 783, C.A.; 38 Digest (Repl.) 769, 1849.
- (3) *Camberwell Assessment Committee v. Ellis*, [1900] A.C. 510; 69 L.J.Q.B. 828; 83 L.T. 201; 65 J.P. 132; 49 W.R. 238; 16 T.L.R. 504; sub nom. *Ellis v. Camberwell Union, Ryde & K. Rat. App.* 195, H.L.; 38 Digest (Repl.) 768, 1841.
- (4) *R. v. New River Co.* (1879), 4 Q.B.D. 309; 27 W.R. 785; sub nom. *R. v. St. Mary, Islington Parish Assessment Committee*, 48 L.J.M.C. 123; sub nom. *New River Co. v. Islington Assessment Committee*, 40 L.T. 322; 43 J.P. 349; Ryde, Rat. App. (1871-85), 223; 38 Digest (Repl.) 766, 1813.

A Also referred to in argument :

R. v. Poplar Union Assessment Committee (1884), 13 Q.B.D. 364; sub nom. *R. v. East and West India Docks Co.*, 53 L.J.M.C. 97; 51 L.T. 97; sub nom. *East and West India Docks Co. v. Poplar Union*, 48 J.P. 564; Ryde, Rat. App. (1871-85), 347, C.A.; 38 Digest (Repl.) 766, 1814.

B **Rule Nisi** calling on Shoreditch Assessment Committee to show cause why a writ of mandamus should not issue directed to them, commanding them to appoint a person to make a provisional list for the parish of Shoreditch, in the borough of Shoreditch, containing the gross value and rateable value of the Crown and Shuttle public-house, situate in High Street, Shoreditch, whereof the ratepayer, Harry N. Morgan, was the occupier and licensee, as reduced since the making of the valuation list in force, as required by the Valuation (Metropolis) Act, 1869, s. 47 (2).

C The rule was obtained at the instance of the ratepayer on the ground that the gross value and rateable value of the public-house had been reduced in the course of the year beginning April 6, 1910, within the meaning of s. 47. The ratepayer held a full licence in respect of the house for the sale by retail of intoxicating liquors for consumption on the premises. Since 1905 the gross value of the premises as assessed for poor rate had been £260, and the licence duty had been £35. On May 11, 1910, he signed a requisition addressed to the town clerk of Shoreditch, as clerk to the overseers of the borough, requesting the overseers in pursuance of the Valuation (Metropolis) Act, 1869, to insert the premises in a provisional valuation list, on the ground that an alteration had taken place in the value of the hereditament reducing the gross value and rateable value owing to a specific cause, viz., the imposition of increased duties of excise charged on licences for the sale of intoxicating liquors specified in Sched. I to the Finance (1909-10) Act, 1910. The schedule and s. 43 and s. 44 (1) provided for the duty in respect of a licence to be taken out annually by a retailer of a spirits (publican's licence) should be a duty equal to one-half the annual value of the licensed premises, subject to a minimum. Mr. Francis Dod, the surveyor instructed by the ratepayer, stated in his affidavit that the licence duty would be increased to £260 so long as the gross value for poor rate remained at £260, under the combined operation of s. 45 of the Valuation (Metropolis) Act, 1869, and s. 43 and s. 44 of the Finance (1909-10) Act, 1910, an increase of £95 per annum over the existing licence duty of £35. The increase had reduced the annual value of the premises by the amount of that increase, subject to any consequential alterations of other imposts on the property. D The passing of the Finance Act had already had the effect of reducing the annual value, although the licence duty was not actually payable till July 1, 1910. On May 14, 1910, he sent to the overseers the notices contained in the requisitions of seven public-houses, including the Crown and Shuttle, and he sent the same notices to the clerk to the assessment committee. On June 8 he received from the clerk to the assessment committee a letter "Re seven requests for the provisional list," E informing him

"That the assessment committee after consideration and after hearing him thereon passed the following resolution—namely: 'That this committee find as a question of fact that none of these premises have been reduced in value during the year so as to warrant the committee appointing a person to make a provisional list therefor'."

I Mr. Dod stated that the excise licence duty was always taken into account before arriving at the rent which the hypothetical tenant was supposed to pay to the hypothetical landlord, i.e., the gross value; and that in such cases it was an agreed rating practice to take it as a fact that the tenant would pay a less rent in proportion to the excise licence duty, and that in view of the reduction in value of the premises due to the increased licence duty the ratepayer was entitled to have the premises inserted in a provisional list.

The ratepayer's solicitor said that from inquiries he had made he was able to state that the Finance (1909-10) Act, 1910, had already had the effect of reducing the annual value of licensed premises, though the licence duty was not actually payable until July 1, 1910.

Mr. Mansfield Robinson, the town clerk of the borough of Shoreditch, the solicitor and clerk to the borough council and clerk to the overseers and also to Shoreditch Assessment Committee, in an affidavit stated his practical experience in valuation of the public-houses in the borough, and the hearing of objections and denied Mr. Dod's statement that the effect of the increased licence duty had been to reduce the annual value of the Crown and Shuttle public-house. Inquiries made after the receipt of the requisitions into the rents paid for licensed premises where the tenancies had changed after the Finance Act, 1910, had been passed—April 29, 1910—showed that in five cases inquired into the rent had either remained as before or had been increased. In the last nineteen years neither the valuation committee (i.e., the overseers) nor the assessment committee had ever taken into account the excise licence duty before arriving at the rent which a tenant would pay for licensed premises, nor had any of the valuers or licensees ever claimed or asked for such allowance. It was not an agreed rating practice, nor had he ever known it done, to take it as a fact that the tenant would pay a less rent in proportion to the excise duty. The valuation committee on considering the requisition determined that the Crown and Shuttle had not changed in value since April 6, 1910, and it was inserted at the existing gross value and rateable value in the quinquennial list lodged on June 1, 1910. After hearing Mr. Dod's statements in favour of a reduction in the seven cases, which were dealt with together, the assessment committee resolved that as a matter of fact the premises had not been reduced in value during the year.

Mr. Bramham, rating surveyor and valuer, in an affidavit said that he had found from inquiry in the borough of Shoreditch that the increase in the licence duty under the Finance Act had not reduced the annual value of the premises; that he had never taken into account the excise licence duty in arriving at the rent payable by the tenant of a public-house; that it had never in his experience been taken into account by the surveyor acting for the licensee when objecting before the assessment committee, nor had the excise licence duty been mentioned or claimed by Mr. Dod as a reduction in any of the cases in which he had appeared before the assessment committee of the Hackney Union for which Mr. Bramham acted as an objector; and, further, that it was not an agreed rating practice to take it as a fact that the tenant would pay less rent in proportion to the excise licence duty.

The King's Bench Divisional Court (LORD ALVERSTONE, C.J., GRANTHAM and CHANNELL, JJ.) on June 17, 1910, held that the circumstances appearing on the affidavits showed *prima facie* that the annual value of the hereditament had been reduced and the rule should be made absolute. The assessment committee appealed to the Court of Appeal.

C. A. Russell, K.C., and Avory, K.C. (with them Courthope-Munroe), for the assessment committee.

Danckwerts, K.C., and W. C. Ryde for the ratepayer.

Cur. adv. vult.

July 28, 1910. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—This appeal raises an important and difficult question as to the effect of the Finance (1909-10) Act, 1910, on the rating of licensed public-houses in the metropolis. The Crown and Shuttle is a public-house in Shoreditch. The ratepayer is the occupier and licensee of the house, and has been so since 1896. It is a tied house. At the quinquennial valuation in 1905 the gross value as assessed for poor rate was £260. The licence duty payable

A by the ratepayer was, until the Finance Act came into operation, £35. But under the Finance Act the duty is equal to half the annual value of the licensed premises, i.e., £130—an increase of £95 a year. In these circumstances the ratepayer applied under s. 47 of the Valuation (Metropolis) Act, 1869, for a provisional list on the ground that the value of the licensed house had been reduced by reason of this increased duty. The overseers did not send a provisional list to the assessment committee, as requested by the requisition, within fourteen days, and the assessment committee after consideration, and after hearing the ratepayer's representative, passed a resolution that they found as a question of fact that the premises had not been reduced in value during the year so as to warrant the committee appointing a person to make a provisional list therefor. Thereupon the ratepayer applied to the Divisional Court for a mandamus, which was granted, and the assessment committee now appeal from the order of the Divisional Court.

C In support of the appeal it has been argued: (i) that the introductory words of s. 47 show that the subsequent parts of the section have no operation unless and until it has been established to the satisfaction of the assessment committee that the value has in fact been reduced, and that this has not been established; (ii) that the overseers and the assessment committee have a discretion of a judicial nature, and that this discretion has been honestly exercised and cannot be overridden by a mandamus, there being no mistake in law, and the mistake, if any, being in fact only; (iii) that there is no evidence to raise even a *prima facie* case of any cause such as the section requires, the increased duty being probably thrown on the brewer, who will reduce his charges for beer supplied; and (iv) that the extra £95 a year, though a charge on or a deduction from the profits of the trade of the publican, is not a matter which can be taken into account in considering the gross value, as defined in s. 4, which the hypothetical talent might reasonably be expected to pay. Each of these points deserves attention.

D [His LORDSHIP held on the first two points that, if the overseers did nothing for fourteen days the assessment committee were bound to appoint a person to make a provisional list and that mandamus would issue in an appropriate case, and continued:] As to the third point, I cannot doubt that the increased duty of £95 must *prima facie* affect the gross value of the licensed premises—*res ipsa loquitur*. It is a sum the payment of which is essential to the carrying on of the business of a publican. It may well be that the whole sum will not ultimately fall on the publican, but at first at all events it must be borne by him. It will be for the valuer when appointed to consider, not what is the correct value, but what reduction, if any, has taken place by reason of this cause, starting from the assumption that £260 was the proper sum apart from this charge. This in substance is the ground on which CHANNELL, J., bases his judgment. The Finance (1909-10) Act, 1910, received the Royal Assent on April 29. The increased licence duty was not payable until July 1. No evidence derived from actual experience can be available in so short a period, and it would, in my opinion, be wrong to decline to have regard to the strong—I might almost say the overwhelming—*prima facie* case because of the impossibility of obtaining corroboration, and this consideration becomes more weighty when it is remembered that if the ratepayer were to wait for more than twelve months he could not avail himself under s. 47 of the reduction in value caused by the Finance Act, for it would not have happened in the course of the year.

I As to the fourth point, I have already partly dealt with it. The case in the House of Lords of *Cartwright v. Scolcoates Union* (1) decides that takings and profits of a licensed house may be taken into account in arriving at gross value. The hypothetical tenant would certainly be less willing to pay the old rent if he knew that an inevitable—not an optional—deduction of £95 a year from the profits would in future have to be made. The licence is not like a gun licence or a dog licence. Though granted to an individual, it is only granted to him as occupier of this particular house. It is the possession of the licence which gives

an increased value to the occupation of the house and anything which makes that licence more costly must tend to diminish that increased value. It was contended by the ratepayer that this licence duty is a tax usually payable by tenants of a public-house within the meaning of s. 4. Though I do not wholly reject this contention, I prefer to rely on the ground above stated.

As already stated, I think the action of the assessment committee involved a mistake in law. There was no special circumstance affecting the Crown and Shuttle as distinguished from any other licensed house. The Finance Act was indisputable. The proper inference from the unquestioned facts is really a matter of law. Put shortly, the proposition on which the assessment committee have acted is this: "The admitted sudden increase of licence duty from £35 to £130 is not even *prima facie* evidence of reduction in value of the licensed house so as to justify us in appointing a valuer to ascertain whether in fact there has been any, and, if any, what, reduction." This proposition seems to me to be wrong in law. It is not a case in which there is evidence on both sides, the weight of which would have to be considered. In the above observations I have dealt with the case apart from authority. I am not aware of any authority which precludes me from acting on the view I have formed. In the language of CHANNELL, J., when once I am satisfied that a *prima facie* case has been made out "all the rest seems to me to follow." The case in this court of *R. v. Southwark Assessment Committee* (2) is an authority in support of my view. If I had arrived at the conclusion that the mistake of the assessment committee did not involve a mistake in law, I might have been obliged to consider how far the dicta of BRIGHAM, J., and KENNEDY, J., in the *Southwark Case* (2) ([1909] 1 K.B. at p. 293) ought to be followed; but I am relieved from that necessity. In my opinion the decision of the Divisional Court was right, and this appeal must be dismissed with costs.

FARWELL, L.J.—I am of opinion that the order of the Divisional Court is correct, and that the mandamus should issue. I do not myself attach any importance to the last three lines of the order, as I read them only as suggesting, not as deciding, the existence of the reduction in value, and I therefore see no necessity for any amendment of the order, which appears to be in the same form as in *R. v. Southwark Assessment Committee* (2).

[HIS LORDSHIP held that if there was a *prima facie* case the assessment committee were bound to appoint a person to make a provisional list and could be compelled to do so by mandamus, and continued:] The next question then arises: Is there any justification for the refusal by the assessment committee to perform their customary duty of appointing a valuer, or (to use the phrase adopted in the Divisional Court) is there not even a *prima facie* case for the assessment committee to hear and determine? Now, there is no question of altering the list generally. It is merely the question whether there has been since the commencement of the present rating year an alteration in the value of these particular premises, due to some definable cause affecting the assessable value of these premises? Such cause must not be one which affects all property in the rating area, but it is not the less a cause affecting a particular property, because it affects all the property of that class in the area. The section refers to premises the value of which has altered,

"not by general economic or social change, but by change in their own individual conditions affecting value":

(*Camberwell Assessment Committee v. Ellis* (3) ([1900] A.C. at p. 525)). In the present case, the Crown and Shuttle was fully licensed to June 30 in this year, the licence duty being £35 and the gross value since 1905 being £260. On April 29, 1910, the Finance (1909-10) Act, 1910, came into operation, and under that Act the licence duty, the payment of which is essential to the continuance of the house as a licensed house, was increased from £35 to £130. On May 11 the ratepayer, who

is lessee and occupier of the Crown and Shuttle, duly applied to the assessment committee to reduce the gross value and rateable value of the premises. This the committee refused to do on June 7 by this resolution :

"The committee find as a question of fact that none of these premises have been reduced in value during the year so as to warrant the committee appointing a person to make a provisional list therefore."

My first observation on this point is that the committee by calling it a question of fact cannot make it so. It is plain that the real question is one of law, viz., whether the increase of duty is a sufficient cause within s. 47? If it is not, *cadit questio*. If it is, then a question of fact may arise, viz., to what extent is the value reduced?

On the question of law I am of opinion that there has been a reduction within s. 47. The problem to be solved is : What would the hypothetical tenant give for the premises for a year if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge, and the landlord undertook repairs and insurance and other expenses (if any) necessary to maintain the hereditament in a state to command that rent? (s. 4). To ascertain this, it is obviously important to ascertain the use which the tenant may expect to be able to make of the premises, the facility afforded by the premises for carrying on any particular trade, and the nature of that trade being a primary consideration: *Cartwright v. Sculcoates Union* (1) ([1900] A.C. at p. 159). One of the chief elements in value of a public-house is the licence. The profitable use to which the premises can be put is dependent on the existence of the licence, and, in estimating the amount of such profit as bearing on the amount of rent obtainable, the price to be paid for the licence necessarily comes into consideration. A privilege which costs £35 is obviously more valuable than the same privilege when it costs £130, and when the question is whether the reasonable man will give the same rent for a licensed house the licence of which costs him £130 as he would give for the same house the licence of which costs him £35, the only possible answer is in the negative. Test it in this way: Suppose the new duty instead of being half the annual value were fixed at the whole annual value, is it not obvious that *prima facie* no one would take the house at all? If a house as a licensed house is worth £230 a year when the licence costs £35, what rent could the landlord hope to get if the duty were raised to £265? It is not (as CHANNELL, J., points out in the Divisional Court) like the duty on the sale of tobacco. The tobacconist's shop is not valued as such; the licensed premises are, because the licence is not ambulatory, but is confined to a specified trade at a specified place. I do not think it necessary to express any opinion as to the meaning of "tenant's rates and taxes" in s. 4. The question is whether in ascertaining the special value to be attached to licensed premises the expense of obtaining the licence is to be taken into consideration; and unless one side only of the account is to be taken I can see no ground whatever for excluding it.

It was suggested that arrangements might, and probably would, be made with a view to throwing the burden on to the brewers or the public. But there has been no possibility of doing anything of the sort at present, and we are dealing with a sudden emergency that has arisen, and any particular arrangements with or by individual tenants would be irrelevant. The question is not what rent will a particular individual give, but what will the hypothetical tenant give? It is on this ground that the "tie" is disregarded in valuing tied houses. The hypothesis deals with the ordinary individual, not with a man bound by special covenants. Then it was suggested, rather than argued, that s. 44 of the Finance (1909-10) Act, 1910, which imposes the duty, shows that this is not correct. But it is impossible to adopt a suggestion which would have the effect of making that Act amend the Rating and Valuation Acts, the Income Tax Acts, the Water Acts, and probably many others, especially as s. 96 expressly mentions that certain Acts are to be construed with various parts of this Act, and the Valuation (Metropolis)

Act is not one of them. The ratepayer on the other hand, suggested that s. 44 (2) last paragraph, and s. 87 are in his favour; and there are no doubt expressions therein which point in that direction. But I place no reliance on this. The Act is one of great complexity and obscurity, and I do not think that we ought to read incidental statements therein as amounting to positive enactments. I am of opinion that this appeal fails, and must be dismissed with costs.

KENNEDY, L.J., referred to the issues and the provisions of the Valuation (Metropolis) Act, 1869, and continued: It appears to me that the first point to be decided is whether or not, if it be granted to the ratepayer that in fact the increase in the duty on the licence to a substantial extent affects the value of the house by diminishing the rent which the hypothetical tenant would be willing to pay, the increase of the duty can be a cause within the words "any cause" in s. 47 of the Act of 1869. Tested by the reasoning of the opinions delivered in the House of Lords in *Camberwell Assessment Committee v. Ellis* (3), and especially by the opinion of LORD DAVEY ([1900] A.C. at p. 523), the increase of the duty ought to be treated, I think, as a cause within the meaning of the section. The house is valued and rated more highly because it has a licence attached to it. The increase in the licence duty is a definable cause affecting unfavourably the value of the house as a licensed house, because the hypothetical tenant will naturally, and in the ordinary course, have to consider this necessary outgoing in deciding what rent he can afford to pay for the tenancy. I agree with the Lord Chief Justice that the licence duty is not a usual tenant's rate or tax; but, on the whole, I agree with him also that the licence duty is so far a material element in the calculation of the rent that a substantial increase of that duty may constitute a cause of reduction in the value of the house within the words of s. 47, and none the less so because other licensed houses may be similarly affected by the same definite cause. I think that the criticisms of counsel for the ratepayer on the affidavits of Mr. Robinson and Mr. Bramham, on which the assessment committee sought on the hearing of the motion for a mandamus, to found an opposite inference, were well founded.

But then follows that which appears to me to be a more difficult question. Granted that an increase of the licence duty is, in its nature, capable of being a cause of a substantial reduction of value within the meaning of s. 47—I may say, in passing, that alike in the case of a supplemental and of a provisional list the alteration must be substantial, as said by COCKBURN, C.J., in *R. v. New River Co.* (4) (4 Q.B.D. at p. 313), did the ratepayer furnish evidence on which the assessment committee could properly act, even as *prima facie* evidence, that this possible cause has in fact so operated in the case of the Crown and Shuttle? Like CHANNELL, J., in the court below, I have felt some doubt—indeed, in my own case, I must say, considerable doubt—on this point. I asked counsel whether any case could be cited in which a claim for the making of a provisional list or a supplemental list—they stand on the same basis in this respect—had been approved by the court, except where, as in *R. v. Southwark Assessment Committee* (2), from a diminution of receipts there was some tangible proof of an actual falling in value. I understood them to say that they did not know of any such case. Clearly a ratepayer cannot rightly ask for the making of a provisional list on the ground of a purely contingent or even probable reduction in the value of the hereditament. *Quia timet* would be no ground for the relief given by s. 47. The present case appears to me to be very near the line. But for the reason given by CHANNELL, J., the practical certainty, in the absence of proof of countervailing circumstances, that so material an increase in licence duty must affect the amount of the tenant's profit, and, therefore, the rent which he will agree to pay for the house, I am not prepared to differ from the conclusion on this point in the case at which the Divisional Court and, as I know, my colleagues in this court have arrived. [His LORDSHIP held that in the

absence of evidence to refute the prima facie case for appointing a person to make a provisional list mandamus should issue to compel the assessment committee to appoint the person and the appeal should be dismissed.]

Appeal dismissed.

Solicitors: *H. Mansfield Robinson; Godden, Son & Holme.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

BAMFIELD v. GOOLE AND SHEFFIELD TRANSPORT CO., LTD.

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.), April 13, May 10, 1910]

[*Reported* [1910] 2 K.B. 94; 79 L.J.K.B. 1070; 103 L.T. 201]

Carriage of Goods—Fitness of goods to be carried—Absence of danger—Warranty by consignor—Effect of notice of danger to, and means of knowledge of, carrier.

Per FLETCHER MOULTON and FARWELL, L.JJ.: A person who requires another to perform a legal duty impliedly warrants that he has a title to make the request. Accordingly, a consignor who tenders goods to a common carrier to be carried by him in performance of his common law obligation to carry thereby impliedly warrants to the carrier that the goods so tendered are fit to be carried in the ordinary way, and are not dangerous; but no such warranty can be regarded as existing where adequate notice has been given to the carrier of the nature of the goods tendered or where the carrier had the means of knowing, or reasonably ought to have known, their nature.

Per VAUGHAN WILLIAMS, L.J.: No warranty that goods are fit to be carried, or not dangerous to be carried, arises unless the carrier, be he common carrier or not, is placed in a position where he had no opportunity of getting information as to the nature of the goods consigned and had to rely on the obligation on the consignor of the goods not to tender for carriage dangerous goods not fit to be carried because they were dangerous to his knowledge or goods which he might have known to be dangerous if he had availed himself of opportunities of inspection or examination which the carrier had not got.

Notes. Considered and followed: *Great Northern Rail. Co. v. L. E. P. Transport and Depository, Ltd.*, [1922] All E.R. Rep. 18. Referred to: *The West Cock*, [1911] P. 208; *Blacker v. Lake and Elliot* (1912), 106 L.T. 533; *Transoceanica Soc. Italiana di Navigazione v. Shipton*, [1923] 1 K.B. 31; *Burley (C), Ltd. v. Stepney Corpn.*, [1947] 1 All E.R. 507.

As to the duties and liabilities of carriers and the carriage of dangerous goods, see 4 HALSBURY'S LAWS (3rd Edn.) 137 et seq., and for cases see 8 DIGEST (Repl.) 12 et seq., 148–150.

Cases referred to:

- (1) *Brass v. Maitland* (1856), 6 E. & B. 470; 26 L.J.Q.B. 49; 27 L.T.O.S. 249; 2 Jur. N.S. 710; 4 W.R. 647; 119 E.R. 940; 8 Digest (Repl.) 148, 938.
- (2) *Readhead v. Midland Rail. Co.* (1867), L.R. 2 Q.B. 412; 36 L.J.Q.B. 181; 8 B. & S. 371; 15 W.R. 831; affirmed (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737; sub nom. *Redhead v. Midland Rail. Co.*, 9 B. & S. 519; 20 L.T. 628, Ex.Ch.; 8 Digest (Repl.) 75, 496.
- (3) *Acatos v. Burns* (1878), 3 Ex.D. 282; 47 L.J.Q.B. 566; 26 W.R. 624, C.A.; 39 Digest 439, 684.

- (4) *Farrant v. Barnes* (1862), 11 C.B.N.S. 553; 31 L.J.C.P. 137; 8 Jur. N.S. 868; 142 E.R. 912; 8 Digest (Repl.) 148, 937.
- (5) *Williams v. East India Co.* (1802), 3 East., 192; 102 E.R. 571; 8 Digest (Repl.) 149, 945.
- (6) *Langridge v. Levy* (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed (1838), 4 M. & W. 337; 1 Horn & H. 325; 150 E.R. 1458; sub nom. *Levy v. Langridge*, 7 L.J.Ex. 387, Ex.Ch.; 39 Digest 458, 852.
- (7) *Sheffield Corpn. v. Barclay*, [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 54 W.R. 49; 21 T.L.R. 642; 49 Sol. Jo. 617; 3 L.G.R. 992; 10 Com. Cas. 287; 12 Mans. 248, H.L.; 3 Digest (Repl.) 307, 969.
- (8) *Humphrys v. Pratt* (1831), 5 Bli. N.S. 154; 2 Dow. & Cl. 288; 5 E.R. 269, H.L.; 21 Digest 547, 1227.
- (9) *Evans v. Collins* (1843), 5 Q.B.D. 804; 12 L.J.Q.B. 339; 1 L.T.O.S. 255, 336; 7 Jur. 743; reversed sub nom. *Collins v. Evans* (1844), 5 Q.B. 820; Dav. & Mer. 669; 13 L.J.Q.B. 180; 2 L.T.O.S. 425; 8 Jur. 345; 114 E.R. 1459, Ex.Ch.; 41 Digest 120, 758.
- (10) *Bank of England v. Cutler*, [1908] 2 K.B. 208; 77 L.J.K.B. 889; 98 L.T. 336; 24 T.L.R. 518; 52 Sol. Jo. 442, C.A.; 3 Digest (Repl.) 133, 29.
- (11) *Lane v. Cotton* (1701), 1 Ld. Raym. 646; 11 Mod. Rep. 12; 12 Mod. Rep. 472; Carth. 487; Holt, K.B. 582; 1 Salk. 17; 1 Com. 100; 91 E.R. 1332; 37 Digest 369, 3.
- (12) *Johnson v. Midland Rail. Co.* (1849), 4 Exch. 367; 6 Ry. & Can. Cas. 61; 18 L.J.Ex. 366; 13 L.T.O.S. 305; 154 E.R. 1254; 8 Digest (Repl.) 7, 24.
- (13) *Crouch v. London and North Western Rail. Co.* (1854), 14 C.B. 255; 7 Ry. & Can. Cas. 717; 23 L.J.C.P. 73; 22 L.T.O.S. 224; 18 Jur. 148; 2 W.R. 166; 2 C.L.R. 188; 139 E.R. 105; 8 Digest (Repl.) 5, 9.
- (14) *Walker v. Jackson* (1842), 10 M. & W. 161; 12 L.J.Ex. 165; 11 L.J.Ex. 346; 152 E.R. 424; 8 Digest (Repl.) 24, 140.

Also referred to in argument :

Greenshields, Cowie & Co. v. Stephens & Sons, [1908] 1 K.B. 51; 77 L.J.K.B. 124; 98 L.T. 89; 52 Sol. Jo. 727; 10 Asp. M.L.C. 597; 13 Com. Cas. 91, C.A.; affirmed [1908] A.C. 431; 77 L.J.K.B. 985; 99 L.T. 597; 24 T.L.R. 880; 52 Sol. Jo. 727; 11 Asp. M.L.C. 167; 14 Com. Cas. 41, H.L.; 41 Digest 597, 4225.

Hearne v. Garton (1859), 2 E. & E. 66; 28 L.J.M.C. 216; 33 L.T.O.S. 256; 23 J.P. 693; 5 Jur. N.S. 648; 7 W.R. 566; 121 E.R. 26; 8 Digest (Repl.) 150, 946.

Peck v. North Staffordshire Rail. Co. (1863), 10 H.L. Cas. 473; 3 New Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 768; 9 Jur. N.S. 914; 11 W.R. 1023; 11 E.R. 1109, H.L.; 8 Digest (Repl.) 60, 394.

Dunn v. Bucknall Bros., Dunn v. Donald Currie & Co., [1902] 2 K.B. 614; 71 L.J.K.B. 963; 87 L.T. 497; 51 W.R. 100; 18 T.L.R. 807; 9 Asp. M.L.C. 336; 8 Com. Cas. 33, C.A.; 8 Digest (Repl.) 26, 160.

Wylde v. Pickford (1841), 8 M. & W. 443; 10 L.J.Ex. 382; 15 E.R. 1113; 8 Digest (Repl.) 15, 73.

Blower v. Great Western Rail. Co. (1872), L.R. 7 C.P. 655; 41 L.J.C.P. 268; 26 L.T. 883; 36 J.P. 792; sub nom. *Great Western Rail. Co. v. Blower*, 20 W.R. 776, C.P.; 2 Digest (Repl.) 364, 455.

Hutchinson v. Guion (1858), 5 C.B.N.S. 149; 28 L.J.C.P. 63; 32 L.T.O.S. 276; 4 Jur. N.S. 1149; 6 W.R. 757; 141 E.R. 59; 41 Digest 471, 3029.

Pierce v. Winsor, 2 Sprague, 35.

Appeal by the defendants from a decision of WALTON, J., in an action tried by him without a jury.

The action was brought by the plaintiff, the widow and administratrix of William Moxon Bamfield, deceased, for injury and damage sustained by herself owing to

the defendants' negligence and breach of duty which, she alleged, resulted in the death of her husband on Nov. 6, 1908. The plaintiff's husband was the owner of a canal boat called the *Harry* in which he carried for reward goods and merchandise between Goole and Sheffield, and he was frequently assisted in the management and working of the boat and the carriage of goods and merchandise therein by the plaintiff. On Oct. 27, 1908, the defendants shipped on board the boat at Goole for carriage therein to Sheffield, twenty-seven closed casks of goods described by them as scrap or general cargo, and on Oct. 31, 1908, they so shipped four more such casks. On Nov. 2, 1908, the boat so loaded and in charge of Bamfield and the plaintiff left Goole for Sheffield for the purpose of carrying the goods to Sheffield. The casks did not contain scrap or general cargo, but in fact contained a substance known as ferro-silicon as the defendants knew or ought to have known, but of which fact the plaintiff and her husband were ignorant. The plaintiff said that she and her husband accepted the casks for carriage in the boat, and carried the same therein in the belief induced by the defendant's description thereof that the same contained scrap or general cargo. The substance ferro-silicon was a dangerous substance, in that it gave off poisonous gases which caused, or were likely to cause, serious injury to and the death of persons inhaling the same. The plaintiff alleged that it was the duty of the defendants before shipping the goods on board the boat to give notice to the plaintiff and her husband of what such goods consisted, and of their dangerous character; that the defendants wrongfully and in breach of their duty, or, alternatively, negligently, shipped the goods on board the boat for carriage, packed so as to permit the formation and escape of the poisonous gases, and without giving any notice either to the plaintiff or her husband, by reason of which failure to give notice and of the ignorance of the plaintiff and her husband of the true nature and character of the goods, the plaintiff and her husband permitted the goods to be loaded on board and carried in the boat; and that in consequence of the poisonous gases given off by the goods during the carriage thereof on board the boat the plaintiff and her husband became and were seriously ill, and her husband died on Nov. 6, 1908. By their defence the defendants said they were common carriers, and they further said that on Oct. 29 and Nov. 2, 1908, William Moxon Bamfield, as common carrier, shipped on board the *Harry* at Goole for carriage to Sheffield thirty-one casks of ferro-silicon which he carried for reward at the request of the defendants. Ferro-silicon had been brought from the continent of Europe by one of the steamers of the Lancashire and Yorkshire Railway Co. The defendants as common carriers had contracted with the Lancashire and Yorkshire Railway Co. to transport the ferro-silicon from Goole to Sheffield. By sub-contract with the defendants W. M. Bamfield as common carrier contracted to transport the ferro-silicon and other goods from Goole to Sheffield, and in pursuance of such sub-contract received the goods from the Lancashire and Yorkshire Railway Co. for such transport. The defendants denied that the thirty-one casks of ferro-silicon were described by them as scrap or general cargo. Such casks of ferro-silicon were described to W. M. Bamfield by the Lancashire and Yorkshire Railway Co. and their servants or agents, and by the defendants their servants or agents, as ferro-silicon, and were so described as ferro-silicon in the manifest of the canal boat *Harry*. The defendants said that they were not under any duty to give directions to W. M. Bamfield as to the method of stowing the ferro-silicon on his canal boat, or the place or method in which it would be safest for any reason to carry the ferro-silicon. The defendants denied that the ferro-silicon was a dangerous substance in that the same gave off poisonous gases as alleged. If the ferro-silicon was dangerous such danger was in fact unknown to the defendants, and W. M. Bamfield had the same means of knowledge of the character and properties of the ferro-silicon as were open to the defendants. The defendants denied that they were under any duty to give notice to W. M. Bamfield of any danger attached to the ferro-silicon, or that they had any means of knowing any danger attached thereto other than the means within the knowledge of W. M. Bamfield. The defendants

also denied that the casks were so packed as to permit the formation and escape of poisonous gases. The ferro-silicon was packed as it was proper and usual to pack it. The defendants were themselves common carriers of goods, and in so far as the casks were in the custody or under the direction of the defendants they were in their possession or under their direction as such common carriers, and they were handed over to W. M. Bamfield for further transport in the same way as they were received by the defendants. If the casks were packed otherwise than was usual with such goods, or so as to permit of the formation and escape of poisonous gases (which the defendants denied) the defendants were not aware of such facts, nor were they under any duty to inform W. M. Bamfield of such facts, and W. M. Bamfield had the same knowledge or means of knowledge of the packing of the casks and of the contents thereof and the liability to gases therefrom as the defendants had.

WALTON, J., found in the first place that the defendants did not in fact know that the ferro-silicon which they had delivered to Bamfield to be carried from Goole to Sheffield on board his canal boat was dangerous to carry, and, secondly, that Bamfield did not know that the goods delivered to him by the defendants were dangerous, and that no negligence could be imputed to him in respect of his not knowing that they were dangerous. The learned judge did not find that the defendants ought to have known that the goods were dangerous, and that knowledge ought to have been imputed to them, but he found that the goods were dangerous, that no notice had been given to the plaintiff or her husband, and that damage ensued, namely, the damage in respect of which compensation was claimed in the action. He was of opinion, on the authority of the judgment of the majority of the court in *Brass v. Maitland* (1), that the plaintiff's case was made out and he, therefore, gave judgment for the plaintiff for £150 damages in respect of her own illness, and £175 damages for the pecuniary loss occasioned by the death of her husband. The defendants appealed.

Tindal Atkinson, K.C., and W. H. Owen for the defendants.

Lowenthal for the plaintiff.

Cur. adv. vult.

May 10, 1910. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—In this case WALTON, J., having found, first, that the defendants did not know that the ferro-silicon which the defendants delivered to Bamfield, an inland carrier by water, to be carried from Goole to Sheffield in his barge, was dangerous to carry, and secondly, that Bamfield, the water carrier, did not know that the goods delivered to him were dangerous, thus summarises the material facts and his conclusion in law :

“Although I have not found that the defendants knew that the goods were dangerous, and although I have not found that they ought to have known that the goods were dangerous, and that knowledge ought to have been imputed to them, I find that the goods were dangerous, that no notice was given, and that damage ensued—the damage in respect of which compensation is claimed in this action. Upon the authority of *Brass v. Maitland* (1) I may say that the plaintiff's case is made out.”

Brass v. Maitland (1) is summarised by BLACKBURN, J., in *Readhead v. Midland Rail. Co.* (2), and his view is that the judgment of the majority of the court, LORD CAMPBELL, C.J., and WIGHTMAN, J., establishes the principle that where one party to a contract engages to select and supply an article for a particular purpose, and the other party has nothing to do with the selection, but relies entirely on the party who supplies, it is to be taken as part of the contract implied by law that the supplier warrants the reasonable sufficiency of the article for that purpose; and I think he means that the majority of the court were of the opinion that a consignor of goods to be carried warrants that the goods are fit to be carried and not dangerous. In

Brass v. Maitland (1) the decision dealt with the duty of consignors of goods to be carried by sea in a general ship, and, therefore, was in no way based upon the obligation of the carriers by the custom of the realm. BLACKBURN, J., in *Readhead v. Midland Rail. Co.* (2), in noting the fact that CROMPTON, J., delivered a dissentient judgment, says (L.R. 2 Q.B. at p. 437) that

"the effect of the judgment of CROMPTON, J., is such as to show that he did not think the principle general, and was not inclined to carry it farther than the decisions had already gone."

BLACKBURN, J., in his judgment in that case preferred the judgment of the majority of the court in *Brass v. Maitland* (1) and differed from the majority of the court, LUSH, J., and MELLOR, J., in *Readhead v. Midland Rail. Co.* (2), and the Exchequer Chamber affirmed the judgment of the majority—that is, of LUSH, J., and MELLOR, J., and differed from BLACKBURN, J.

Brass v. Maitland (1) was again considered in *Acatos v. Burns* (3). In the Exchequer Chamber BRAMWELL, L.J., speaking of the counterclaim of the defendants, which was a counterclaim for damages for the wrongful shipping by the plaintiff of maize which he knew to be in a dangerous condition, says (47 L.J.Q.B. at p. 568):

"As to the counterclaim, the statement is such that if there were a warranty in point of law that the goods were in a state which made them safe for shipment—that is, that they could be safely carried, the facts are sufficiently stated to show a breach of the warranty; but I am of opinion that there was no such warranty. We might admit *Brass v. Maitland* (1) to be good law, and yet say that it does not govern this case, for the quality of the article tendered for shipment was as well known to the shipowner as to the shipper. I am therefore of opinion that there was no such warranty, and on that ground the counterclaim fails."

BRETT, L.J., in the same case says (*ibid.* at p. 570):

"As to the warranty, neither *Brass v. Maitland* (1) nor any other case shows that there is a warranty by the shipper that the goods shipped have no concealed defects at the time of the shipment."

Acatos v. Burns (3), in my opinion, goes to negative the general principle referred to by BLACKBURN, J., as being established by the judgments delivered by LORD CAMPBELL, C.J., and WIGHTMAN, J., in *Brass v. Maitland* (1).

Brass v. Maitland (1) is discussed again in *Farrant v. Barnes* (4). ERLE, C.J., in his judgment in that case cites first the view of LORD CAMPBELL expressed in his judgment in *Brass v. Maitland* (1) (6 E. & B. at p. 481) as follows:

"Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature."

He then sets out the view of CROMPTON, J., expressed in these words (*ibid.* at p. 493):

"Probably an engagement or duty may be implied that the shipper will use and take due and proper care and diligence not to deliver goods apparently safe but really dangerous, without giving notice thereof; and any want of care in the course of shipment in not communicating what he ought to communicate might be negligence for which he would be liable; but, where no negligence is alleged or where the plea negatives any alleged negligence, I doubt extremely whether any right of action can exist."

After these quotations ERLE, C.J., thus states his own conclusion in *Farrant v. Barnes* (4) (11 C.B.N.S. at p. 563):

"Here it is expressly found by the jury that the defendant took no precaution to inform the plaintiff of the dangerous nature of the article in question when he entrusted it to him to carry. It seems to me that the principle on which the decision of *Brass v. Maitland* (1) is founded, taking it in the narrowest and most limited way, authorises us to say that the defendant in this case is responsible for the injury which the plaintiff has sustained."

It will be observed that LORD CAMPBELL seems, by the language in his judgment, to recognise that knowledge is essential to raise the duty of the consignor, whether such duty takes the form of implied warranty, or a duty to take reasonable care not to ship goods apparently safe but really dangerous, for LORD CAMPBELL speaks of the undertaking by the shippers that they will not deliver to be carried goods of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature.

The outcome of these cases seems to me to be that generally no warranty that the goods are fit to be carried ought to be implied unless the consignor knew or ought to have known of the dangerous character of the goods he was tendering for carriage, but it is said that such a warranty may arise in the case of a common carrier on inland waters who is bound as such to receive the goods tendered for carriage. I think not. So to hold would be a plain extension of the principle which CROMPTON, J., in *Brass v. Maitland* (1) said he did not think general, and which he thought ought not to be carried, further than the decisions had already gone. I think that no warranty that the goods were fit to be carried, or were not dangerous to carry, would arise unless the barge-owner, be he common carrier or not, was placed in a position where he had no opportunity of getting information as to the nature of the goods consigned, and had to rely on the obligation on the consignor or sender of the goods not to tender for carriage dangerous goods not fit to be carried because they were dangerous to his knowledge, or goods which he might have known to be dangerous if he had availed himself of opportunities of inspection or examination, which the carrier Bamfield had not got. It will be observed that in this case the defendants were merely forwarding carriers, having received the ferro-silicon from the railway company, who in turn received it from a ship, the first consignors being the German merchants. I do not think that I can say that this is the case here when the judge has found that the defendants did not know that the goods were dangerous, and has not found that the defendants ought to have known.

My conclusion is that, if the knowledge and opportunities of knowledge are equal, and there is nothing in the contract or the surrounding facts to show that one party relies entirely on the other party, be he consignor of goods to be sold or vendor of food to be eaten, no warranty will arise as to the fitness of the goods to be carried, or the fitness of the article sold as food. If the cause of action in this case is treated as an action for a tort, as it was necessarily treated in *Farrant v. Barnes* (4) the passage quoted by WILLES, J., in that case from the judgment of LORD ELLENBOROUGH in *Williams v. East India Co.* (5) shows plainly that the legal duty for the breach of which this action is brought only arises when the defendants are "cognisant of the dangerous quality of the article." Again, ERLE, C.J., says in his judgment in *Farrant v. Barnes* (4) (11 C.B.N.S. at p. 561):

"The defendant, knowing the dangerous character of the article, and omitting to give notice of it to the plaintiff, so that he might exercise his discretion as to whether he would take it or not, was guilty of a clear breach of duty."

The Chief Justice, after saying that the case is covered by *Langridge v. Levy* (6) goes on to say: "The case, however, upon which I rely is *Brass v. Maitland* (1)." That case, however, was based upon a breach of an implied warranty. In my judgment the knowledge of the defendant is material alike in an action based on

tort and in an action based on contract, but I think that in an action based on contract actual knowledge by the defendant is not essential. It is sufficient in such a case if the circumstances were such that the defendant ought to have known; but WALTON, J., has not found as a fact that the defendants in this case "ought to have known"; and, in my judgment, this is a fact the onus of proving which was on the plaintiff. The only ground upon which I think the plaintiff could succeed would be if one draws the conclusion that the company, whether or not they knew ferro-silicon to be occasionally dangerous of carriage, ought not to have described the ferro-silicon in casks as general cargo, but to have told Bamfield that which they knew and Bamfield did not know, viz., that the article in the casks was ferro-silicon. This is a long way off the judgment of the majority of the court in *Brass v. Maitland* (1) on which WALTON, J., decided the present case. But I have come to the conclusion that we ought, following the judgment of CROMPTON, J., in that case, to dismiss the appeal on the ground that the defendants owed a duty to Bamfield to communicate such information as they had as to the nature of the goods to be sent in the barge, and that through their servants they were guilty of negligence and want of care in not communicating to the carrier the name, which they knew, of this somewhat unusual cargo. The measure of damages, in my opinion, will be the same whether the cause of action is breach of implied warranty or negligence. This appeal will be dismissed with costs.

FLETCHER MOULTON, L.J.—The facts of the present case are simple, but they raise a question of great general importance as to the rights of common carriers.

The plaintiff is the widow of William Moxon Bamfield, who was the owner of a canal boat plying between Goole and Sheffield, and in October, 1908, the defendants shipped on board his boat at Goole for carriage to Sheffield goods which are described as a general cargo in the only documents which, according to the evidence, were given to him. These goods consisted of thirty-one closed casks containing ferro-silicon. The defendants sought to prove that he was informed of the contents of these casks, but the judge has found that they failed in so doing, and, as far as I am in a position to judge of the the conclusion to which he came in this respect, I am of opinion that he was right in so finding. Whether by reason of imperfect packing or otherwise, the ferro-silicon underwent chemical change during the transit, and the judge finds that the gases given off thereby were the cause of death of William Moxon Bamfield and of the illness of the plaintiff. She sues the defendants for damages in respect of the death of her husband and her own sufferings, and the judge has found a verdict in her favour for £325. It is not contested in this appeal that the plaintiff's illness and the death of her husband were due to the gases given off by the ferro-silicon, nor is the amount of the damages contested if the facts give to the plaintiff any course of action. The only point raised by the appeal is that the defendants are in no way responsible for the consequences of their having shipped the goods. The evidence with regard to ferro-silicon clearly establishes that while some specimens are stable, others are liable to give off gases if exposed to moisture. These gases are among the most poisonous known to chemists, one of them being so violent in its action that a minute quantity if inhaled is sufficient to cause instant death. The use of ferro-silicon in iron manufacture is of comparatively recent growth, but cases of death from gases given off by ferro-silicon had been known for some years prior to the occurrence of the events which led to the present action, and in 1907 the Board of Trade published a notice to shipowners warning them against the dangers connected with its carriage. The learned judge has, however, found that the defendants did not know that ferro-silicon was dangerous when they shipped it, although he finds, as he was bound to find, that it was in fact a dangerous substance. It is admitted that the plaintiff's husband received and carried these goods as a common carrier.

The facts of the case, therefore, stand thus. A common carrier receives as such a quantity of general cargo, the nature of which he does not know and is not

informed of. The goods so received by him are in fact dangerous goods, and as such unfit for carriage as general cargo. If damage results from the dangerous character of the goods, are the shippers liable? The cardinal fact in this case is that common carriers have a duty to carry the goods tendered to them for a fair price unless there is a reasonable excuse, and, these goods being tendered to him as general cargo by the defendants, the plaintiff's husband was in law bound to carry them, unless there was a reasonable ground for his refusing to do so. There is no suggestion of his knowledge of any circumstances that would justify his refusing to carry the casks, and, therefore, we must hold that, as a common carrier, he was bound to carry these casks on their being so tendered to him. That being so, I should have felt bound to hold, even if the matter were *res integra*, that there was a correlative duty on the part of the tenderer that the goods should be fit and proper for carriage. It seems to me to be consonant with and required by the fundamental principles of English law that one who thus requires an individual to perform a legal duty impliedly warrants that he has a title to make the request.

In the case of a ministerial duty this principle has been recognised by the House of Lords in *Sheffield Corpn. v. Barclay* (7) where a banker in good faith sent to a corporation a transfer of corporation stock which purported to be executed by the registered holders of the stock, with a request to the corporation to register the stock in the name of the banker. One of the signatures was in fact forged, and the House of Lords held that the banker was bound to indemnify the corporation upon an implied contract that the transfer was genuine. LORD DAVEY lays down the law thus ([1905] A.C. at p. 399):

"I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use) and without any default on his own part acts in a manner which is apparently legal, but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty."

By analogy it is, in my opinion, good law that, where a man calls upon a common carrier to carry general cargo, thus relying simply upon the common law duty of the carrier so to do, and without informing the carrier of the nature of those goods so as to enable him to judge of their fitness, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against damage arising from the fact that the goods are not such that he had the right thus to call upon the common carrier to carry.

But the matter is not *res integra*, although it may be that the exact case is not fully covered by authority. In *Brass v. Mailland* (1) the plaintiffs were owners of a general ship, and the defendants delivered to them casks of bleaching powder of a corrosive character to be carried from London to Calcutta. The declaration contained two counts, the first based on improper packing, whereby the corrosive contents escaped and destroyed the general cargo; and the second on the defendants having shipped a dangerous article, knowing it to be such, without notice to the plaintiffs of its dangerous character. Both counts alleged ignorance on the part of the plaintiffs of the dangerous character of the goods. To the first count it was pleaded that the defendants purchased the goods from a third party ready packed, and were not guilty of negligence. Another plea to the first count alleged that the persons employed on the ship knew and had the means of judging the sufficiency of the casks. To the second count there was a plea that the master of the ship knew, or had the means of knowing, the dangerous character of the goods. On demurrer both counts were held to be good, and the first of the three pleas above mentioned was held to be bad as an answer to the first count. The other two pleas were held

to be good as amounting to an allegation of facts equivalent to notice. In delivering the judgment of the majority of the court, LORD CAMPBELL, C.J., says (6 E. & B. at p. 481):

"Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature without expressly giving notice that they are of a dangerous nature."

Reference has been made to this judgment (which was the judgment of the majority of the court) as establishing that there is an absolute warranty that goods delivered to a common carrier for carriage are safe and fit to be carried on the voyage, but a perusal of the judgment shows that no such warranty is regarded as existing where adequate notice has been given to the carrier of the nature of the goods tendered, or where the carrier had the means of knowing, and reasonably ought to have known, their nature. In such a case LORD CAMPBELL, C.J., says (*ibid.* at p. 486):

"There was no occasion for the defendants to give any express notice, and they cannot be charged with any breach of duty in putting the packages on board, however dangerous they might be."

The true inference in such a case is that the carrier consents to carry them with knowledge of their nature, and, therefore, he takes upon himself the obligation to take adequate precaution in the carriage and the consequences of his thus carrying them. In *Brass v. Maitland* (1) CROMPTON, J., delivered a dissenting judgment, which rather expresses his doubt as to the principles laid down in the judgment of the majority of the court than supplies any definite conclusions on the part of that eminent judge as to what are the rights of a common carrier and a shipper respectively. He had no doubt that the shipper of goods known by him to be dangerous was bound to give notice of the fact to the carrier, but he felt a difficulty in holding that the duty went further than to give notice if the shipper was himself aware of the fact.

On this point the judgment of the majority of the court is, in my opinion, correct. Inasmuch as a common carrier is liable to a shipper for damage done to the goods from other goods shipped with them, it is evident that no carrier could safely carry on his business without knowledge of the nature of the goods given him to carry unless the shipper of dangerous goods without notice is liable to indemnify him against the consequences of their being dangerous. The only alternative would be that the carrier has a duty to ascertain the nature of the goods, and a right to compel disclosure of their nature from the shipper, and it is, therefore, his fault that he does not know the nature of the goods. But, as LORD CAMPBELL, C.J., says (*ibid.* at p. 482), in cases where the carrier has neither knowledge nor the means of knowledge of the dangerous nature of the goods:

"If under these circumstances there were not a duty incumbent on the shipper to give notice of the dangerous nature of the goods shipped, commerce could not be carried on. It would be strange to suppose that the master or mate having no reason to suspect that goods offered to him for a general ship may not safely be stowed away in the hold, must ask every shipper the contents of every package. If he has not to do so and there is no duty on the part of the shipper of a dangerous package to give notice of its contents or quality, the consequence is that, without any remedy against the shipper although no blame is imputable to the shipowners or those employed by them, this package may cause the destruction of the ship and all her cargo and the lives of all who sailed in her."

This reasoning appears to me to show that the duty on the part of the shipper is looked upon as a necessary protection to the carrier in his business. It follows that it does not depend upon any scienter on the part of the shipper. If he calls upon the carrier to perform the common law duty of carrying the goods, he must take care either that he gives notice of their nature or that they are fit to be carried as ordinary goods.

Much reliance was placed by the defendants on *Acatos v. Burns* (3) as limiting or throwing doubt upon the decision of the Court of Queen's Bench in *Brass v. Maitland* (1). To my mind there is no conflict between the two decisions. In *Acatos v. Burns* (3) there was the clearest notice to the carrier of the nature of the goods, which he was requested to carry. They consisted of a parcel of maize, and it was proved that the maize was taken alongside the steamer in lighters and shipped in bulk. It was winnowed on board by the agents of the shipper, and after each fifty kilos of the maize was shipped the second officer of the ship examined it. On the voyage the maize sprouted, and the action was for damages for landing the maize at an intermediate port and selling it without authority. The jury found that the maize was not in a fit condition to be shipped. In my opinion, the true inference to be drawn in this case on the principles laid down in *Brass v. Maitland* (1) was that the carrier had full knowledge of the nature of the goods that he was required to carry. One of the incidents in carrying maize in bulk is that in some circumstances it may sprout. But that was a risk which the carrier took upon himself in consenting to carry goods known to be liable to such a contingency, and the careful examination made on behalf of the ship at the port of loading shows that the carrier was well aware of the risks he was taking.

There is further authority in favour of the plaintiff's case. *Farrant v. Barnes* (4) was a case in which the defendant employed the plaintiff to carry an article of dangerous character—namely, a carboy of nitric acid—without notice to him of the nature of the article. The carboy exploded and injured the plaintiff, and he was held entitled to recover damages for the injury, on the ground that the defendant was liable for damages resulting from his not having given notice to the plaintiff of the dangerous character of the goods. In his judgment in this case WILLES, J., says (11 C.B.N.S. at pp. 563-565):

I apprehend that as a matter of legal duty a person who gives another dangerous goods to convey, goods which require more care and caution than ordinary merchandise, and which are likely in the absence of such caution to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them and is liable for the consequences which are likely to ensue from the omission to give such notice. . . . The case of a shipment of dangerous goods may be an extreme case; but it serves to illustrate the general principle that, wherever a person employs another to carry an article which from its dangerous character requires more than ordinary care, he must give him reasonable notice of the nature of the article, and that, if he fails to do so, he is responsible for the probable consequences of his neglect."

Similarly, KEATING, J., in his judgment, says:

"It is clear that persons sending dangerous articles by a carrier are bound to give notice of their character."

It is true that the other member of the court refers in his judgment to the fact that the defendant was aware of the dangerous character of the article, but it is to be noted that he expressly relies on the decision in *Brass v. Maitland* (1) which did not depend on any scienter on the part of the shipper. For the above reasons, therefore, I am of opinion that the judgment of the learned judge in favour of the plaintiff was right, and that this appeal should be dismissed with costs.

FARWELL, L.J.—This appeal raises a question of some importance on which there appears to be no direct authority, and which may be stated thus. Does a

consignor who tenders goods to a common carrier for carriage impliedly warrant that they are fit for carriage in the sense that they are not dangerous to be carried as delivered and packed (a) if the consignor is ignorant of their dangerous character, and (b) if he knows their nature, but is ignorant of its danger, the carrier in both cases being ignorant of the nature of the goods and, therefore, necessarily ignorant of the danger? It is pleaded by both parties that the deceased Bamfield was a common carrier, and he is a carrier to whom the provisions of the Railway and Canal Acts do not apply.

I think that it is clear on the authorities that, if the consignor knows of the dangerous nature of the goods, he is bound to inform the carrier thereof. Thus in *Brass v. Maitland* (1) LORD CAMPBELL says (6 E. & B. at p. 481):

"Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port I am of opinion that the shippers undertake that they will not deliver, to be carried in the voyage packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not, on inspection, be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature."

But a duty to disclose is one thing and a warranty of safety is another; for there can be no duty to disclose a fact that the consignor neither knows, nor ought to have known, and an action founded on the failure to perform such a duty must allege and prove scienter, and differs in that respect from an action on warranty like the present. But, although it is true that in all cases cited to us the consignors either knew, or ought to have known, of the danger, the principle on which the judgments rest is the common law obligation of the carrier to carry according to his profession, and the correlative obligation of the consignor to tender for carriage such goods only as can be safely carried.

In my opinion, every consignor who tenders goods to a common carrier to be carried by him in performance of his common law obligation to carry, thereby impliedly warrants to the carrier that the goods so tendered are fit to be carried in the ordinary way, and are not dangerous. This principle is not confined to carriers, but extends *mutatis mutandis* to all cases where any one is entitled to call on another to perform a public duty at his instance. Thus the sheriff who, acting innocently in compliance with the directions of a judgment creditor commits a trespass, is entitled to be indemnified by the creditor who directed him: *Humphrys v. Pratt* (8); *Collins v. Evans* (9), explained by LORD DAVEY in *Sheffield Corpn. v. Barclay* (7). The transferee or broker who requests a corporation or the Bank of England to register a transfer impliedly warrants that the transfer is genuine: *Sheffield Corpn. v. Barclay* (7); *Bank of England v. Cutler* (10). LORD DAVEY in the former case states the principle thus ([1905] A.C. at p. 399):

"I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it."

It will be observed that he confines his proposition to a duty of a ministerial character, but I think that this is only because that was the actual case before the House; he could not have intended "ministerial" to exclude cases in which the

person performing the obligation had some pecuniary interest, for the corporation in that case were dealing with the register of their own debenture stock, and received a small sum for registering. LORD HALSBURY suggests no such limitation, and when the reason for the principle is considered it is plain to my mind that it extends beyond cases of mere ministerial duty where no personal interest is involved.

If two persons are contracting on equal terms, either party being free to accept or reject the offer of the other, there is no reason as a general rule for procuring anything more than the parties have expressed in their contract. But, if one party is bound by law to act on the request of the other, and is not even entitled to inquire and compel an answer as to the contents of packages tendered, it is, in my opinion, only reasonable to imply a warranty by the person so enforcing his common law right that the packages tendered are not dangerous. The warranty arises out of the request to perform the common law obligation which arises only upon such request: see LORD HALSBURY's speech in *Sheffield Corp'n. v. Barclay* (7). It may also be put thus. A common carrier is bound to carry according to his profession, but he does not profess to carry goods dangerous to life or limb; he is bound, to use LORD HOLT's phrase in *Lane v. Cotton* (11) (12 Mod. at p. 484), to carry "packets proper to be sent by a carrier." The consignor who tenders for carriage goods whose nature is not disclosed, to be carried in accordance with the carrier's common law duty, impliedly warrants that they are goods which the carrier is bound to carry, because he has tendered them to be carried in accordance with the common law duty. It is true that we are dealing with a common carrier who carries for reward, and not with a person performing a mere ministerial office; but a common carrier stands in a peculiar position at common law. PARKE, B., in *Johnson v. Midland Rail. Co.* (12) speaks of him as a person who has undertaken a public trust, and says (4 Exch. at p. 372):

"Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office under pain of an action against him."

He is bound to carry according to his profession at common law, and is liable to an action for refusing, and he is further bound as bailee of the goods entrusted to him to answer for such goods at all events—that is, he is an insurer of them except only against loss occasioned by the act of God or the King's enemies. It follows from the line of reasoning adopted by LORD BLACKBURN in *Readhead v. Midland Rail. Co.* (2)—which is not, in my opinion, affected by the judgment in the Exchequer Chamber in that case—that in all such cases the undertaking of the consignor with the carrier is co-extensive with the undertaking of the carrier to the consignor. Again, apart from the Carriers Act, 1830, which extends only to the extent of liability to the particular consignor and does not affect the present case, a common carrier at law cannot compel disclosure of the contents of packages before he accepts them: *Crouch v. London and North Western Rail. Co.* (13). Indeed, it is obvious that business could not be carried on if every common carrier had a right to have the packages—often nailed-up packing cases—unpacked before him. He is compelled by law to accept and take on trust and carry the packages tendered to him; if they are explosives and blow all his cargo to pieces he is liable to all the other owners whose goods he was carrying with them; if they are ill-packed—i.e., petroleum in a cask that develops a leak and soaks the other owners' goods—he is also liable; and, if the goods are dangerous, he risks his own life and limb and the lives and limbs of his employees; it is only reasonable that the consignors of such dangerous and ill-packed goods should indemnify him from the consequences of the performance of the statutory obligation which such consignors imposed upon.

The importance of this is emphasised by *Walker v. Jackson* (14). There the defendants were not common carriers of goods at all, but owners of a ferry, and

A they contracted to carry over and land a carriage which contained certain jewellery, and the defendants were held liable for the loss of the jewellery, although the plaintiffs had not communicated to the defendants the presence thereof in the carriage. PARKE, B., there says (10 M. & W. at p. 168):

B "If anything is delivered to a person to be carried it is the duty of the person receiving it to ask such questions about it as may be necessary; if he asks no questions, and there be no fraud to give the case a false complexion on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties. It is a fraud which vitiates the contract altogether."

C That is to say, both parties in making a special contract are free to make their own bargain, and each has himself only to thank if he omits to take proper precautions by insuring. It is because the common carrier cannot insist on information of this character that the consignor is deemed to warrant the innocuous character of the goods tendered. The implied warranty is, however, displaced by evidence that the carrier, on accepting the goods, knew of their unfitness or dangerous character, D whether such knowledge arises from express information or from the general knowledge of mankind of the natural incidents of the goods tendered for carriage; in such cases the carrier carries under a special contract and not under his common law liability, and can make what special terms he pleases, and the ordinary limitation on a common carrier of reasonableness of charges does not apply, because he can refuse to carry at all. In *Acatos v. Burns* (3) both parties knew that the E cargo was maize, and that maize was liable to heat. LORD BRAMWELL says (3 Ex.D. at p. 288):

"The quality of the maize tendered for shipment was as much known to the one side as the other."

LORD ESHER says (ibid. at p. 292) that

F "neither *Brass v. Maitland* (1) nor any other case shows that there is a warranty by the shipper that the goods shipped have no concealed effects at the time of shipment."

G That, read by the light of the facts in that case, means, I think, that no case shows that, where both parties know that the cargo is such an article as maize, the shipper warrants that it is not subject to the not unusual peril of heating. In the present case, the consignors knew that the cargo was ferro-silicon and the carrier did not; and that authority has no application. To make it applicable, the maize should have been shipped in sacks or cases concealing its nature. This action is brought under the Fatal Accidents Act, 1846, and also by the carrier's widow in her own right for injuries received by her when she was on board the barge acting as her late husband's assistant. But the extent of the liability on the warranty H that the goods tendered are not dangerous is not limited to the goods of others carried or the conveyance on which they are carried, but is an absolute warranty that the goods are not dangerous to be carried by the carrier or his servants or employees. Such warranty is given to the latter as well as to the carrier himself on the same ground that the duty to disclose was held to exist towards the carrier's servants as well as the carrier himself in *Farrant v. Barnes* (4). I am, therefore, I of opinion that this appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Hill & Aspinall*, for *A. M. Jackson & Co.*, Hull; *Fielder, Fielder & Jones*, for *W. F. W. Rhodes*, Brighouse.

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

GLAMORGAN QUARTER SESSIONS *v.* WILSON

[KING'S BENCH DIVISION (Bray, J.), March 2, 3, 8, 1910]

[Reported [1910] 1 K.B. 725; 79 L.J.K.B. 454; 102 L.T. 500; 74 J.P. 299;
26 T.L.R. 351; 5 Tax Cas. 537]

Income Tax—Interest—Compensation fund under Licensing Act, 1904—Deposit with bank—Assessability of quarter sessions—Payment of interest by bank without deduction of tax—Customs and Inland Revenue Act, 1888 (51 & 52 Vict., c. 8), s. 24 (3).

The quarter sessions of a county as the compensation authority under the Licensing Act, 1904, deposited with a bank sums received by them as part of the compensation fund under the Act. A large balance, which varied from time to time, stood to the credit of the compensation fund, and bank interest accrued on this deposit. This interest was paid over by the bank to the treasurer—being the bank itself—appointed by the quarter sessions without deduction of the income tax on such interest. The quarter sessions having been assessed to income tax on such interest,

Held: the quarter sessions were assessable to tax, and, further, as they had received the interest without the income tax having been deducted, they were properly assessed to such income tax, notwithstanding that the bank was under a duty (under the Customs and Inland Revenue Act, 1888, s. 24 (3)) to deduct such income tax from the interest and account for the same to the Crown.

Notes. The Income Tax Acts, 1842 and 1853, and the Customs and Inland Revenue Act, 1888, s. 24 (3) have been replaced by the Income Tax Act, 1952: 31 HALSBURY'S STATUTES (2nd Edn.). The Licensing Act, 1904, has been replaced by the Licensing Acts, 1953 and 1961: 33 and 41 HALSBURY'S STATUTES (2nd Edn.).

Applied: *Stokes v. Bennett*, [1953] 2 All E.R. 313; *Grosvenor Place Estates, Ltd. v. Roberts (I. of T.)*, [1960] 1 All E.R. 643. Referred to: *Stewart v. Normandy Estate Co.* (1933), 18 Tax Cas. 244.

As to charge to tax under Case 3 of Sched. D., see 20 HALSBURY'S LAWS (3rd Edn.) 245 et seq.; and for cases see 28 DIGEST (Repl.) 161 et seq.

Case referred to :

- (1) *Mersey Docks and Harbour Board v. Lucas* (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 32 W.R. 34; 2 Tax Cas. 25, H.L.; 28 Digest (Repl.) 47, 179.

Also referred to in argument :

Lord Advocate v. Edinburgh Corpn. (1903), 6 F. (Ct. of Sess.) 1; 41 Sc. L.R. 1; 11 S.L.T. 345; 28 Digest (Repl.) 131, *395.

Lord Advocate v. Edinburgh Corpn. (1905), 7 F. (Ct. of Sess.) 972; 42 Sc. L.R. 691; 13 S.L.T. 241; 28 Digest (Repl.) 187, *508.

L.C.C. v. A.-G., [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest (Repl.) 191, 790.

R. v. Southampton Licensing Justices, Ex parte Cardy, [1906] 1 K.B. 446; 75 L.J.K.B. 295; 94 L.T. 437; 70 J.P. 175; 54 W.R. 484; 22 T.L.R. 236; 50 Sol. Jo. 206, D.C.; 30 Digest (Repl.) 76, 583.

R. v. Woodhouse, [1906] 2 K.B. 501; 75 L.J.K.B. 745; 95 L.T. 367; 70 J.P. 485; 22 T.L.R. 603, C.A.; on appeal sub nom. *Leeds Corpn. v. Ryder*, [1907] A.C. 420; 76 L.J.K.B. 1032; 97 L.T. 261; 71 J.P. 484; 23 T.L.R. 721; sub nom. *Leeds Corpn. v. Woodhouse*, 51 Sol. Jo. 716, H.L.; 16 Digest (Repl.) 114, 10.

- A** *Coomber v. Berks Justices* (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 32 W.R. 525; 2 Tax Cas. 1, H.L.; 28 Digest (Repl.) 18, 69.
Royal Aquarium and Summer and Winter Garden Society v. Parkinson, [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 16 Digest (Repl.) 114, 5.
- B** *Leeds Permanent Benefit Building Society v. Mallandaine*, [1897] 2 Q.B. 402; 66 L.J.Q.B. 813; 77 L.T. 122; 61 J.P. 675; 13 T.L.R. 535; 3 Tax Cas. 577, C.A.; 7 Digest (Repl.) 512, 214.
L.C.C. v. Grove (1896), 61 J.P. 52; 45 W.R. 279; 13 T.L.R. 70; 41 Sol. Jo. 95; 3 Tax Cas. 508, C.A.; 28 Digest (Repl.) 112, 423.
Gilbertson v. Ferguson (1881), 7 Q.B.D. 562; 46 L.T. 10; 1 Tax Cas. 501, C.A.; 28 Digest (Repl.) 204, 858.
- C** *A.-G. v. Ashton Gas Co.*, [1904] 2 Ch. 621; 73 L.J.Ch. 673; 91 L.T. 673; 68 J.P. 477; 20 T.L.R. 601, C.A.; affirmed sub nom. *Ashton Gas Co. v. A.-G.*, [1906] A.C. 10; 75 L.J.Ch. 1; 93 L.T. 676; 70 J.P. 49; 22 T.L.R. 82; 13 Mans. 35, H.L.; 10 Digest (Repl.) 1253, 8827.
A.-G. v. L.C.C., [1907] A.C. 131; 76 L.J.K.B. 454; 96 L.T. 481; 71 J.P. 217; 23 T.L.R. 390; 51 Sol. Jo. 372; 5 L.G.R. 465; 5 Tax Cas. 242, H.L.; 28 Digest (Repl.) 192, 791.
- D**

Case Stated under s. 59 of the Taxes Management Act, 1880, by Commissioners of Income Tax.

At a meeting of the commissioners for general purposes of income tax held at Cardiff on Sept. 22, 1908, the quarter sessions for the county of Glamorgan per T. Mansel Franklen, clerk of the peace for the county, appealed against an assessment made on them for the year ending April 5, 1908, of £16 17s. 11d., duty, being income tax at the rate of 1s. in the pound on £337 19s., being interest received in the previous year on money on deposit in the National Provincial Bank of England (Cardiff branch) under the following circumstances. By the Licensing Act, 1904, the justices of a licensing district had power under the provisions of s. 1 of the Act, to refer to the quarter sessions the question of the renewal of existing on-licences. By s. 2 of the Act it was provided that where the quarter sessions refused the renewal of such licences compensation should be paid to the persons interested in the licensed premises in the manner therein set forth. By s. 3 (1) and (2) of the Act, the quarter sessions were directed to impose charges in respect of all existing on-licences renewed in respect of premises within their area at the rates set out in Sched. I to the Act, and these charges were directed to be levied and paid together with and as part of the duties on the corresponding excise licences, and the amount produced in each year paid over to the quarter sessions by the Inland Revenue in accordance with rules made by the Treasury for the purpose. By s. 3 (4):

H "Any sums paid under this Act to quarter sessions in respect of the charges under this section or received by quarter sessions from any other source for the payment of compensation under this Act shall be paid by them to a separate account under their management, and the moneys standing to the credit of that account shall constitute the compensation fund."

By s. 5 of the Act, quarter sessions might delegate any of their powers and duties under the Act to a committee. Section 6 of the Act gave the Secretary of State power to make rules for carrying into effect the Act, and, inter alia, to regulate the management and application of the compensation fund, and the audit of the accounts of quarter sessions.

I In accordance with this power the Secretary of State for the Home Department made certain rules dated Dec. 20, 1904, a print whereof was annexed to and formed part of the Case, and under r. 2 in these rules the compensation authority meant as respects a county the quarter sessions for that county, and included with regard to any matter delegated to a committee under s. 5 (2) of the Licensing Act, 1904,

that committee. By r. 49 it was provided that the compensation authority should appoint a treasurer, and that on such appointment notice was to be sent thereof to the Commissioners of Inland Revenue. By r. 57 it was directed that:

"All sums received by the compensation authority in respect of charges under the Act or from any other source for the payment of compensation, shall be paid to the treasurer of the compensation authority and credited by him to the compensation fund."

By r. 50 it was directed that:

"Money authorised by the compensation authority to be paid out of the compensation fund shall not be paid except on an order signed by two members of the compensation authority and by the treasurer of that authority, or, if the treasurer is a bank, the clerk of that authority."

By r. 60 it was provided that:

"It shall be the duty of the compensation authority to see that any balance in excess of current requirements standing to the credit of the compensation fund is placed on deposit at interest, or invested in any manner authorised by law for investments by trustees, and that the interest thereon is paid to the credit of the compensation fund."

The quarter sessions for the county of Glamorgan delegated their powers under the Licensing Act to a committee appointed by them, and under the provisions of the Act on the recommendation of this committee, called the county licensing committee, the quarter sessions made charges as authorised by the Act for the purpose of providing a compensation fund. They appointed the National Provincial Bank of England, Ltd., to be their treasurer, and duly notified the Commissioners of Inland Revenue of the appointment. During the year ending April 5, 1907, a large balance standing to the credit of the compensation fund, and which fluctuated from time to time, was on deposit at the National Provincial Bank of England, Ltd., and the bank interest accruing credited to the compensation fund for the year ending April 5, 1907, amounted to the said sum of £337 19s., above mentioned. It was admitted that such interest was not annual, and that the rate of interest varied from time to time with the bank rate. By the Income Tax Act, 1842, s. 40, it was provided in relation to the duty of income tax:

"All bodies politic, corporate or collegiate companies, fraternities, fellowships, or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will, under, and by virtue of this Act be chargeable with, and that the chamberlain or other officer acting as treasurer, auditor, or receiver for the time being of every such corporation, company, fraternity, fellowship, or society shall be answerable for doing all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing such bodies corporate, companies, fraternities, fellowships, or societies to the duties granted by this Act and paying the same."

By the Income Tax Act, 1853, s. 2, income tax was to be charged (inter alia) as follows:

"Schedule D. For and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act."

For the appellants it was contended that: (a) The quarter sessions was a judicial body and could not be assessed; (b) that they had no beneficial interest in the compensation fund, but had only the power of distributing it between the persons to whom it belonged, and that this distribution was made by the court's judicial decision under power given them by the Licensing Act, 1904. The surveyor of taxes maintained (inter alia): (a) That the income in question was assessable

A under the third case of Sch. D of the Income Tax Act, 1842, s. 100; (b) that there was no statutory exemption by which the quarter sessions could claim to be exempted; and (c) that the interest was taxable, and that it was immaterial for what purpose it was intended that the interest should be applied, or that the quarter sessions only had the power of distributing the compensation fund and any interest which might accrue thereon among the persons entitled thereto, and he cited
B *Mersey Docks and Harbour Board v. Lucas* (1) in support of this contention. The commissioners were of opinion that the assessment was rightly made, and confirmed the same accordingly. The case was argued and dealt with on the footing that the income tax on the interest had not been deducted by the bank before they credited the compensation fund with such interest, and that as between the bank qua bank and the bank qua treasurer the bank qua bank had credited the bank
C qua treasurer with the full amount of the interest without any deduction of income tax on such interest.

Danckwerts, K.C. (R. Vaughan Williams with him), for the appellants.

The Solicitor-General (Sir Samuel Evans, K.C.) (William Finlay with him) for the respondent.

D *Cur. adv. vult.*

Mar. 8, 1910. **BRAY, J.**—In this case the quarter sessions for the county of Glamorgan appealed against an assessment for income tax on £337 19s., being interest received in the previous year—that is, the year prior to 1908—on money on deposit in the National Provincial Bank of England, and the commissioners having confirmed the assessment, a Case has been stated.

E Two grounds were argued before me. The first was that quarter sessions could not be assessed; and the second was that when the duty was thrown on the bank paying interest to deduct the income tax, the person receiving the interest could no longer be assessed. It had been argued before the commissioners that this money was not liable to be assessed for income tax at all; that the quarter sessions
F were not bound to pay income tax, and that they were entitled to receive the whole of the interest without deducting income tax at all. That ground has very properly been abandoned by counsel for the appellants. It is clearly not maintainable. So that it is conceded by the appellants that in one shape or another—either by deduction by the bank or otherwise—the Inland Revenue are entitled to receive this sum of £16 17s. The points, therefore, that remain are purely technical.
G They are quite devoid of merits; but, of course, I have to decide them. It is suggested that to hold that quarter sessions are assessable would be an injury to their dignity and their feelings, and that is the ground on which quarter sessions now refuse to pay this income tax. I must deal with the first point—viz., whether quarter sessions can be assessed. Who are quarter sessions? First of all, they are some body, at all events, who are appellants here; they can instruct a solicitor and they can appeal. They must be somebody. They have certain powers and duties;
H but I have only to deal with them in their capacity as a compensation authority. Under the Licensing Act, 1904, by s. 2, when they refuse a renewal of a licence a sum equal to the difference between the value of the licensed premises, and so on, shall be paid as compensation to the persons interested in the licensed premises. The section goes on to provide how that sum shall be ascertained, and then we
I come to s. 3.—“Financial Provisions.” Under sub-s. (1) and sub-s. (2) they have the power to impose charges in respect of all existing on-licences renewed within their area, and they are entitled to receive those sums. By sub-s. (4):

“Any sums paid under this Act to quarter sessions in respect of the charges under this section, or received by quarter sessions from any other source for the payment of compensation under this Act, shall be paid by them to a separate account under their management, and the moneys standing to the credit of that account shall constitute the compensation fund.”

So they are to receive the moneys and they are to pay them into an account called the "compensation fund account." They are entitled under sub-s. (5) to deduct any expenses; so it is to be presumed that they can incur expenses.

There are later provisions for borrowing. There are also rules made under that Act, and under a heading of "Payment of Compensation Money," r. 35 states:

"On the day fixed the compensation authority [quarter sessions] shall pay to each person entitled to compensation his share of the compensation money."

By r. 49:

"The compensation authority shall appoint some person or some bank to be their treasurer, and the treasurer (if not a bank) shall give to the compensation authority such security as they may require."

The treasurer is not the owner of the money; he is merely an officer. That appears clearly by r. 51, which provides:

"The remuneration of the clerk, and of the treasurer and any other officers appointed under these rules shall be such as may be fixed by the compensation authority with the consent of the Secretary of State."

There are a number of rules, beginning with r. 55, dealing with the compensation fund. Rule 57 is:

"All sums received by the compensation authority in respect of charges under the Act, or from any other source for the payment of compensation, shall be paid to the treasurer of the compensation authority and credited by him to the compensation fund."

Rule 58 provides: "Any fees paid under these rule . . . shall be accounted for . . ."

Rule 59 provides:

"Money authorised by the compensation authority to be paid out of the compensation fund shall not be paid, except on an order signed by two members of the compensation authority and by the treasurer of that authority, or, if the treasurer is a bank, the clerk of that authority."

Rule 60 is:

"It shall be the duty of the compensation authority [quarter sessions] to see that any balance in excess of current requirements, standing to the credit of the compensation fund, is placed on deposit at interest, or invested in any manner authorised by law for investments by trustees, and that the interest thereon is paid to the credit of the compensation fund."

Then r. 61 provides:

"It shall be the duty of the compensation authority to cause proper accounts to be kept in connection with the compensation fund. . . ."

There are provisions with reference to audit, and with reference to borrowing and the repayment of money.

Therefore, the quarter sessions acting as the compensation authority are persons who will have to receive moneys, and who have the duty of paying moneys. The first question that arose before me was under s. 40 of the Income Tax Act, 1842. It does not seem to me necessary that I should decide whether quarter sessions come within that section as "bodies" there specified, because if they are not one of those bodies they are at all events a collection of individuals, and a collection of individuals comes within the word "persons," and when a person is charged a collection of individuals may be charged. Therefore it seems to be quite unnecessary for me to decide whether they come under that section, or whether they do not. If they come under s. 40, well and good. If they do not come under s. 40, then they are "persons," and are assessable as such. I have been referred to subsequent sections, especially s. 43, and it is said that under that section the

A treasurer must be assessed, and that he is "a receiver appointed by any court." In my opinion that was not intended to apply to such a person as the treasurer of the compensation authority at all. It applies to the ordinary case of a receiver appointed by the Court of Chancery or by any other court. Therefore I do not think that that section affects the question. The result, in my opinion, is that the quarter sessions are assessable, and therefore, so far as that ground is concerned,

B the appeal fails.

The next ground taken is that, inasmuch as an Act entitles or makes it the duty of the persons receiving a deposit and paying interest, such as the bank in this case, to deduct the income tax from the interest which they pay, and, inasmuch as they are liable for the tax whether they deduct it or not, that must be considered as impliedly repealing sections of the earlier Acts which make the persons receiving the interest chargeable. In my opinion, no such repeal is implied at all. It is not inconsistent with the liability of the persons receiving the interest to be chargeable; it is simply an additional power given to the Inland Revenue to obtain the income tax from the person paying as well as from the person receiving the interest; and in this case, where the person paying has not deducted the income tax from the interest, and where the person receiving the interest has received the whole interest, I do not for a moment doubt that quarter sessions in this case, having received the whole interest, are chargeable to the income tax. Therefore, it seems to me that on both grounds the appeal fails, and must be dismissed with costs.

Appeal dismissed.

E Solicitors: *Broad & Co.*; Solicitor of Inland Revenue.

[Reported by W. W. ORR, ESQ., Barrister-at-Law.]

F

LORD LLANGATTOCK v. WATNEY, COMBE, REID & CO., LTD.

G [HOUSE OF LORDS (Lord Loreburn, L.C., Lord James of Hereford, Lord Atkinson, Lord Shaw and Lord Mersey), April 18, 19, 1910]

Reported [1910] A.C. 394; 79 L.J.K.B. 559; 102 L.T. 548; 74 J.P. 194;
26 T.L.R. 418; 54 Sol. Jo. 456]

Licensing—Compensation charge—Deduction from rent—Amount of deduction—

H "Unexpired term"—Unexpired term of existing lease, not of reversionary interest—*Licensing Act, 1904* (4 Edw. 7, c. 23), s. 3 (3), and *Sched. 2*.

I The expression "unexpired term" in *Sched. 2* to the *Licensing Act, 1904* [now the *Licensing Act, 1953*, *Sched. 4*, pt. 2] held to mean the unexpired term of an existing lease, not of a reversionary interest, and in calculating the amount of compensation charge which the lessee of a licensed house is entitled under s. 3 (3) of the Act [now s. 18 (4) of the 1953 Act] to deduct from the rent payable to the lessor, a reversionary lease, to commence the next day but one after the termination of the existing lease, cannot be taken into account.

Decision of the Court of Appeal, [1910] 1 K.B. 236, affirmed.

Notes. The *Licensing Act, 1904*, has been repealed. Section 18 (4) and *Sched. 4*, pt. 2 of the *Licensing Act, 1953*, corresponds to s. 3 (3) and *Sched. 2* of the 1904 Act.

Followed: *Knight v. City of London Brewery*, [1912] 1 K.B. 10. Referred to: *Mann, Crossmann and Paulin v. Land Registry (Registrar)*, [1918] 1 Ch. 202.

As to deductions from rent of licensed premises in respect of the unexpired term of a payor of a compensation charge, see 22 HALSBURY'S LAWS (3rd Edn.) 583, paras. 1192, 1193, and for cases see 30 DIGEST (Repl.) 59, 441-443. For the Licensing Act, 1953, s. 18 (4), Sched. 4, pt. 2, see 33 HALSBURY'S STATUTES (2nd Edn.) 167, 300.

Cases referred to in argument :

R. v. St. Marylebone Vestry (1887), 20 Q.B.D. 415; 57 L.J.M.C. 9; 52 J.P. 534; sub nom. *R. v. St. Marylebone Vestry and Hyde, Ex parte Berners*, 58 L.T. 180; 36 W.R. 271; sub nom. *Hyde v. Marylebone Vestry*, 4 T.L.R. 163, D.C.; 38 Digest (Repl.) 184, 138.

Robinson v. Barton-Eccles Local Board (1883), 8 App. Cas. 798; 53 L.J.Ch. 226; 50 L.T. 57; 48 J.P. 276; 32 W.R. 249, H.L.; 26 Digest (Repl.) 547, 2187.

Cottee v. Richardson (1851), 7 Exch. 143; 21 L.J.Ex. 52; 18 L.T.O.S. 172; 155 E.R. 892; 31 Digest (Repl.) 594, 7124.

St. John, Hampstead, Vestry v. Cotton (1886), 12 App. Cas. 1; 56 L.J.Q.B. 225; 56 L.T. 1; 51 J.P. 340; 35 W.R. 505; 3 T.L.R. 161, H.L.; 42 Digest 620, 208.

Appeal by the lessor of two public-houses from a decision of the Court of Appeal (SIR HERBERT COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.), reported [1910] 1 K.B. 236, reversing a judgment of A. T. LAWRENCE, J., reported [1909] 2 K.B. 884, upon a Special Case.

The appellant claimed £16 18s. as due to him from the respondents, the tenants of the two public-houses, for one quarter's rent of the Queen public-house, Camberwell, due Dec. 25, 1908, after deducting income tax under Sched. A, and the proportion of the compensation charged payable under the Licensing Act, 1904; and also the sum of £20 19s. for one quarter's rent of the Roebuck public-house, Walworth, due Dec. 25, 1908, after deducting income tax and the proportion of the compensation charge. The appellant was the tenant for life, and entitled to receive the rents of the two public-houses. The respondents were the assignees of leases of the public-houses. The two public-houses were occupied by tenants of the respondents, who were the holders of the licences granted in respect thereof. In respect of the Queen the respondents were the assignees of two leases—namely, first, a lease for the term of thirty-one years from Dec. 25, 1878, expiring on Dec. 25, 1909, and secondly, a lease for a term of years commencing from the day but one next after the date of the expiration or sooner determination of this lease, and enduring until June 24, 1935. In respect of the Roebuck the respondents were also the assignees of two leases—namely, first, a lease for the term of thirty-one years from Dec. 25, 1886, expiring on Dec. 25, 1917, and secondly, a lease for a term of years commencing from the day but one next after the date of the expiration or sooner determination of the first lease and enduring until June 24, 1935.

The Licensing Act, 1904, by s. 3 [corresponding to s. 18 of the 1953 Act] empowered the quarter sessions to impose certain charges (called "compensation charges") upon all existing on-licences renewed in respect of houses within their areas, and by virtue of s. 3 (3), such deductions from rent as were set out in the second schedule to the Act [corresponding to Sched. 4, pt. 2, of the 1953 Act] might be made by any licence-holder who paid a charge under the section, and also by any person from whose rent a deduction was made in respect of the payment of such a charge. A scale of deduction was provided by the schedule which, so far as material, was as follows :

"A person whose unexpired term does not exceed one year may deduct a sum equal to 100 per cent. of the charge, a person whose unexpired term does not exceed two years may deduct a sum equal to 88 per cent. of the charge, a person whose unexpired term does not exceed three years may deduct a sum equal to 82 per cent. of the charge, . . . a person whose unexpired term does

not exceed ten years may deduct a sum equal to 45 per cent. of the charge, a person whose unexpired term exceeds twenty-five but does not exceed thirty years may deduct a sum equal to 7 per cent. of the charge, but the amount deducted shall in no case exceed half the rent."

In 1908 the quarter sessions for the county of London under s. 3 of the Act imposed in respect of the two public-houses being houses within their area, the following compensation charges: In respect of the Queen public-house, £30, and in respect of the Roebuck public-house, £40. The compensation charges were before Dec. 25, 1908, paid by the licence-holders, who made such deductions from the rents paid by them to the respondents as were authorised by s. 3 and the second schedule to the Act. The appellant admitted that the respondents were entitled to deduct certain percentages of the compensation charges from the rents due by them to the appellant on Dec. 25, 1908, but contended that under the second schedule the respondents were entitled to deduct seven per cent. of the charges and no more, on the ground that the respondents were persons whose unexpired term exceeded twenty-five but did not exceed thirty years within the meaning of the schedule.

The respondents contended (i) that in respect of the Queen they were entitled to deduct from the rent due to the appellant eighty-eight per cent. of the compensation charge of £30 on the ground that they were persons "whose unexpired" term did not exceed two years" within the meaning of the schedule; and (ii) that in respect of the Roebuck they were entitled to deduct from the rent due to the appellant forty-five per cent. of the compensation charge of £40 on the ground that they were persons "whose unexpired term does not exceed ten years" within the meaning of the schedule.

If the appellant's contention was right then it was admitted by the respondents that the sums claimed in the action were due from them to the appellant—namely, in respect of the Queen, £16 18s.; and in respect of the Roebuck, £20 19s. If the respondent's contention was right in respect of the Queen, nothing was due from the respondents to the appellant so far as the rent payable on Dec. 25, 1908, was concerned, and in respect of the Roebuck public-house the sum of £5 15s. was due from the respondents to the appellant for such rent. A. T. LAWRENCE, J., was of opinion that the appellant's contention was right, and accordingly made an order entering judgment for the appellant for the full amounts claimed with costs, but his judgment was reversed by the Court of Appeal.

Macmorran, K.C., and *W. C. Ryde* for the appellant.

Acland, K.C., and *J. Bruce Williamson (Bodkin with them)*, for the respondents.

LORD LOREBURN, L.C.—At the first blush the effect of the Act, according to the decision of the Court of Appeal in this case, seems hard upon the appellant, and I do not doubt that in a sense it is hard upon him, but, if we consider the meaning of the Act, it will appear that the provisions of it may, in particular cases, operate with apparent unfairness to more persons than those situated in the position of the appellant.

What we have to decide is the meaning of the words appearing in the second schedule of the Licensing Act, 1904 [now Sched. 4, pt. 2, of the Licensing Act, 1953]. The words are that a person shall be permitted to deduct from his rent according to a particular scale in respect of his "unexpired term." We have been asked to take what may be called a popular meaning of the word "term," and upon this ground, that the Act provides that upon the withdrawing of a licence otherwise than for specified grounds, compensation is to be paid to all who are interested in the licensed house which is to be deprived of the licence; and it seems, upon the face of it, equitable, as we are told, that all should contribute to the fund from which the compensation is to come. At first sight it would seem singular that those who are to receive compensation are not to contribute towards

the fund which provides the compensation in proportion to their real interest. When the Act is examined it appears that the compensation levy is annual, and the annual levy is adjusted to a scale provided in the second schedule. It is imaginable that a levy might be prescribed by Parliament to be assessed in one of two ways. The Act might say that you should ascertain what in each year was the entire interest of the different persons interested in the house, and assess them accordingly. There would be considerable difficulty, no doubt, in working out a scheme of that kind, and there is no machinery or provision whatever in the Act for that purpose. You would have to determine the values of the several persons' interests, and not the rent which they are paying, as the basis upon which they were to contribute. Another way which might be prescribed, and, as I think, has been prescribed by Parliament, is that you are to take the actual term possessed by the tenant in the legal sense of the word, and the rent actually payable during that term, and by enabling each person who pays rent to deduct from that rent according to a fixed scale, so distribute the annual burden, not among all who may have an interest in the property, but among all who pay rent for it, or receive rent in respect of it.

Which of these two is the true construction of the present Act? I think that the latter is for several reasons. One is that while the second section of this Act, which prescribes the distribution of the compensation speaks of the interest of the persons entitled, the second schedule which imposes the contribution does not speak of interests, but adjusts the contribution to the rent, and to the rent of an unexpired term. In construing an Act of Parliament, we must give weight to a difference so obvious upon the face of it. Another reason is that if you say that "unexpired term" does not mean unexpired term in the legal sense, but means unexpired period, of what is it to be the period? Is it to be the period of all the years for which a tenant may have a right to enjoy the property either at present or in the future? The counsel for the appellant shrink from this conclusion. They would have us disregard an *interesse termini* which is to come into enjoyment in the future if a sufficient interval stands between it and the subsisting term. What is a sufficient interval? There is nothing in the Act to suggest, and it would leave this enactment in hopeless confusion if we were to say that the sufficiency or insufficiency of the interval had to be discussed and decided in each particular case. Why are we to say that an *interesse termini* is to be disregarded if there is a sufficient interval? If you adopt the view that the word "term" in the second schedule is the same thing as "period," then it seems to me that you are bound logically to count up all the periods which the tenant has, either in the present or in the future, however distant the future periods may be, and I do not see how that method is to be worked if the periods of all the present and future interests are to be counted together. A man might have a term in possession ending next year, and he might have a right, either a freehold right or an *interesse termini* which would arise many years hence; and it would be inequitable or unfair, if we are to scrutinise the fairness of an Act of Parliament, to count those two together, and so to regulate the levy that the tenant would have to pay in *praesenti* in respect of an interest long deferred exactly the same as if that interest was at present enjoyed.

If we are to regard what is called equitable and fair in construing this statute, it seems to me that there may be imagined equally on either side cases which would seem harsh or inequitable. Our only course is to follow the words of the Act of Parliament. I do not repel the possibility of treating language employed in an Act of Parliament as having the ordinary or common signification distinguishing it from the legal or technical interpretation, but I do not think that there is any ground in this case for departing from the strict words of the Act itself. We must construe the Act as it stands, and give legal effect to legal language. It seems to me pretty clear that this schedule is imperfect in the sense that it does not contemplate or provide for a variety of contingencies. For example, I

do not know how you would work, under this schedule, the case in which there was a lease for lives, and, though I do not wish to decide upon any matters which are not before the House at the present moment, I think that I can see that if there was an *interesse termini* to commence a day after the conclusion of a subsisting lease, and the *interesse termini* belonged to a complete stranger, an anomaly would arise. A person possessed of an *interesse termini*, who pays no rent and receives no rent, would not be liable to contribute at all to the levy, and yet he would be entitled to a very large share of the compensation; and so also in the case of the last years of a long lease at a peppercorn rent. These are only illustrations of the various anomalies which may possibly arise in the working of the scheme prescribed by this Act. Whether the appellant or the respondents are right, anomalies would exist on one side or the other. We have, therefore, no choice except to look at the language of the Act of Parliament, and construe it and apply it accordingly; and I think that in this instance the Court of Appeal has applied it properly.

LORD JAMES OF HEREFORD.—I concur.

LORD ATKINSON.—I concur. The learned counsel for the appellant asks us to give to the word "term" a meaning which, I think, as far as my knowledge goes, has never been attributed to it by any court of justice—namely, as including not only the time during which a lease in possession will run, but the time for which leases in reversion may be given; and they ask us to do this because they say that all persons interested in the house share in the contribution, that those who enjoy the benefit should bear the burden, and that this principle is so imperative that we must strain the language of the statute in order to carry it into effect. The answer to that contention is, to my mind, that you violate the principle in other directions as much as you apply it in the interests of the client for whom they appear. There are injustices which will be done whichever argument you adopt, and under those circumstances there is nothing to induce the House to depart from the ordinary sense of the language used, which provides that the entire burden is to be thrown upon the licensee, and that he can only shift it off his own shoulders, in so far as the relation of landlord and tenant exists in those above him, by deducting it from the rent which he pays, a rent which must be paid not under the reversionary lease at all, but under the lease existing at the time. I therefore entirely concur in the judgment which has been delivered by the Lord Chancellor. I think that the decision of the Court of Appeal is right.

LORD SHAW.—I confess that I have had considerable difficulty in this case. As the result of the argument it appears to be clear to me, and I think to all your Lordships, that this statute in its provisions does not make the burden of the annual charge coincident with, or even proportional to the receipt of the compensation ultimately to be awarded. At all events I am clear that the statute in its expression is not a plain enough general indication to that effect, to enable us to adopt a particular construction of the word "term" which is there employed. That word occurs in the second schedule to the Act [now Sched. 4, pt. 2 of the 1953 Act], and the words are these: "A person whose unexpired term does not exceed," and so on. That language is of course inaccurate and inappropriate. There is no term of a person in the ordinary sense at all; and, therefore, each party is driven to amplify the word "term." "The expression means a person the unexpired term of whose interest," says the one, or "a person the unexpired term of whose lease" says the other. In analysing this statute in order to ascertain which of those is to be taken as the correct interpretation, my judgment is that the schedule applies, and applies only, to the relations of landlord and tenant, and to the term of those relations qualifying the deduction which is to be made from the rent. There is much force in the contention which was presented by the appellants, that it would have been reasonable to say that the person referred to

is a person the term of whose interest does not expire; but when I find that the schedule deals, and, as LORD ATKINSON has observed, deals only with those who stand in the relation of landlord and tenant, I am bound, although with some reluctance, to concur with your Lordships in this view, that it is to the lease and the existing lease alone that the word "term" applies. I cannot say that, had my judgment been upon the other side, there would not have been also a sense of reluctance in delivering it, because I am convinced that whichever interpretation of this statute as drawn is taken hardships and unreasonable results will follow. But that is a consequence for which your Lordships, as the interpreting body, are in no way responsible.

LORD MERSEY.—I concur.

Appeal dismissed.

Solicitors: *Johnsons, Long & Co.; A. H. Macpherson.*

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

TURNER v. WALSH

[COURT OF APPEAL (Lord Alverstone, C.J., Fletcher Moulton and Farwell, L.J.J.), May 12, 21, 1909]

[*Reported* [1909] 2 K.B. 484; 78 L.J.K.B. 753; 100 L.T. 832; 25 T.L.R. 605]

Mortgage—Powers of mortgagor—Right to sue lessee for damages for breach of covenant to repair—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 10.

Section 10 of the Conveyancing Act, 1881 [now s. 141 of the Law of Property Act, 1925] enabled a mortgagor who was entitled to the income of the mortgaged property to sue the lessee for damages for breach of a covenant to repair so long as the mortgagee had not taken possession of the mortgaged property or given notice of his intention to do so.

Notes. Section 10 of the Conveyancing Act, 1881, has been repealed and is replaced by s. 141 of the Law of Property Act, 1925. Section 25 (5) of the Supreme Court of Judicature Act, 1873, has been repealed and is replaced by s. 98 of the Law of Property Act, 1925.

Explained and distinguished: *Schalit v. Nadler, Ltd.*, [1933] All E.R. Rep. 708. Referred to: *Allen v. I.R. Comrs.*, [1914] 2 K.B. 327.

As to the rights and liabilities of the mortgagor in general, see 27 HALSBURY'S LAWS (3rd Edn.) 244 et seq.; and for cases see 35 DIGEST 319 et seq. For the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

- (1) *Doe d. Marriott v. Edwards* (1834), 5 B. & Ad. 1065; 6 C. & P. 208; 3 Nev. & M.K.B. 193; 110 E.R. 1086; 31 Digest (Repl.) 526, 6490.
- (2) *Fairclough v. Marshall* (1878), 4 Ex.D. 37; 48 L.J.Q.B. 146; 39 L.T. 389; 27 W.R. 145, C.A.; 35 Digest 341, 835.
- (3) *Heath v. Pugh* (1881), 6 Q.B.D. 345; 50 L.J.Q.B. 473; 44 L.T. 327; 29 W.R. 904, C.A.; on appeal sub nom. *Pugh v. Heath* (1882), 7 App. Cas. 235; 51 L.J.Q.B. 367; 46 L.T. 321; 30 W.R. 553, H.L.; 35 Digest 319, 633.

- (4) *Casburne v. Inglis* (1738), 2 Jac. & W. 194; Lee temp. Hard. 399; 2 Eq. Cas. Abr. 728; 37 E.R. 600; sub nom. *Casborne v. Scarfe*, West temp. Hard. 221; 1 Atk. 603, L.C.; 35 Digest 343, 853.
- (5) *Marquis Cholmondeley v. Lord Clinton* (1820), 2 Jac. & W. 1; 37 E.R. 527; on appeal (1821), 4 Bli. 1, H.L.; 35 Digest 348, 904.
- (6) *Matthews v. Usher*, [1900] 2 Q.B. 535; 69 L.J.Q.B. 856; 83 L.T. 353; 49 W.R. 40; 16 T.L.R. 493; sub nom. *Mathevs v. Usher*, No. 1, 44 Sol. Jo. 606, C.A.; 35 Digest 341, 837.

Also referred to in argument :

Trent v. Hunt (1853), 9 Exch. 14; 1 C.L.R. 752; 22 L.J.Ex. 318; 22 L.T.O.S. 23; 17 Jur. 899; 1 W.R. 481; 156 E.R. 7; 35 Digest 320, 648.

Municipal Permanent Investment Building Society v. Smith (1888), 22 Q.B.D. 70; 58 L.J.Q.B. 61; 37 W.R. 42; 5 T.L.R. 17, C.A.; 35 Digest 335, 769.

Molyneux v. Richard, [1906] 1 Ch. 34; 75 L.J.Ch. 39; 93 L.T. 698; 54 W.R. 177; 22 T.L.R. 76; 35 Digest 341, 838.

Copestake v. Hoper, [1908] 2 Ch. 10; 77 L.J.Ch. 610; 99 L.T. 371; 24 T.L.R. 628; 52 Sol. Jo. 516, C.A.

Robbins v. Whyte, [1906] 1 K.B. 125; 75 L.J.K.B. 38; 94 L.T. 287; 54 W.R. 105; 22 T.L.R. 106; 50 Sol. Jo. 141; 31 Digest (Repl.) 567, 6873.

Appeal from an order of CHANNELL, J., upon a preliminary point of law in an action brought by the plaintiff to recover damages for breach of a covenant to repair contained in a lease granted to the defendant.

On June 14, 1888, the Prudential Assurance Co. granted a lease of a house to the defendant for a term of twenty-one years from September, 1887. The lease contained a covenant by the lessee to keep the house in good repair. On May 21, 1906, the Prudential Assurance Co. conveyed the demised premises to the plaintiff in fee simple subject to the lease and on May 22, 1906, the plaintiff conveyed the demised premises to the Prudential Assurance Co. in fee simple by way of mortgage to secure the payment of a sum of money which was still owing when this action was commenced. The mortgagees had not taken, or given notice of their intention to take, possession of the mortgaged property, and the plaintiff was in receipt of the rents and profits. This action was brought by the plaintiff for damages for breach of the covenant to keep the premises in good repair, and the defendant set up the defence (inter alia) that the plaintiff, having mortgaged the reversion, could not sue upon the covenant. This defence was argued, as a preliminary point of law, before CHANNELL, J., when the plaintiff relied solely upon s. 25 (5) of the Supreme Court of Judicature Act, 1873, and the learned judge gave judgment in favour of the defendant.

By the Supreme Court of Judicature Act, 1873, s. 25 (5):

“A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.”

By the Conveyancing Act, 1881, s. 10:

“(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall

go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land lease. (2) This section applies only to leases made after the commencement of this Act."

Mark Romer, K.C., and P. Rose Innes for the plaintiff.

Eldon Bankes, K.C., and C. C. Scott for the defendant.

Cur. adv. vult.

May 21, 1909. **FARWELL, L.J.**, read the following judgment of the court.—By indenture of lease dated June 14, 1888, the Prudential Assurance Co. demised to the defendant a house at Duddington for twenty-one years from September, 1887. The lease contained the usual covenants, including covenants to keep the house in good repair. On May 21, 1906, the Prudential Assurance Co. conveyed the premises demised by the lease to the plaintiff in fee, and on May 22, 1906, the plaintiff conveyed the same premises in fee to the Prudential Assurance Co. by way of mortgage to secure a sum of money still owing. The Prudential Assurance Co. have not taken, and have given no notice of intention to take, possession of the mortgaged property. The plaintiff now sues the lessee for breach of covenant to repair, and the question is whether he can maintain such an action.

It is plain that he could not have done so before the Judicature Acts, at law the covenants in the lease were incident to the reversion and passed with it by the mortgage: see *Doe d. Marriott v. Edwards* (1). The case was argued in the court below solely on s. 25 (5), of the Judicature Act, 1873, [now s. 98 of the Law of Property Act, 1925] and I agree with **CHANNELL, J.**, that the sub-section has no application to the present case. It enables a mortgagor entitled to possession or receipt of rents and profits, whose mortgagee has neither taken possession nor given notice of any intention to take possession, to sue for possession or recovery of rents and profits

"or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

But an action for breach of covenant is not an action in tort, but in contract—a difference that must certainly have been present to the mind of the legislature in 1873; and we cannot read "trespass or other wrong relative thereto"—that is, to the demised land—as including an action *ex contractu* for damages for breach of contract. A doubt as to the meaning of these words was suggested by **LORD BRAMWELL** in 1878, in *Fairclough v. Marshall* (2), and in 1881 the Conveyancing Act was passed, and on the construction of s. 10 of that Act [now s. 141 of the Law of Property Act, 1925] the argument in this court has mainly turned. That section was not brought to the attention of **CHANNELL, J.** It provides, in our opinion, for two distinct matters, quite independent one of the other: it first annexes rent and the benefit of covenants to the reversion, notwithstanding the severance of such reversion, and it then makes rent recoverable and covenants enforceable,

"by the person from time to time entitled, subject to the term, to the income of the whole or any part"

of the demised land. The words "whole or any part" show that the latter part of the section is independent of the former, for there can have been no severance when the whole of the land remains. Moreover, it would be absurd to give the right to sue and recover to different persons according as the reversion on the

demised premises was severed or not, so that in cases where the reversion has been severed the persons named in this section could recover, but in cases where there has been no such severance they could not. If the two divisions of the section were transposed so that the section ran, "Rent, &c., and the benefit of every covenant, &c., shall be capable of being recovered, &c., by the person from time to time entitled, &c., and shall be annexed to the reversion notwithstanding severance," the case would be hardly arguable.

The question then becomes simply one of fact: Who is entitled to the income of the mortgaged property? Where land is both demised and mortgaged, the answer depends on whether the mortgagee has taken possession or given notice of his intention to take possession of the mortgaged property or not. If he has done so then he is entitled; if he has not, the mortgagor was always and is still so entitled, and he receives and retains such income for his own benefit without any liability to account either at law or in equity. As LORD SELBORNE says in *Heath v. Pugh* (3) (6 Q.B.D. at p. 359):

"It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful, and not by wrong. He was entitled to the rents and profits as long as he remained in possession; mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee."

Section 10 makes no alteration in the rights of anyone, but merely alters procedure, so as to give the right of action to the person entitled to the proceeds of such action. This is plain if the true nature and character of a mortgage is borne in mind; it is a mere security for the debt, and (subject to the paramount liability to this debt) the mortgagor retains an estate which can be granted and demised, which descends to the heir.

"It may be demised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery . . .; the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets":

per LORD HARDWICKE in *Casborne v. Scarfe* (4) (1 Atk. at p. 605); or, as COTTON, L.J., says in *Fairclough v. Marshall* (2) (4 Ex.D. at p. 48):

"We are here to recognise equities, and to deal with substance rather than form. It is not the mortgagees who are the owners, but the mortgagor. The mortgagor is the beneficial owner, subject to the incumbrance, and the plaintiff is in the position of a mortgagor having beneficial ownership of a rent issuing out of the land and certain other benefits."

This has been settled for many years, but practical difficulties arose in procedure when the mortgagee did not take possession; his safety was always paramount, and he could protect himself by taking possession; but while he remained satisfied with his security, and left the mortgagor in undisputed possession, the latter was sometimes embarrassed in enforcing covenants in leases. If the mortgage preceded the leases, the tenants were estopped from disputing their lessors' title, and no difficulty arose; but if the leases preceded the mortgage, the mortgagor was driven to obtain leave to use the mortgagee's name in order to sue on the lessee's covenants; he could obtain the rent by distraining as the mortgagors' bailiff; but he could not sue on the covenants. It is probable that any difficulty in obtaining such leave seldom arose, because it was to the interest of the mortgagee as well as of the mortgagor that the lessees' covenants should be performed, and, if the mortgagee were in possession, he would be liable for neglecting to enforce them. But the mortgagor was not without remedy; he could have obtained leave to use the mortgagee's name in suing on giving a proper indemnity, although, in consequence of the tenderness displayed to mortgagees by courts of equity, he would

have had to file a bill to redeem in order to obtain such leave. The mortgagee is not a trustee for the mortgagor except in a very special and modified sense, as was explained by SIR THOMAS PLUMER in *Marquis Cholmondeley v. Lord Clinton* (5) (2 Jac. & W. at p. 182 et seq.). But, in the absence of any special agreement, the damages, when recovered, undoubtedly belonged to the mortgagor, and although the mortgagee could, of course, sue on the covenant himself for his own benefit, if he pleased, he could not do so without rendering himself liable to account as mortgagee in possession of the demised property—a position that no mortgagee who was not desirous of calling in his mortgage would be willing to accept. It is plain, therefore, that a construction of s. 10 which obviates these technical difficulties interferes with no rights, but merely simplifies procedure.

It is urged that s. 10 falls under part 3 of the Act, headed "Leases," and that "Mortgages," form part 4, and that mortgages would have been expressly mentioned in s. 10 if leases of land in mortgage had been intended. We are unable to follow this. The Act is not constructed in watertight compartments. The object of the Act was to amend the law of property generally, and mortgages and leases constantly overlap; there are probably few large estates in England all or parts of which have not been in mortgage for the last two centuries at least. The words in s. 10, "person entitled to the income," are perfectly general. "Income," by s. 2 (3), includes "rents and profits," and it would be difficult to find a better definition of a mortgagor in possession than the person entitled to the rents and profits of the land, or to the income thereof, if the land is subject to a lease. It is certainly in accordance with the intention expressed in s. 25 (11), of the Judicature Act, 1873, that this should be so, and it seems probable that when, in 1878, it was suggested in *Fairclough v. Marshall* (2) that s. 25 (5), had this defect, s. 10 of the Conveyancing Act, 1881, was framed designedly to cure it. *Matthews v. Usher* (6) was decided under s. 14; the lease in that case was dated long before the Act, and s. 10 had, therefore, no application. We are, therefore, of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors : *Stilgoes ; W. Gamble.*

[*Reported by J. H. WILLIAMS, ESQ., Barrister-at-Law.*]

BRIDGWATER CORPORATION v. STONE AND ANOTHER

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Bigham and Walton, JJ.), October 15, 1908]

[Reported 99 L.T. 806; 72 J.P. 487; 6 L.G.R. 1171]

Street—Private street works—Expenses—Apportionment—Objection—Matters which justices can consider—Matters other than frontages—Private Street Works Act, 1892 (55 & 56 Vict., c. 57), ss. 7 (f), 8 (1), 10.

Where an urban authority has not resolved under s. 10 of the Private Street Works Act, 1892, that in settling the apportionment regard is to be had to the matters set out in that section other than the frontage of the respective premises the justices were **held** to have no jurisdiction, when hearing objections under s. 8 (1) of the Act, to have regard to such matters and to reduce the apportionment in respect thereof.

Notes. The Private Street Works Act, 1892, ss. 7, 8 (1), and 10 have been replaced by ss. 177, 178 (1) and 176 of the Highways Act, 1959, respectively.

Applied: *Hornchurch U.D.C. v. Webber*, [1938] 1 All E.R. 309.

As to hearing of objections to apportionments, see 19 HALSBURY'S LAWS (3rd Edn.) 445; and for cases see 26 DIGEST (Repl.) 618-619. For Highways Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 402.

Cases referred to in argument :

Newport Urban Sanitary Authority v. Graham (1882), 9 Q.B.D. 183; 47 L.T. 98; 47 J.P. 133; 31 W.R. 121, D.C.; 26 Digest (Repl.) 590, 2473.

Herne Bay U.D.C. v. Payne and Wood, [1907] 2 K.B. 130; 76 L.J.K.B. 685; 96 L.T. 666; 71 J.P. 282; 23 T.L.R. 442; 5 L.G.R. 631, D.C.; 26 Digest (Repl.) 617, 2698.

Case Stated by justices.

Upon the hearing of the matter of certain objections made by the respondents under s. 7 of the Private Street Works Act, 1892, to certain proposals of the appellants with reference to a street called Provident Place, within the borough, the following facts were admitted or proved in evidence. The appellants are the urban authority for the borough of Bridgwater, and the respondents, Maria Stone and Henry Charles Jennings, are respectively owners of dwelling-houses and premises known as Nos. 16 and 14, Wembdon Road, in the borough, which are situated on either side the entrance or approach to the street called Provident Place. The Private Street Works Act, 1892, was duly adopted by the appellants, and came into force and applied to the borough of Bridgwater on Dec. 1, 1897. On Nov. 21, 1907, the appellants resolved under and in pursuance of s. 6 (1) of the Private Street Works Act, 1892, to level, pave, metal, flag, channel, and make good the street known as Provident Place aforesaid, which is a street within the meaning of s. 5 of the Act. A specification of such works with plans and sections and an estimate of the probable expenses of the works and a provisional apportionment of the estimated expenses among the premises stated to be liable to be charged therewith was duly prepared and submitted to the appellants, who by resolution approved the same, and such resolution was published and copies thereof served on the owners of the premises alleged to be liable to be charged, and the approved specifications, plans and sections and provisional apportionment, were deposited at the appellants' offices open to inspection in the manner prescribed by, and in all respects so as to comply with, the provisions of s. 6 of the Act. The amount of expenses proposed to be charged against the respondent Maria Stone is £62 2s. 9d., and against the respondent H. C. Jennings is £53 2s. 1d.

Within one month from the first publication of the resolution, the respondents

objected to the proposals of the appellants, the grounds of objection, so far as the same are material to this case, being: In the case of the respondent Maria Stone: (a) That her house is not in Provident Place, but in Wembdon Road, and that her property should not have been included in the provisional apportionment; and (b) that she would not receive any benefit from the proposed works. In the case of the respondent H. C. Jennings: (a) That Provident Place commences at the cottages at each side of the place; (b) that his premises should be excluded from the provisional apportionment on the ground that they are situated in Wembdon Road, not in Provident Place; and (c) that he will receive no benefit from the proposed works, that there is no entrance or exit to or from his premises from the street, that a blank wall incloses his lawn and garden, and that he has no frontage adjoining or abutting on Provident Place. The appellants did not resolve that in settling the provisional apportionment regard should be had to any consideration other than the frontage of the respective premises fronting, adjoining, or abutting on the street. The houses belonging to the respondents were built many years ago, and both of them face Wembdon Road, which is a highway repairable by the inhabitants at large. The houses are numbered as part of Wembdon Road, and are rated as part of that road. They are erected at opposite corners of the entrance or approach to the street called Provident Place, and the gardens of both houses adjoin that part of Provident Place which leads to the houses in that street. The respondent Maria Stone has an entrance to her premises from the entrance or approach to Provident Place, and, in addition, the main entrance to her premises is from the said entrance or approach to Provident Place, and the respondent Henry Charles Jennings, who purchased his house last year, blocked up an entrance to his premises from the entrance or approach to Provident Place. There are forty houses numbered and rated as being in Provident Place (excluding the two houses of the respondents, if they were right in their contention), the average rateable value being £6 each, with frontages to the street varying from 12 ft. 5 in. to 25 ft. 2 in., and in the provisional apportionment the owners of such cottages are charged sums varying from £7 14s. 7d. to £15 13s. 6d. In the provisional apportionment the frontage charged in respect of the premises belonging to the respondent Maria Stone is 99 ft. 9 in., and in respect of the premises belonging to the respondent H. C. Jennings 85 ft. 3 in., being in each case the length of the entrance or approach to the street from Wembdon Road to the first of the cottages on the west and east sides respectively of the street called Provident Place.

In the course of the hearing it was pointed out, as the fact is, that on the hearing of the objections made to the proposals of the appellants in connection with the making up of another street in the borough under the powers of the said Private Street Works Act, 1892, two owners of premises situate in and facing a front street whose gardens extended back for a considerable distance and abutted on a side street which was about to be made up and who were charged in the provisional apportionment for the making up of such side street in respect of the whole of the frontage to such side street were granted relief and the provisional apportionment was amended by the court of summary jurisdiction (who heard the objections in question), and that such alterations and amendments were subsequently acquiesced in by the appellants although no resolution had been passed in that case that regard should be had to any consideration but frontage, and it was further pointed out, as the fact is, that in the making up of another street in the borough under the powers of the same Act the appellants had approved of a provisional apportionment in which the appellants had been charged with the cost of making up part of the street which adjoined land of a private owner, although in that case also no resolution had been passed that regard should be had to the greater or less degree of benefit to be derived by any premises.

It was contended on behalf of the respondents that in view of all the facts before stated the premises of the respondents ought to be excluded from the provisional

apportionment, and that the justices were empowered by virtue of s. 8 (1) of the Private Street Works Act, 1892, to quash in whole or in part or amend the resolution, plans, sections, and provisional apportionment, or any of them, and that the justices ought to amend the provisional apportionment in the case of Provident Place by excluding the premises of the respondents therefrom on the ground that they are situated in Wembdon Road and not in Provident Place. It was contended on behalf of the appellants that the premises of the respondents adjoined or abutted on Provident Place, and that, therefore, the justices had no power to alter or amend the provisional apportionment by excluding the whole or any part of the premises of the respondents therefrom as no resolution had been passed by the appellants under s. 10 of the Private Street Works Act, 1892, that in settling the apportionment regard should be had to the greater or less degree of benefit derived by any premises from the proposed works, and, further, that the justices could not take into consideration any proceedings or dealings with regard to other streets which had come under the operation of the Private Street Works Act, 1892, in the borough of Bridgwater.

Having heard the respondents' objections and the arguments addressed to them, the justices considered that they were empowered under s. 8 (1) of the Private Street Works Act, 1892, to alter and amend the provisional apportionment, and determined the matter of such objections as follows: (i) That the premises belonging to the respondents Maria Stone and H. C. Jennings, Nos. 1 and 42 on the before-mentioned plan, are not situated in the street called Provident Place, but in Wembdon Road; (ii) that a portion of the premises belonging to the respondents Maria Stone and H. C. Jennings respectively adjoins the street; and (iii) that the frontage of each of the before-mentioned premises which should be included in the apportionment measures 16 ft., and they accordingly amended the provisional apportionment: (a) In the case of the respondent Maria Stone, by reducing the frontage included therein from 99 ft. 9 in. to 16 ft., and the amount of charges from £62 2s. 9d. to £9 19s. 4d.; and (b) in the case of the respondent H. C. Jennings, by reducing the frontage included therein from 85 ft. 3 in. to 16 ft., and the amount of charge from £53 2s. 1d. to £9 19s. 4d.

By s. 7 of the Private Street Works Act, 1892:

"During the said month any owner . . . may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds; (that is to say) . . . (f) That the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection or (where the provisional apportionment is made with regard to other considerations than frontage as hereinafter provided) in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of any premises."

By s. 8 (1):

"The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned . . . and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be . . . as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable."

And by s. 10:

"In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority

may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say): (a) The greater or less degree of benefit to be derived by any premises from such works; (b) the amount and value of any work already done by the owners or occupiers of any such premises."

Naldrett for the appellants.

The respondents did not appear.

LORD ALVERSTONE, C.J.—This Act enables objection to be taken before the work is done, and allows owners to go to the justices and have their objections determined. These respondents objected that their premises ought not to have been included in the provisional apportionment, and that they would receive no benefit from the proposed works. It is clear that the justices thought that although the premises were abutting upon or adjoining the road which was going to be made up, they thought that the charge on the respondents was one that the urban authority ought not to have made. They have decided that the frontages which should be included in the apportionment should be only 16 ft. If they had found that the frontages only measured 16 ft. a difficulty might have arisen, and we should have had to consider whether there was any evidence to support that finding. It seems to us that the authority to decide whether the apportionment is to be based on any other consideration than that of frontage, is not the justices but the urban authority, who, under s. 10 of the Private Street Works Act, 1892, can pass a resolution that the apportionment shall be otherwise than according to frontage. Now that section provides: [His LORDSHIP read the section, and continued:] That that was meant to be left to the urban authority is also confirmed by the provisions of s. 7 (f) which refers to the objections that an owner may take. [His LORDSHIP read that section, and continued:] That indicates that the objections as to degree of benefit or value of work done can only be raised where there has been a resolution that the apportionment is to be otherwise than by frontage. Therefore, the justices had no jurisdiction to cut down the measurement fronting, adjoining, or abutting to the hypothetical figure of 16 ft.; and, therefore, they exceeded their jurisdiction. In the absence of a resolution, which the urban authority might have passed, the respondents' remedy, if any, is by appeal to the Local Government Board under s. 268 of the Public Health Act, 1875, and not by objections taken before the justices under s. 7 of the Private Street Works Act, 1892.

BIGHAM, J.—I agree.

WALTON, J.—I agree.

Appeal allowed.

Solicitors: *Read & Read*, for *W. T. Baker*, Bridgwater.

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

WRIGHT AND ANOTHER v. ANDERTON

[KING'S BENCH DIVISION (Bigham and Walton, JJ.), December 8, 1908]

[Reported [1909] 1 K.B. 209; 78 L.J.K.B. 165; 100 L.T. 123;
25 T.L.R. 156; 53 Sol. Jo. 135]

Inn—Liability for loss of guests' goods—Commencement of relationship of innkeeper and guest—Effect of agreement between innkeeper and third party as to payment.

The responsibility of an innkeeper for the safety of a traveller's property begins at the moment the relationship of guest and innkeeper arises. That relationship arises as soon as the traveller enters the inn with the intention of using it as an inn and is received on that basis by the innkeeper. An agreement between an innkeeper and a third party that the third party shall pay a guest's expenses does not prevent the relationship of innkeeper and guest arising between the innkeeper and the guest whose expenses are to be paid under such agreement.

Notes. By s. 2 (1) (a) of the Hotel Proprietors Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 467) an innkeeper shall not be liable to make good to any traveller any loss or damage in respect of any property brought to the hotel by the traveller, unless sleeping accommodation at the hotel has been engaged by the traveller. The case is reported because it applies to cases not excluded by s. 2 (1) (a) of the 1956 Act.

Considered: *Grant v. Cardiff Hotels Co.* (1921), 37 T.L.R. 775. Applied: *Cryan v. Hotel Rembrandt* (1925), 133 L.T. 395.

As to innkeepers' liability for loss of their guests' property, see 21 HALSBURY'S LAWS (3rd Edn.) 451-460; and for cases see 29 DIGEST 4-5, 10-12.

Case referred to in argument:

Burgess v. Clements (1815), 1 Stark. 249, n.; 4 M. & S. 306; 105 E.R. 848; 29 Digest 13, 176.

Appeal from the decision of His Honour JUDGE BOMPAS, sitting at the Bradford County Court.

The plaintiffs were two members of a hockey team, and went on Jan. 18, 1908, to Bradford to play a match with the Bradford hockey team. The defendant kept the White Hart Inn at Bradford. The Bradford Hockey Club arranged for a room in which the teams could change their clothes before the play, and for the supply of tea after the match was over. The previous year the president of the Bradford Hockey Club had arranged with the defendant for the use of a room in his hotel, which he expressly selected, for two hours each Saturday afternoon during the hockey season, for a fee of 2s. 6d. a week, and at the same time he arranged that the defendant should supply tea at 9d. a head on the same afternoon, which was also paid for by the Bradford Club. This arrangement was renewed in the year 1907. On the Saturday in question the teams changed their clothes in the room in question, and left them on a seat which ran round the room. They were out at the match for about an hour and a half, and on their return found that a thief had entered the room and had taken all the watches and jewellery from the waistcoat pockets and all the money out of the trousers pockets of their clothes. The thief was never found. The plaintiffs lost jewellery and money which they estimate at £40. After dressing they had tea in another room at the hotel. They brought this action to recover the amount of their loss from the hotel keeper. The county court judge gave judgment for the plaintiffs, and the defendant appealed.

Richard Watson for the defendant.

F. J. Stanger for the plaintiffs.

Cur. adv. vult.

Dec. 8, 1908. **BIGHAM, J.**—I think this appeal must be dismissed. Two points were taken. First, that the room in which the goods and clothing had been left by the plaintiffs was, in the circumstances, not a part of the inn. That question appears to me to be more a question of fact than of law, but if it be a mere question of the legal inference to be drawn from the facts stated by the county court judge in his judgment, I think the inference which the judge has drawn is right, and I need not say more about that point, for I agree with the judge, and I agree with his reasons. The next point was that the relation of guest and landlord had not arisen between the parties so as to make the common law applicable to the case. I do not agree with that contention, and I propose to state what I conceive the law to be on this point. The responsibility of an innkeeper for the safety of a traveller's property begins the moment the relation of guest and host or innkeeper arises, and that relation arises as soon as the traveller enters the inn with the intention of using it as an inn, and is received on that basis by the landlord. It does not matter that no food or lodging has been supplied or found up to the time of the loss of the goods, and it is sufficient if the circumstances show that there is an intention on the one hand to supply and upon the other to accept such accommodation. The goods of the traveller then become liable to a lien, although the lien does not attach until a debt has been incurred, and it does not, in my opinion, matter who is to pay, it may be the traveller himself or it may be some other person. If these circumstances are found to exist, then the common law liability of an innkeeper for the safety of the goods of his guest arises. These circumstances existed, I think, in this case. The plaintiffs entered the inn, intending to use it as an inn. The landlord allowed them to come in, as in the absence of any lawful objection he was bound to do, for the purpose of using his inn. They came in intending to use the accommodation provided for dressing and undressing, and intending to be supplied with refreshment. The moment these circumstances arose, the landlord's liability for the safety of the plaintiff's clothes and goods left at the inn arose. In these circumstances it was said that as the plaintiffs were not the persons who were to pay for the accommodation and refreshment they were to receive the defendant was not liable. As I have said before, I do not think that matters, as the landlord was to be paid. For these reasons I think the appeal must be dismissed.

WALTON, J.—I agree.

Appeal dismissed.

Solicitors: *Crossman, Prichard & Co.*, for *Langhorne & Barnes*, Wakefield;
Steadman, Van Praagh & Gaylor, for *Neumann & Holmes*, Bradford.

[Reported by P. B. DURNFORD, Esq., Barrister-at-Law.]

GRAMOPHONE AND TYPEWRITER, LTD. v. STANLEY

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.J.J.), March 12, 13, 16, 27, 1908]

[Reported [1908] 2 K.B. 89; 77 L.J.K.B. 884; 99 L.T. 39;
24 T.L.R. 480; 15 Mans. 251; 5 Tax Cas. 358]

*Income Tax—Foreign company—All shares owned by English company—
Liability to tax of profits of foreign company.*

An English company, carrying on business in the United Kingdom, held all the shares of a German company registered as a joint stock company with limited liability under German law. The members of the board of management of the German company were also directors of the English company, and the members of the board of supervision of the German company were nominees of the English company. By German law, the German company was obliged to transfer to its patents account £15,000 out of its profits (which sum was equivalent to the depreciation in value of the patents owned by it) before it could divide its profits.

Held: the German company was a different entity from the English company; the fact that the whole of the shares of the German company belonged to the English company did not make the business of the German company the business of the English company; and the English company was not liable to income tax in respect of the £15,000, but only in respect of such profits of the German company as it had actually received in this country.

Notes. Considered: *American Thread Co. v. Joyce* (1912), 106 L.T. 171; *Continental Tyre and Rubber Co. (Great Britain) Ltd. v. Daimler Co., Continental Tyre and Rubber Co. (Great Britain) Ltd. v. Tilling*, [1915] 1 K.B. 893; *I.R.Comrs. v. Maxse*, [1918] 2 K.B. 715; *I.R.Comrs. v. Sansom*, [1921] 2 K.B. 492; *Singer v. Williams*, [1921] A.C. 41; *Smith, Stone and Knight, Ltd. v. Birmingham Corpn.*, [1939] 4 All E.R. 116; *Bullock (Inspector of Taxes) v. Unit Construction Co., Ltd.*, [1958] 3 All E.R. 186. Referred to: *Salmon v. Quin and Axtens*, [1909] 1 Ch. 311; *Logan v. Davis* (1911), 104 L.T. 914; *Liverpool and London and Globe Insurance Co. v. Bennett, Brice v. Northern Assurance, Brice v. Ocean Accident and Guarantee Corpn.*, [1912] 2 K.B. 41; *Smith v. Incorporated Council of Law Reporting for England and Wales*, [1914] 3 K.B. 674; *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd.*, [1916-17] All E.R.Rep. 191; *I.R.Comrs. v. Cavan Central Co-operative Agricultural and Dairy Society* (1917), 12 Tax Cas. 1; *Hood v. Magee* (1918), 7 Tax Cas. 327; *New Zealand Shipping Co. v. Thew* (1922), 8 Tax Cas. 208; *Bradbury v. English Sewing Cotton*, [1923] All E.R.Rep. 427; *Gas Lighting Improvement Co. v. I.R.Comrs.*, [1923] A.C. 723; *I.R.Comrs. v. Morgan-Grenville-Gavin*, [1936] 1 All E.R. 895; *E.B.M. Co. v. Dominion Bank*, [1937] 3 All E.R. 555; *Cameron v. Prendergast*, [1940] 2 All E.R. 35; *Russell v. I.R.Comrs.*, *I.R.Comrs. v. Russell*, [1944] 2 All E.R. 192; *Grundt v. Great Boulder Gold Mines, Ltd.*, [1948] 1 All E.R. 21.

As to company owning shares in another company, see 20 HALSBURY'S LAWS (3rd Edn.) 108 et seq.; and for cases see 28 DIGEST (Repl.) 251 et seq.

I Cases referred to:

- (1) *Salomon v. Salomon & Co., Salomon & Co. v. Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, 11.
- (2) *Apthorpe v. Peter Schoenhofen Brewing Co., Ltd.* (1899), 80 L.T. 395; 15 T.L.R. 245; 4 Tax Cas. 41, C.A.; 28 Digest (Repl.) 256, 1130.
- (3) *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame*, [1906] 2 Ch. 34; 75 L.J.Ch. 437; 94 L.T. 651; 22 T.L.R. 378; 50 Sol. Jo. 359; 14 Mans. 156, C.A.; 9 Digest (Repl.) 498, 3282.

- (4) *Kodak, Ltd. v. Clark*, [1903] 1 K.B. 505; 72 L.J.K.B. 369; 88 L.T. 155; 67 J.P. 213; 51 W.R. 459; 19 T.L.R. 243; 47 Sol. Jo. 296; 4 Tax Cas. 549, C.A.; 28 Digest (Repl.) 256, 1132.
- (5) *United States Brewing Co., Ltd. v. Apthorpe* (1898), 4 Tax Cas. 17; 28 Digest (Repl.) 255, 1127.

Also referred to in argument :

San Paolo (Brazilian) Rail. Co. v. Carter, [1896] A.C. 31; 65 L.J.Q.B. 161; 73 L.T. 538; 60 J.P. 84, 452; 44 W.R. 336; 12 T.L.R. 107; 3 Tax Cas. 407, H.L.; 28 Digest (Repl.) 253, 1119.

Frank Jones Brewing Co. v. Apthorpe (1898), 15 T.L.R. 113; 4 Tax Cas. 6, D.C.; 28 Digest (Repl.) 252, 1115.

St. Louis Breweries, Ltd. v. Apthorpe (1898), 79 L.T. 551; 63 J.P. 135; 47 W.R. 334; 15 T.L.R. 112; 43 Sol. Jo. 114; 4 Tax Cas. 111, D.C.; 28 Digest (Repl.) 255, 1129.

London Bank of Mexico and South America v. Apthorpe, [1891] 2 Q.B. 378; 60 L.J.Q.B. 653; 65 L.T. 601; 56 J.P. 86; 39 W.R. 564; 7 T.L.R. 567; 3 Tax Cas. 143, C.A.; 28 Digest (Repl.) 253, 1118.

Merscy Docks and Harbour Board v. Lucas (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 32 W.R. 34; 2 Tax Cas. 25, H.L.; 28 Digest (Repl.) 47, 179.

Colliness Iron Co. v. Black (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 29 W.R. 717; 1 Tax Cas. 287, H.L.; 28 Digest (Repl.) 143, 546.

Alianza Co., Ltd. v. Bell, [1906] A.C. 18; 75 L.J.K.B. 44; 93 L.T. 705; 54 W.R. 413; 22 T.L.R. 94; 50 Sol. Jo. 74; 5 Tax Cas. 172, H.L.; 28 Digest (Repl.) 113, 426.

Nizam State Rail. Co. v. Wyatt (1890), 24 Q.B.D. 548; 59 L.J.Q.B. 430; 62 L.T. 765; 2 Tax Cas. 584, D.C.; 28 Digest (Repl.) 128, 488.

Bartholomay Brewing Co. v. Wyatt, *Nobel Dynamite Trust Co. v. Wyatt*, [1893] 2 Q.B. 499; 62 L.J.Q.B. 525; 69 L.T. 561; 58 J.P. 133; 42 W.R. 173; 9 T.L.R. 658; 37 Sol. Jo. 717; 5 R. 564; 3 Tax Cas. 213, 224, D.C.; 28 Digest (Repl.) 207, 870.

Colquhoun v. Brooks (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 28 Digest (Repl.) 206, 866.

A.-G. v. Glendining (1904), 92 L.T. 87; 21 Digest 17, 95.

Winans v. R., [1908] 1 K.B. 1022; 77 L.J.K.B. 565; 98 L.T. 602; 24 T.L.R. 445; 52 Sol. Jo. 378, C.A.; affirmed sub nom. *Winans v. A.-G.*, [1910] A.C. 27; 79 L.J.K.B. 156; 101 L.T. 754; 26 T.L.R. 133; 54 Sol. Jo. 133, H.L.; 21 Digest 5, 1.

Ashton Gas Co. v. A.-G., [1906] A.C. 10; 75 L.J.Ch. 1; 93 L.T. 676; 70 J.P. 49; 22 T.L.R. 82; 13 Mans. 35, H.L.; 10 Digest (Repl.) 1253, 8827.

Browne v. Collins (1871), L.R. 12 Eq. 586; 36 Digest (Repl.) 558, 1177.

Orr v. Glasgow, Airdrie and Monklands Rail. Co. (1860), 2 L.T. 550; 6 Jur.N.S. 877; 8 W.R. 643, H.L.; 9 Digest (Repl.) 538, 3539.

Appeal from a decision of WALTON, J., dated Aug. 10, 1906, and reported [1906] 2 K.B. 856, on a Case stated by the Commissioners of Income Tax for St. Paul, Covent Garden. The question was as to the liability of an English company to income tax in respect of profits made by a German company in which the English company held all the shares.

At a meeting of the commissioners on Jan. 22, 1903, the Gramophone and Typewriter, Ltd., the plaintiff company, appealed against an assessment under Sched. D of the Income Tax Act, 1853, [repealed] for the year ended April 5, 1902, amounting to £79,348.

The plaintiff was an English company registered under the Companies Acts, 1862 to 1898, on Dec. 10, 1900, having a registered office at 21, City Road, in the

A city of London, formerly at 31, Maiden Lane, Covent Garden, in the city of Westminster. The memorandum of association of the plaintiff company states that the objects for which the company was established were (inter alia) to acquire and take over, as a going concern, the business and undertaking carried on at 31, Maiden Lane, London, W.C., and elsewhere, under the style or firm of "The Gramophone Co., Ltd.," and all or any of the assets and liabilities of the proprietors of such business and undertaking.

B The Deutsche Gramophon Aktiengesellschaft (the German company) was registered on Jan. 30, 1900, and among those who united in forming it were the Gramophone Co., Ltd., named in the memorandum of association of the plaintiff company. The German company was constituted on Jan. 30, 1900, under a deed of association, a joint stock company with limited liability in conformity with the C German law, with its head office in Berlin.

Article 213 of the German Code provided:

"Shareholders cannot demand back their money, they have only a right during the duration of the company to net profit, unless such distribution is prohibited either by the law or by the articles."

D The constitution, or administration as it is called, of the German company provided:

"The official bodies of the company are (a) the general meeting of shareholders, (b) the board of supervision, (c) the board of management."

The balance-sheet and distribution of profits were to be prepared and made in accordance with the following articles:

E "The business year comprises the period from Sept. 1 to Aug. 31 of the following year. The first business year extends from the day of the registration of the company to Aug. 31, 1900. The board of management has to determine every year, with the sanction of the board of supervision, how much shall be written off annually from the book value of the immovable and movable property. With regard to the depreciation of the patents, at least one-third of the working profit remaining after deduction of all the business expenses shall, before anything is written off the immovable property, be devoted to writing off amounts on patents or similar accounts. The balance-sheet is to be made up to Aug. 31. The net profit remaining after writing off all depreciation and setting aside all reserves and carrying forward any sum to new account shall be distributed as follows: (i) In the first place the shareholders shall receive a dividend up to 4 per cent. on the paid-up share capital. (ii) The board of supervision shall then receive a percentage of 6 per cent. of the remainder. (iii) The rest shall be distributed as a further dividend."

F The German company in making up its balance-sheet stated its total profits at £79,348 10s. 10d., but of that amount £15,000 was, in accordance with the requirements of German law, transferred to a depreciation fund.

G The plaintiff company now held all the shares of the German company, and the members of the board of management of the German company were also directors of the plaintiff company, and the members of the board of supervision of the German company are nominees of the plaintiff company. The directors of the I plaintiff company, in accordance with the requirements contained in the articles of association of the same company, presented their report to their shareholders for the year ended June 30, 1901. From that report a total credit balance appeared of £79,348 10s. 10d., which balance was appropriated in manner set forth in the report, and the whole of which balance was included in the assessment now appealed against. It was admitted on the hearing of the appeal that the whole of the £79,348 10s. 10d. was liable to be taxed under Sched. D except as to £15,000, part thereof, a sum stated in the report to have been transferred "to patents account, Germany, in accordance with German law." This £15,000, transferred

to patents account to meet the requirements of the German law, concerned the plaintiff in respect of their interest in the German company. A

In the report of the directors of the plaintiff company the whole of the profits of the German company were brought in in one sum, but the board of management of the German company had set aside and transferred to their patents account the sum of £15,000, which amount was equivalent to the deterioration during the year of the value of the patents purchased by the German company, since these patents at the time of the constitution of the German company had three years to run. This sum of £15,000 was provided out of earnings of the German company. It was contended on behalf of the plaintiff company (i) that the sum of £15,000 transferred to the patents account, in conformity with the German law by the German company, was not chargeable with income tax, (ii) that the sum of £15,000 was not profits of the plaintiff company, inasmuch as there was no resolution in general meeting of the German company for the distribution of this sum among the shareholders, and by German law this sum could not be so distributed; and (iii) that the £15,000 was not profits or gains at all within the meaning of the Income Tax Acts, either of the German company or the plaintiff company. B C

The commissioners held (i) that the English company controlled the German company from England, and that the head and seat and directing power of the plaintiff company were at the plaintiff's registered office in London; (ii) that the entire business of the German company was carried on by and was the business and property of the plaintiff company, and that the profits of the German company were the profits of the plaintiff company, and that the £15,000 was profits of the plaintiff company within the meaning of the Income Tax Acts, and further, that all the profits of the German company should be assessed without regard to the mode of application of such profits, and they confirmed the assessment. D E

WALTON, J., held there was no evidence that the business of the German company was the business of the plaintiff company, as the fact that the plaintiff company had become the owner of all the shares in the German company did not extinguish the German company, and having regard to the judgment of the House of Lords in *Salomon v. Salomon* (1), the fact that the shares of the German company all belonged to the plaintiff company did not make the German company a mere trustee or agent for the plaintiff company or for the shareholders in the plaintiff company. His Lordship accordingly allowed the company's appeal. The surveyor of taxes appealed from this decision. F

The Attorney-General (Sir W. Robson, K.C.) and William Finlay for the Crown. Danckwerts, K.C., and R. Vaughan Williams for the company. G

Cur. adv. vult.

March 27, 1908. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—This is an appeal from the judgment of WALTON, J., who held that the plaintiff company, whom I shall call the English company, are not liable to pay income tax in respect of £15,000, part of the profits of a German company, not distributed in the way of dividend or transmitted to England, but written off by the German company in Germany to meet the depreciation of patents. The question arises on a Case stated by the commissioners. It is undoubtedly true that, if the commissioners find a fact, it is not open to this court to question that finding unless there is no evidence to support it. If, however, the commissioners state the evidence which was before them, and add that on such evidence they hold that certain results follow, I think it is open, and was intended by the commissioners that it should be open, to the court to say whether the evidence justified what the commissioners held. I am satisfied that the Case stated by the commissioners falls under the latter head. They have carefully stated the evidence, but they have not, in my opinion, to use the words found in one of the authorities, "stated the appellants out of court." I may add that the arguments before WALTON, J., proceeded on this footing. H I

A The German company was established in Germany in 1900 in accordance with German law. It was undoubtedly a company with several shareholders, who brought in considerable capital. One of those shareholders was an English company, whose undertaking was subsequently acquired by the present English company. At some date, which is not stated, the English company acquired all the shares of the German company, and I assume in favour of the Crown that this

B event had happened before the material dates. The fact that an individual by himself or by his nominees holds practically all the shares in a company may give him the control of the company in the sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the directors or make the property or assets of the company his as distinct from the corporation's. Nor

C does it make any difference if he acquires not practically the whole, but absolutely the whole of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more. I do not doubt that a person in that position may cause such an arrangement to be entered into between himself and the company as will suffice to constitute the company his agent for the purpose of carrying on the business, and thereupon the

D business will become, for all taxing purposes, his business. Whether this consequence follows is in each case a matter of fact. In the present case I am unable to discover anything in addition to the holding of the shares which in any way supports this conclusion. The German company was not at first, and there is no evidence that it has ever become, a sham company or a mere cloak for the English company. It has its board of management and its board of supervision as required

E by the German law. Its accounts are made out in accordance with German law. On the other hand, the English company has its board of directors, some of whom are on the German board. It has a proper account and a balance-sheet in which its interest in the German company is described accurately as so many shares in the German company, and the gross profits of the German company are in no way brought into the profit and loss account of the English company. Against this the

F only thing to be said is that the chairman of the English company made a foolish speech in which he treated the gross profits of the German company as profits of the English company, but the dividend declared by the English company did not proceed on this footing. In my opinion, it would be wrong to attribute to the loose and inaccurate language of the chairman a force sufficient to override the formal acts of both the English company and the German company and all the other

G circumstances of the case. The Crown can, in my opinion, only succeed by making out that the German company was merely the agent of the English company as principal in carrying on the business. Nothing short of this would suffice, and I can see nothing to justify such a conclusion. We have been greatly pressed by *Apthorpe (Surveyor of Taxes) v. Peter Schoenhofen Brewing Co., Ltd.* (2). But when the facts of that case are looked into it is apparent that the Chicago company

H was a mere form kept up to satisfy the American law and that the three American directors accepted the position of delegates of the English company. The officers and servants of the American company were appointed and dismissed by the English company, and the working capital required for carrying on the business was provided by the English company. In other words, the relation of principal and agent did exist in that case. If an action was brought by a creditor of the

I German company against the English company as undisclosed principal, and the only materials before the jury were those found in the Case stated by the commissioners, I think it would be the duty of the judge to nonsuit the plaintiff. If it is said that the relation between the companies was that of trustee and cestui que trust rather than that of agent and principal, I think it is equally clear that no action could be maintained on that footing. In my opinion the decision of *WALTON, J.*, was perfectly right. The English company is only liable to pay income tax on such portions of the profits of the German company as have been received in this country. The appeal must be dismissed with costs.

FLETCHER MOULTON, L.J.—I am of the same opinion. Much of the law applicable to the question before us is not open to reasonable doubt. The holding of shares in a foreign corporation entirely situated and carrying on business in a foreign country comes unquestionably under r. 5. The English holder is liable only for such profits as he actually received in this country by way of dividend, and is in nowise responsible for what the actual profits of the corporation itself shall have been nor whether according to English law a larger amount might have been divided as dividend. The profits of a corporation are not profits of any business carried on by him in a foreign country, because the individual corporator does not carry on the business of the corporation. He is only entitled to the profits of that business to a certain extent freed and ascertained in a certain way depending on the constitution of the corporation and his holding in it. This legal proposition that the legal corporator cannot be held to be wholly or partly carrying on the business of the corporation is not weakened by the fact that the extent of his interest in it entitles him to exercise a greater or less control over the manner in which that business is carried on. Such control is inseparable from his position as a corporator and is a wholly different thing both in fact and in law from carrying on the business himself. The directors and employees are not his agents, and he has no power of giving directions to them which they must obey. It has been decided in this court in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuningham* (3) that in an English company, by whose articles of association certain powers are placed in the hands of the directors, shareholders could not interfere with the exercise of those powers by the directors even by a majority at a general meeting. Their course is to obtain the requisite majority to remove the directors and put persons in their places who agree to their policy. This shows that the control of individual corporators is something wholly different from the management of the business itself. Now, is this principle less true when the holding of the individual corporator is so large that he is able to override the wishes of the other corporators in matters relating to the control of the business of the company? The extent but not the nature of his power is changed by the magnitude of his holding. It is not open in this court to dispute this proposition of law, inasmuch as in *Kodak, Ltd. v. Clark* (4) this court laid down that it applied to a case where the holding of an English company in a foreign corporation amounted to 98 per cent. of the capital of the corporation. But, apart from this decision, which is binding on us, I am of opinion that it is sound law. I can see nothing changed in the relationship of the individual corporator to the business of the corporation by the fact that he is a large holder of the stock.

The present case requires us to examine a more difficult question—viz., that of an individual corporator who owns the whole of the stock of the corporation. According to English law, it is not possible for an individual corporator to be the legal owner of the whole of the stock of a company so as legally to be the sole shareholder, as the company would by English law cease to exist if the number of corporators fell below a certain standard. But, according to German law, no such limitation appears to exist, and in the present case the respondents acquired the whole of the shares of the German Gramophone Co., and it is in consequence of such acquisition that the present dispute arises. Treating it as an abstract proposition of law, I am of opinion that the acquisition of the whole of the shares of the corporation by one individual does not of itself alter the nature of his relationship to the corporation. His *de facto* control when he possesses 98 per cent. is probably complete from a practical point of view, and, although it is no doubt rendered more complete in theory when he possesses himself of the whole of the shares, it is still of the nature of a control exercised by corporators over the corporation, and does not make him and the corporation in any sense identical. The directors of the corporation do not become his agents. Their duties are still controlled by the rules and constitution of the corporation itself. Nor is this consideration one of theoretical law only. The fact that the whole of the shares of the corporation are held by one individual at one moment by no means implies that

A they will be so at a future time, and the responsibility of the directors and officers of the corporation is to the corporation itself, whatever be its composition at any moment as to number of corporators. It would be no excuse to them when called to account in the regular way and at the regular periods according to the constitution of the corporation to plead that they obeyed the directions of the corporators at a particular moment (unless given in the manner prescribed by the constitution

B of the corporation), and on the strength of such directions failed to obey the corporate rules. The German company was not in its inception a "one man" company. It was formed by the coalition of three firms or companies, of which one was a predecessor of the present English company. The capital consisted of 1,000 shares, of which 540 were held by the then existing English company and the other 460 were held independently. Although, therefore, from the first the

C English interest in the company was what is often called a "controlling interest," there was a substantial holding in the company in other hands, so that there can be no doubt that it was a bona fide German company, in which the English interest was that of holding shares alone. From the time of its formation to the date with which we have to deal it has been carried on, so far as appears, in a strictly regular manner as a German company. It possesses German statutes, the requirements of

D which have been punctiliously complied with by the governing body of the company. The balance-sheets for each year are before us, and they show that the management have put aside the sums which they were required to put aside for depreciation by German company law, and they have also put aside sums in respect of the depreciation of the patents which were in accordance with the provisions of the statutes of the company, though larger than the minimum prescribed thereby. Dividends

E have been regularly declared and the balance carried forward. It is further to be remarked that there is no trace of anything like the relationship of agency between the German company and the English company at any part of its existence. The proceedings at the general meetings are quite regular, and in some cases deal with the price at which goods are purchased by the German company from the English company. They regulate the salaries to be paid to the German Aufsichtsrath, or

F board of supervision, and it is evident from the accounts that the German Vorstand, or management, was paid an amount based on the result of the trading. Indeed, there has been no suggestion from first to last that the German company has not been regularly carried on as though it were an independent company (except, perhaps, as to one matter with which I shall presently deal), and it seems to me clear that at any time the English company, which now possesses the whole of the shares

G of the German company, might have sold any proportion of them to independent corporators, and the latter would have found the affairs of the German company in strict order just as though it had been carried on throughout as a company in which the shares were held in many hands.

During the argument counsel for the Crown pressed on us certain decisions with regard to companies formed in England to purchase breweries in the United States

H of America, and more especially *Apthorpe v. Peter Schoenhofen Brewing Co., Ltd.* (2) and *United States Brewing Co., Ltd. v. Apthorpe* (5). These cases are very valuable as illustrating the principles to be applied in cases of businesses carried on in foreign countries in which English companies are interested; but there is a danger in regarding them as mainly turning on abstract principles or laying down general rules. In almost all the cases special facts are to be found which greatly

I influenced the decisions of the courts, and, as they are confessedly cases that are near the border line, it is impossible to say that the ultimate decision of the court was not arrived at by reason of these special facts. In both of the above cases I find that the English company was formed for the specific purpose (among other things) of purchasing the foreign undertaking, and that its purpose was carried out by a direct sale of the property, plant, and business of that foreign undertaking to the English company. It is true that in both these cases, in order to evade the laws in force in the State as to the holding of certain types of property by foreign corporations, substantially the whole of the shares of the foreign company were

simultaneously transferred to the English company for the purpose of keeping up the fiction that the American property still belonged to the American company. But it is evident from the facts stated in the Special Case that the business was carried on by means of the plant and property of the English company, and with working capital provided by it. It was far more than merely the holder of the shares in the American company. In my opinion, in both these cases the persons who managed the American business after it had been transferred to the English company were in the position of agents of the English company, and would have been accountable to it in that capacity. In my opinion no relation of this kind is shown to exist in the present case. The English company has no relation to the German company, except as the holder of its shares. In order to bring the present case within these decisions counsel for the Crown relied very strongly on the language of the finding of the commissioners in the present case, and he contended that it must be looked on as a finding of fact binding on all the courts, and that in other words the commissioners had "stated the appellants out of court" by these findings. In my opinion the findings were not intended to have that effect, and it would have been very unfair of the commissioners thus to have shut out the plaintiff company from the right to take the opinion of a superior court. The point of law which they desired to raise was whether there was any such evidence as would justify a jury in coming to the conclusions expressed in the commissioners' findings, and an examination of the case convinces me that the commissioners intended to put before the court the whole of the evidence which they had before them, so that the court might judge whether it justified those findings.

The only special circumstances on which counsel for the Crown relied beyond the fact that the English company was the holder of the whole of the shares of the German company are to be found in the speech delivered by the chairman of the English company at a general meeting of the shareholders, and in a report to those shareholders which was put before them at that meeting. In my opinion it is impossible to look on such statements as altering the legal position of an English company, or creating any estoppel against it. The first set of references reduces itself to an expression of opinion that the profits of the German company belonged to the English company, and were available for distribution. The passage is unquestionably incorrect, because the whole of one of the items mentioned and part of another could not have been used for distribution without violating the German law, to which the German company was, of course, subject. But, apart from this, it is only the expression of a layman, for whose views the company is not responsible, nor could the expression of those views on such an occasion give any rights to the Crown. The most important part of the second paragraph relied on reads as follows:

"Those two resident proprietors in Germany would be content with a nominal sum in future, for they had practically nothing to do, the whole of the shares of the German company being held by this company."

On examining the passage, it is clear that in using the word "directors" the speaker referred to members of the Aufsichtsrath or committee of supervision, and he is referring to the arrangement by which the German company had fixed £200 as the total remuneration of the five members of the Aufsichtsrath to be divided amongst them in such proportions as they agreed amongst themselves. To my mind, this is no indication that the English company was anything more than a holder of the shares of the German company. It was natural that they should put on the German board of supervision men who were directors of the English company, and on the English board the German members of the board of supervision, and that the functions of the German board of supervision would be reduced to a minimum by the unity of holding. But I can see nothing in this to indicate that the German company was not carrying on a bona fide business under German management in all respects according to German company law, and that its property and capital in fact as well as in form belonged to such company.

- A** The other piece of evidence relied on by counsel for the Crown was the report of the directors to the company, which was presented at the same meeting. This speaks of the profits of the German company and of the holding of 74 per cent. of the French company, and no doubt adds them to the credit balance of the trading of the English company in order to obtain the total credit balance. But it goes on to make substantially the same deductions that are made in the balance-sheet of the German company, so that the objection is really only to the form of the statement and not to its substance. But there is nothing in this statement which indicates any intention to interfere with the independence of the German company, and I think that both it and the speech of the chairman are wholly insufficient to distinguish this case from a simple case in which the whole of the shares of a foreign company carrying on an independent business are held by an English company.
- C** As I have said, this is insufficient in itself to make the business of the foreign company a part of the business of the English company; the shares remain, in my opinion, possessions in that foreign country, and come under the fifth case. Duty, therefore, is payable on so much of the profits of the German company as are remitted to the English company by way of profits or dividend, and the £15,000, which unquestionably was not so remitted, is not chargeable with duty. I am therefore of opinion that this appeal should be dismissed.
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BUCKLEY, L.J.—I am of the same opinion, and, after the judgments which have been given, need do no more than state shortly my reasons in my own words. The question is, I think, one of fact and one on which we are not concluded by any findings of fact on the part of the commissioners. The question of fact is whether the business in Germany is carried on by the plaintiff company. If it is, the defendants do not dispute that the Attorney-General is right. If, on the contrary, the German business is not carried on by the English company, then equally the Attorney-General cannot dispute but that the English company is assessable only on the dividends which it may receive on its shares in the German company. In order to succeed the Attorney-General must, I think, make out either, first, that the German company is a fiction, a sham, a simulacrum, and that in reality the English company and not the German company is carrying on the business; or, secondly, that the German company, if it is a real thing, is the agent of the English company.

G As regards the former of these, there are no facts at all to show that the German company is a pretence. It was formed in January, 1900, by the union of three other companies, each of which brought in substantial properties, and of two individuals. It is duly constituted and governed according to German law, and there is no ground whatever for saying that it is other than a real German corporation carrying on business in Germany under circumstances under which the company and its officers are amenable to German law and with a view to the acquisition of profit. The only remaining question, therefore, is whether the German company is agent of the English company, whether the English company is really carrying on the business and is employing the German company to do so on its behalf. On this point the Attorney-General relies principally on the fact that, as stated in para. 7 of the Case, the plaintiff company now holds all the shares of the German company. In my opinion, this fact does not establish the relation of principal and agent between the English company and the German company. It is so familiar that it would be waste of time to dwell on the difference between the corporation and the aggregate of all the corporations. I may point out the following considerations as bearing on the question whether the possession of all the shares is evidence of agency. Suppose that during the year whose accounts are under review, the plaintiff company had held no shares at all in the first six months, and had held all the shares in the last six months; or, suppose that, having held all the shares but ten to-day, it became the holder of all to-morrow, and again parted with ten the next day, it cannot seriously be suggested that each time one person becomes

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the holder of all the shares, an agency comes into existence which dies again when he parts with some of them. A

Further, it is urged that the English company, as owning all the shares, can control the German company in the sense that the German company must do all that the English company directs. In my opinion this again is a misapprehension. This court decided not long ago in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (3) that even a resolution of a numerical majority at a general meeting of the company cannot impose its will on the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals, they are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals; of course, the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business of the corporation. In my opinion, they are not. To say that they are involves a complete confusion of ideas. B C D

The inquiry may be put in another form, by asking who would be liable on the contract of the German company—obviously the German company—and not those who are the holders of its shares.

Another test to be applied may be whether the English company has ever, in fact, interfered with and controlled the German company. The Case contains no statement at all that they had ever done so. The German company is, and must be, the actor in carrying on the business, and none the less if the English company owns all the shares. The fact is that from (a) the control of the business which no doubt is in the power of the corporators by taking proper steps for the purpose, to (b) carrying on the business, is a long jump. The argument of the Attorney-General seeks to make the two things identical. Much reliance was placed in argument on the form of the English company's report and accounts. In my mind nothing turns on it. It would be illusory to found on the statement in the report the conclusion which the Attorney-General desires, shutting one's eyes at the same time to the form of the balance-sheet. If the profits of the German company were profits earned in a business carried on in Germany by the English company, they ought to have been included in the balance-sheet and certified by the auditors at its foot. They were not so included, but were made the subject of a footnote which separates them from the profits of the English company to which the auditors had spoken. Holding this to be a question of fact, it is not useful, I think, to deal at any length with the cases. I content myself by using for the purposes of illustration and contrast *Apthorpe v. Peter Schoenhofen Brewing Co., Ltd.* (2) and *Kodak v. Clark* (4). The point in *Apthorpe v. Peter Schoenhofen Brewing Co., Ltd.* (2) was that the English company bought all the shares but three, and (so far as it was possible under those circumstances) all the property, plant, and business of the American company. The agreement between the two companies provided that the American company should be kept on foot, and that the American company were to do all things required for vesting the management of the American company in the English company. The English company raised and found the working capital, and the board of directors of the English company were to have the entire right of control and entire directing power over the affairs of the American company. It was on these facts as analysed in the judgment of A. L. SMITH, L.J., and indicated by the other members of the court, that they held that the English company was really carrying on the American business. ROMER, L.J., at the commencement of his judgment negatived the case as being one in which the English company merely occupied the position of owning all the shares. In *Kodak, Ltd. v. Clark* (4) by way of contrast the English company owned 98 per cent. of the shares. It is true E F G H I

A that they did not own them all, but that was not the ground of the decision. The ground was that, while the English company as holding 98 per cent. of the shares no doubt had the control, they had it only as shareholders, and it was the corporation and not the shareholders who were carrying on the business.

B To my mind nothing results from the fact that the two managers of the German company are directors of the English company. I have no doubt that the English company, in a popular sense by its ownership of the shares and by the person of those who conduct affairs in Germany, has an effective control over the German business. That to my mind is not the question. The question is whether the English company is carrying on the business of the German company. In my judgment it is not. On these grounds I think this appeal fails and should be dismissed with costs.

C Solicitors: *Broad & Co.; Solicitor of Inland Revenue.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

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E **R. v. GOVERNOR OF STAFFORD PRISON.** Ex parte EMERY

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Jelf, JJ.), March 23, 1909]

[Reported [1909] 2 K.B. 81; 78 L.J.K.B. 629; 100 L.T. 993;
73 J.P. 284; 25 T.L.R. 440; 22 Cox, C.C. 143]

F *Criminal Law—Trial—Deaf mute—Incapacity to plead or understand proceedings at trial—Jurisdiction to order prisoner to be detained during His Majesty's pleasure—Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), s. 2.*

G A prisoner who was indicted for a felony was found to be deaf and dumb, and to be unable to read or write. On being arraigned he stood mute, and a jury impanelled and sworn for the purpose found that he was mute by the visitation of God. The jury were then sworn again to try the question whether he was capable or incapable of pleading and of following the proceedings, and they found that he was incapable of pleading to and taking his trial upon the indictment and of understanding and following the proceedings by reason of his inability to communicate with or be communicated with by others. The judge thereupon ordered that the prisoner be treated as insane and kept in custody, under s. 2 of the Criminal Lunatics Act, 1800, until His Majesty's pleasure should be known.

H **Held:** the finding of the jury amounted to a finding of insanity within s. 2, and the judge had jurisdiction to order, and had properly ordered, the prisoner to be kept in custody during His Majesty's pleasure.

I **Notes.** Considered: *R. v. Roberts*, [1953] 2 All E.R. 340. Referred to: *R. v. Lee Kun*, [1914-15] All E.R.Rep. 603; *R. v. Podola*, [1959] 3 All E.R. 418.

As to accused standing mute on arraignment, see 10 HALSBURY'S LAWS (3rd Edn.) 401 et seq.; and for cases see 14 DIGEST (Repl.) 278 et seq. For the Criminal Lunatics Act, 1800, s. 2, see 5 HALSBURY'S STATUTES (2nd Edn.) 593-594.

Cases referred to:

(1) *R. v. Steel* (1787), 1 Leach, 451; 14 Digest (Repl.) 279, 2481.

(2) *R. v. Pritchard* (1836), 7 C. & P. 303; 14 Digest (Repl.) 278, 2472.

- (3) *R. v. Dyson* (1831), 1 Lew. C.C. 64; 7 C. & P. 305, n.; 14 Digest (Repl.) 278, A
2471.
(4) *R. v. Berry* (1876), 1 Q.B.D. 447; 45 L.J.M.C. 123; 34 L.T. 590; 40 J.P. 484;
13 Cox, C.C. 189, C.C.R.; 14 Digest (Repl.) 278, 2476.

Rule Nisi for a writ of habeas corpus to the governor of Stafford Prison to bring before the court one Frederick Emery.

The prisoner, Frederick Emery, was indicted at the Stafford Assizes for felony. He was stone deaf, and had been so for a number of years, and he could neither read nor write; there was no method of communicating with him, and no method by which he could be made to follow the evidence at the trial. Upon being arraigned before CHANNELL, J., he stood mute, and a jury was then impanelled and sworn to try the question whether he stood mute of malice or by the visitation of God, and the jury found that he stood mute by the visitation of God. The jury were then sworn a second time to try the question whether he was capable or incapable of pleading to the indictment and following the proceedings at the trial, and the jury found that he was incapable of pleading to and taking his trial upon the indictment, and was unable to follow or understand the proceedings by reason of his inability to communicate with others or to be communicated with by others. Thereupon CHANNELL, J., ordered and adjudged that Emery should be treated as insane, and should be kept in strict custody until His Majesty's pleasure respecting him should be known, and he was removed to and was in custody in Stafford Prison. An order nisi for a writ of habeas corpus was then obtained, with a view to Emery's discharge from custody.

By s. 2 of the Criminal Lunatics Act, 1800 :

"If any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, or if upon the trial of any person so indicted such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known. . . ."

S. A. T. Rowlatt (*W. Allen* with him), for the governor of the prison, showed cause.

S. R. C. Bosanquet, for the prisoner, in support of the rule.

LORD ALVERSTONE, C.J.—I am glad this case has been argued, because it enables us to re-declare what the position of the matter is, and to point out that my brother CHANNELL, with the advice of my brother JELF, followed what was absolutely the right course. In my opinion, no objection at all can be taken either to the ultimate order made, or to the form and course which the proceedings took.

I rather understood, when the case was first brought to our attention, that there had been a combined direction to the jury, both upon the question of the man being mute and upon the question of his inability to plead. We are now told by counsel that that is not so. The first step taken was, when the man was not able to answer, that the issue was left to the jury as to whether he was mute by the visitation of God, or of malice; and the jury found that he was mute by the visitation of God. Subsequently the jury were sworn to deal with the other matter which arose—namely, the ability of the prisoner to plead. I mention that because I think the practice is correctly stated in the books of authority, though there have been some slight variations in one or two—namely, that if the only finding of a jury is that a man is mute by the visitation of God, the plea of not guilty should be entered by the court, and the trial must proceed in the ordinary way. I refer to that because it is obvious that a prisoner may be perfectly able to defend himself although he may be mute by the visitation of God.

A I now come to the important point which is raised in this case. The jury found that Frederick Emery was incapable of pleading to and taking his trial upon the indictment and of understanding and following the proceedings by reason of his inability to communicate with or be communicated with by others, and it was so found by a jury lawfully impanelled for that purpose. On those findings of the jury, CHANNELL, J., made the order that he should be detained in custody until His Majesty's pleasure respecting him should be known. The point which we have to consider upon this application for a writ of habeas corpus is whether that order was properly made and whether the prisoner can be detained under that order. It has been contended by counsel for the prisoner that the order is bad, and that no such order can be made unless there is a finding by the jury that the prisoner is insane; and that a finding by the jury that he is incapable of pleading, or understanding, or being communicated with, is insufficient. I should be very sorry if we were driven to adopt that argument. I cannot conceive anything which might work greater injustice than that a man should be put upon his trial and, unless the jury find him to be insane, should be punished as a criminal, or should be released upon the ground that there was no power to make an order to detain him. In the one case, it might work great injustice to an insane man; in the other case, it might lead to the alarming result that, whatever the man's antecedents were, he must be let loose upon the world.

It seems to me that when we consider the great weight of opinion and the decisions of judges of the greatest experience and authority in the criminal law, we ought not to overrule the practice which has been established for something like one hundred years, and which is so absolutely in accordance with common sense.

E There is *R. v. Steel* (1), in which I have before me the original note of the learned judges. The prisoner, Elizabeth Steel, was tried in 1787 at the Old Bailey for larceny. She was totally deaf, and could neither read nor write; and the jury being charged to inquire whether she stood mute wilfully or by malice, or by the visitation of God, after hearing the evidence, found that she was mute by the visitation of God. Then there seems to have been some difficulty as to the practice; and, F HALE, C.J., and other authorities having been referred to, the judges resolved that the prisoner should be tried, and that the judge do plead for her. That was in 1787, before the Criminal Lunatics Act, 1800, was passed. Therefore the first difficulty as to what was to happen with regard to the trial was solved by the resolution of the judges, which is a very great authority, and one that would be recognised in this court as quite as binding upon us as a decision of the Court for Crown Cases Reserved, as has been pointed out in previous cases in this court. G Then the Criminal Lunatics Act, 1800, was passed, s. 2 of which provided: [His LORDSHIP read s. 2 and continued:] It is perfectly true, as counsel for the prisoner pointed out, that the words "inability to plead," "inability to understand the proceedings," "inability to communicate with any person," are not mentioned in the statute. The only words mentioned are: "Shall be found to be insane, so that such person cannot be tried upon such indictment." We are asked to say that a distinct decision of the Court for Crown Cases Reserved upon this point is not binding upon us. It is perfectly true that a decision of the judges on assize would not be binding upon us, though, at the same time, in such a matter I, speaking for myself, would be very unwilling to upset the practice, which seems a most reasonable one, where H it had been followed by judges of great criminal experience more than fifty years ago. I

In *R. v. Pritchard* (2), ALDERSON, B., dealing with the actual mode of trial to which I have already referred, in addressing the jury, said (7 C. & P. at pp. 304, 305):

"The question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge. A similar case, that of *R. v. Dyson* (3) occurred before PARKE, J.,

on the Northern Circuit, and he adopted the course which I shall now follow. There are three points to be inquired into: First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence—to know that he might challenge any of you to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind. It is not enough, that he may have a general capacity of communicating on ordinary matters. The case I have mentioned was considered by several of the judges, and they approved of the course adopted by PARKE, J."

R. v. Dyson (3), to which he referred, was tried before PARKE, J., where PARKE, J., having referred to HALE'S PLEAS OF THE CROWN, vol. 1, p. 34, directed the jury (7 C. & P. at p. 307),

"that if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane."

It is now said for the prisoner that that is wrong.

It seems to me that when we look at the words in s. 2 of the Act of 1800, "so that such person cannot be tried upon such indictment," we ought, for the purpose of construing the words "sane" and "insane," to consider as material the question whether the prisoner can properly be tried upon the indictment; and we ought not to say that ALDERSON, B., and PARKE, J., and the other judges who have considered this matter, had come to a perfectly wrong conclusion as to the test of sanity or insanity for the purpose of this particular statute. I would only say that I have not been able to find in any of the books that I have consulted any doubt thrown upon the views expressed by those learned judges, and acted upon by them in consequence of their view.

The point arose again almost as distinctly in *R. v. Berry* (4), a decision of the Court for Crown Cases Reserved, consisting of KELLY, C.B., LUSH, J., POLLOCK, B., and FIELD and LINDLEY, JJ. The jury there found that the prisoner Berry was incapable of understanding, and, as a fact, had not understood, the nature of the proceedings at the trial. The question put to the jury by the chairman of the quarter sessions was

"whether, in their opinion, the prisoner was capable of understanding, and had understood, the nature of the proceedings,"

and the jury found the prisoner guilty on the evidence and found that he was not capable of understanding, and, as a fact, had not understood, the nature of the proceedings. The distinct point arose in that case. The question there was one, not of insanity from a general point of view, but of insanity from the point of view of understanding the proceedings. The conviction, it is true, was clear, but the question was raised what sentence the prisoner could have; and thereupon the court ordered that the prisoner should be kept in custody under s. 2 of the Criminal Lunatics Act, 1800, until Her Majesty's pleasure should be known, and that, as they were satisfied that the prisoner had not, from defect of his faculties, intelligence enough to understand the nature of the proceedings against him, he ought to be found to be insane. LUSH, J., speaking of a prisoner being of non-sane mind, said (1 Q.B.D. at p. 451):

"I understand the finding of the jury, that the prisoner was not capable of understanding, and, as a fact, had not understood, the nature of the proceed-

A ings, to mean that the prisoner has not sufficient intellect to understand the nature of the proceedings."

Upon that ground they quashed the conviction. Thereupon counsel for the prisoner, who had very considerable experience in these matters, at once took a point which counsel for the prisoner in the present case has re-discovered for the purposes of this case, and he then contended that there was no finding of the jury on which the prisoner could be remitted to gaol under the statute. Then we find KELLY, C.B., saying (1 Q.B.D. at p. 451):

"Yes; for they have actually found that he is not capable of understanding, and has not understood, the nature of the proceedings; which, in point of law, amounts to a finding of insanity."

C The prisoner was then ordered to be detained during Her Majesty's pleasure.

It seems, therefore, that CHANNELL, J., in adopting this course, had followed the practice which was recognised and adopted by most distinguished judges fifty or sixty years ago. He has only applied the test, which is a very reasonable test, as to sanity or insanity, that insanity for the purpose of an order under this section must mean at least a failure of intellect of such a character as will prevent the prisoner from following the proceedings—the accusations, the evidence, and the case against the prisoner who has been charged. In making this order, CHANNELL, J., has made an order which has been made in previous cases, and which, in my opinion, is in accordance with common sense and with the proper administration of the criminal law. I think, therefore, that there is not the slightest ground for saying that the prisoner must be released, as I think that the order for his detention is a perfectly proper order.

D
E **DARLING, J.**—I am of the same opinion. The order which was made after the trial of the prisoner states this:

F "Whereas upon his arraignment the said Frederick Emery is found to be mute by the visitation of God by a jury lawfully impanelled for that purpose."

So far the proceedings are perfectly regular. Then the jury were asked another question, and this is their finding in answer to it:

G "And whereas upon his arraignment the said Frederick Emery is also found to be incapable of pleading to, and taking his trial upon, the indictment, and of understanding and following the proceedings by reason of his inability to communicate with and be communicated with by others, by a jury lawfully impanelled for that purpose."

Then the order proceeds:

H "It is thereupon ordered and adjudged by this court that the above-named Frederick Emery be treated as non-sane, and kept in close custody until His Majesty's pleasure be known."

I The point made by counsel for the prisoner really is that there is no finding that this man is non-sane. It seems to me that there is. This finding is not merely—as he argued—a finding that because he is a deaf mute, or mute by the visitation of God, he cannot communicate or be communicated with, although he may be perfectly able to understand all that is being done if only he could make himself understood by other means; but it is a distinct finding that he is incapable of understanding the proceedings. It is also a finding that he is incapable of following the proceedings. It is also a finding that he is incapable of making his own view known, and of communicating his view. In these circumstances, it seems to me that there is a sufficient finding so as to bring the case within the decisions which my Lord has particularly cited. It is not a case, as was assumed, of an

absence of any finding that he was a person incapable of understanding the proceedings. If there had not been that finding, I should have had very great difficulty about the matter; but there is that finding. I think, therefore, that this case comes within the decisions to which attention has been directed.

JELF, J.—I am of the same opinion.

Rule discharged.

Solicitors: *The Official Solicitor; Solicitor to the Treasury.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

R. v. ETTRIDGE

[COURT OF CRIMINAL APPEAL (Darling, Walton and Pickford, JJ.), February 27, March 5, 1909]

[Reported [1909] 2 K.B. 24; 78 L.J.K.B. 479; 100 L.T. 624;
73 J.P. 253; 25 T.L.R. 391; 53 Sol. Jo. 401; 22 Cox, C.C. 191;
2 Cr. App. Rep. 62]

Criminal Law—Appeal—Sentence—Plea of Guilty at trial—Power of court to substitute sentence—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (3).

By s. 4 (3) of the Criminal Appeal Act, 1907: "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

Where there is an appeal against sentence in a case where the appellant at the trial has pleaded Guilty to the charge, the court has power to disregard the words "by the verdict" in s. 4 (3) of the Criminal Appeal Act, 1907, and may, under that section, substitute one sentence for another.

R. v. Davidson (1) (1909), 100 L.T. 623, not followed on this point.

Notes. Followed: *R. v. Woodman* (1909), 2 Cr. App. Rep. 67.

As to appeals against sentence, see 10 HALSBURY'S LAWS (3rd Edn.) 541-542; and for cases see 14 DIGEST (Repl.) 606-607. For the Criminal Appeal Act, 1907, s. 4 (3), see 5 HALSBURY'S STATUTES (2nd Edn.) 929.

Cases referred to:

- (1) *R. v. Davidson* (1909), 100 L.T. 623; 25 T.L.R. 352; 22 Cox, C.C. 99; 2 Cr. App. Rep. 51; 73 J.P.Jo. 100, C.C.A.; 14 Digest (Repl.) 606, 6008.
- (2) *Fisher v. Val de Travers Asphalte Co.* (1875), 1 C.P.D. 259; 45 L.J.Q.B. 135; 24 W.R. 198, C.A.; 16 Digest (Repl.) 208, 975.
- (3) *Lloyd v. Lloyd* (1885), 14 Q.B.D. 725; 53 L.T. 536; 49 J.P. 630; 33 W.R. 457; 15 Cox, C.C. 767, D.C.; 25 Digest 378, 276.
- (4) *R. v. Inhabitants of East Ardsley* (1850), 14 Q.B. 793.
- (5) *R. v. Buttle* (1870), L.R. 1 C.C.R. 248; 39 L.J.M.C. 115; 22 L.T. 728; 34 J.P. 565; 18 W.R. 956; 11 Cox, C.C. 566, C.C.R.; 42 Digest 665, 760.
- (6) *R. v. Vasey*, [1905] 2 K.B. 748; 75 L.J.K.B. 19; 93 L.T. 671; 69 J.P. 455; 54 W.R. 218; 22 T.L.R. 1; 50 Sol. Jo. 14; 21 Cox, C.C. 49, C.C.R.; 42 Digest 676, 877.

(7) *Hall v. Knox* (1863), 4 B. & S. 515; 3 New Rep. 117; 33 L.J.M.C. 1; 9 L.T. 380; 28 J.P. 22; 12 W.R. 103; 122 E.R. 552; 25 Digest 380, 296.

(8) *Salmon v. Duncombe* (1886), 11 App. Cas. 627; 55 L.J.P.C. 69; 55 L.T. 446, P.C.; 42 Digest 676, 874.

Also referred to in argument:

R. v. Inhabitants of Everdon (1907), 9 East, 101; 103 E.R. 512; 37 Digest 325, 1253.

Appeal against sentence.

The appellant was indicted at the Middlesex Sessions for breaking and entering a shop, and also for malicious damage to property. He pleaded Guilty to both indictments. On the first indictment he was sentenced to twenty-one months' hard labour, and on the second indictment to three months' hard labour, the sentences to run concurrently.

Warburton for the appellant.

Bodkin for the Crown.

Cur. adv. vult.

D March 5, 1909. **DARLING, J.**, read the following judgment of the court.—The appellant was charged at Middlesex Sessions before the chairman and other justices upon two indictments—(i) that he did break and enter a shop and steal certain goods therein; (ii) that he did then commit malicious damage by breaking the windows of the shop. He pleaded Guilty to each indictment, and was sentenced to twenty-one months' imprisonment with hard labour on the first indictment and to three months' imprisonment with hard labour on the second, the sentences to be concurrent. Against the sentence on the first indictment he now appeals.

E Assuming this court to be of opinion that a different sentence should have been passed we should quash the sentence—as is provided by the Criminal Appeal Act, 1907, s. 4 (3). But there occurs the question whether we have power to pass another sentence in place of that one. Section 3 of the statute enacts that

F “a person convicted on indictment may appeal [to this court] . . . with the leave of the Court of Criminal Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.”

Here the appellant was convicted on his plea of Guilty. He therefore has a right to appeal against the sentence passed upon him. In order to see what this court G may do, we must turn to s. 4 (3) of the statute, and it becomes plain that, should we think a different sentence should have been passed we should “quash the sentence passed at the trial.” Here the difficulty occurs, for the section proceeds,

“and pass such other sentence warranted in law by the verdict in substitution therefor as they think ought to have been passed.”

H Had this sentence in question followed on a verdict there would here be no difficulty. But it was pronounced after no verdict, and in consequence of the plea of Guilty. Counsel for the Crown has argued that the words “by the verdict” may be rejected by us, and the statute read as though they were not there. On the other side it is argued that this court has already, and as at present constituted, held that we have no power in these circumstances to substitute another sentence for one quashed. I We did so decide a week or so ago in *R. v. Davidson* (1). The point, however, was not argued on both sides, and we propose now to consider the question without reference to the opinion we formerly expressed.

Where no meaning can be given to the words of a statute without rejecting some of those used contained in it, or where the statute would become a nullity were all the words retained, the court has power to read a section as though the words which make it meaningless, or nullify it, were not there—for this is enough to cite *Fisher v. Val de Travers Asphalte Co.* (2), and *Lloyd v. Lloyd* (3). This, however, does not nearly solve our present question for the section, even were the words “by

the verdict" retained, is not meaningless, nor is the section a nullity; for it would be operative in all cases in which the conviction is the effect of a verdict of the jury. We are distinctly of opinion that Parliament could hardly have intended that only those who should have been found guilty by a jury should be allowed to appeal against the sentence, which is not the act of the jury at all, but is fixed and awarded by the judge, whether the conviction follow on a plea of Guilty or on a plea of Not Guilty and a verdict of Guilty. We are of opinion that we may in reading this statute reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the legislature; and this is to be ascertained from a careful consideration of the entire statute. For this opinion many cases might be cited, but it is sufficient to refer to *R. v. Inhabitants of East Ardsley* (4), *R. v. Buttle* (5), *R. v. Vasey* (6), and especially *Hall v. Knox* (7) and *Salmon v. Duncombe* (8). In some of the cases cited to us, and notably in this last, the court has attributed to the draftsman some defect of expression. But, strictly speaking, should ambiguity or contradiction in terms be manifest, it is unnecessary to determine whether this be due to bad drafting, to the hurried acceptance of amending words, or to the operation of rules resulting in the passing en bloc of some clauses of a Bill with no opportunity for either discussion or amendment.

From a careful consideration of the whole of this statute we are satisfied that it was intended, as is plainly shown in s. 3, to give to those who might plead Guilty an appeal against the sentence passed on their conviction. It appears to us unreasonable to place the Court of Criminal Appeal in the position of having either to leave the sentence untouched, or to release the guilty person unpunished. No reason for making such a difference between the treatment of a man convicted on his own confession, and that of one convicted by a jury has been suggested to us, nor can we imagine one. If such difference were intended it is nowhere affirmatively expressed, but is merely to be inferred from the presence in s. 4 (3) of the words "by the verdict." Why those words are there we may guess unprofitably, but cannot certainly say. They are not necessary to enable the court to pass a substituted sentence for one quashed, where the appellant has been found guilty by a jury; and we cannot believe that they were deliberately inserted for the express purpose of disabling the court or limiting its power on the consideration of an appeal against sentence by one who has pleaded Guilty. Yet, were we to hold that these words "warranted in law by the verdict" do apply to a case in which sentence has followed on a plea of Guilty, we could give them no other effect. When there has been a verdict these words are plainly superfluous. Where (as in this case) there has been no verdict they cannot be read in any way which would not defeat what was plainly the intention of the legislature.

In these circumstances we are of opinion that the rules to be collected from the cases decided on the interpretation of statutes justify us in disregarding those words, and in holding that this statute gives us power to quash the sentence appealed from, and to pass in its place another sentence warranted by law.

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by G. Dodson, Esq., Barrister-at-Law.]

Re OFNER. SAMUEL v. OFNER

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.J.J.), October 26, 27, 1908]

[Reported [1909] 1 Ch. 60; 78 L.J.Ch. 50; 99 L.T. 813]

Will—Evidence—Evidence to correct mistake—Instructions for will—Admissibility to correct misdescription of beneficiary.

Instructions for his will in the testator's handwriting and written almost contemporaneously with the execution of the will **held** to be admissible, not to ascertain the intention of the testator, but to prove that he had misdescribed, by giving him a wrong name, a person whom he wished to benefit.

Notes. Distinguished. *Re Bateman, Wallace v. Mawdsley* (1911), 27 T.L.R. 313. Applied: *Re Halston, Ewen v. Halston*, [1911–13] All E.R.Rep. 667; *Re Tetsall* (deceased), [1961] 2 All E.R. 801. Referred to: *Re Cruse, Gass v. Ingham*, [1930] W.N. 206; *Re Nesbitt's Will Trusts, Dr. Barnado's Homes National Incorporated Association v. United Newcastle-upon-Tyne Hospitals Board of Governors*, [1953] 1 All E.R. 936.

As to evidence on construction of a will, see 34 HALSBURY'S LAWS (2nd Edn.) 165–187, 227–236; and for cases see 44 DIGEST 614 et seq.

Cases referred to:

- (1) *Re Coleman and Jarrom* (1876), 4 Ch.D. 165; 46 L.J.Ch. 33; sub nom. *Coleman v. Jarrom*, 35 L.T. 614; 25 W.R. 137; 44 Digest 515, 3349.
- (2) *Bernasconi v. Atkinson* (1853), 10 Hare, 345; 23 L.J.Ch. 184, 20 L.J.O.S. 217; 17 Jur. 128; 1 W.R. 125; 68 E.R. 959; 44 Digest 614, 4411.
- (3) *Charter v. Charter* (1874), L.R. 7 H.L. 364; 43 L.J.P. & M. 73, H.L.; 44 Digest 615, 4432.
- (4) *Re Ely, Tottenham v. Ely* (1891), 65 L.T. 452; 44 Digest 629, 4606.
- (5) *Re Feltham's Will Trusts* (1855), 1 K. & J. 528; 69 E.R. 568; 44 Digest 636, 4691.

Also referred to in argument:

- Drake v. Drake* (1860), 8 H.L.Cas. 172; 29 L.J.Ch. 850; 3 L.T. 193; 11 E.R. 392, H.L.; 44 Digest 638, 4658.
- Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363; 2 H. & N. 54; 9 L.J.Ex. 27; 3 Jur. 955; 151 E.R. 154; 44 Digest 543, 3609.
- In the Estate of Hubbuck*, [1905] P. 129; 74 L.J.P. 58; 92 L.T. 665; 54 W.R. 16; 21 T.L.R. 333; 44 Digest 634, 4671.
- Miller v. Travers* (1832), 8 Bing. 244; 1 Moo. & S. 342; 1 L.J.Ch. 157; 131 E.R. 395; 44 Digest 625, 4559.
- Re Gregory's Settlement and Will* (1865), 34 Beav. 600; 6 New Rep. 282; 11 Jur.N.S. 634; 13 W.R. 828; 55 E.R. 767; 44 Digest 572, 3890.
- Re Cheadle, Bishop v. Holt*, [1900] 2 Ch. 620; 69 L.J.Ch. 753; 83 L.T. 297; 49 W.R. 88; 44 Sol. Jo. 673, C.A.; 44 Digest 641, 4786.
- Re Waller, White v. Scoles* (1899), 68 L.J.Ch. 526; 80 L.T. 701; 47 W.R. 563; 43 Sol. Jo. 569, C.A.; 44 Digest 643, 4832.

Appeal against a decision by SWINFEN EADY, J., on a summons taken out by executors to determine questions relating to a will.

By his will, dated Nov. 14, 1905, the testator, William Ofner, after appointing executors thereof, of whom his grandnephew Dr. Alfred Ofner was one, and making certain bequests, bequeathed to Dr. Alfred Ofner, in case he should prove his will, the sum of £200, and in case he should not prove his will the sum of £100, and the following pecuniary legacies: To his niece Marie Ofner the sum of £800; to his "grandnephew Robert Ofner the sum of £100"; to his niece Martha Jacobsohn the sum of £100, and to his grandnephew Curt Ofner the sum of £200, and he devised and bequeathed all his real and personal estate not otherwise

disposed of by his will or any codicil thereto unto and equally between all of them the said Dr. Alfred Ofner, Marie Ofner, "Robert Ofner," Martha Jacobsohn, Curt Ofner, and the other persons to whom pecuniary legacies were bequeathed as should be living at his decease. The testator died on April 6, 1907. He had the following four grandnephews, and no more—viz., Dr. Alfred Ofner, Curt Ofner, Richard Ofner, and Botho Ofner, all resident abroad. He had no grandnephew nor any other relative named "Robert Ofner."

An originating summons was taken out by the executors of the will to which Richard Ofner, Botho Ofner, Martha Jacobsohn, and Marie Ofner were made defendants, for the determination of the following questions: (i) What person (if any) was meant or intended by the testator under the description in his will of "my grandnephew Robert Ofner," and as such was entitled under the will to the sum of £100 and a share of the residuary estate of the testator; (ii) if it should be determined that there was no person so meant and intended and entitled as aforesaid, whether the share of residue purporting to be given to "my grandnephew Robert Ofner" accrued for the benefit of the persons entitled to the other shares in the residue, or whether there was an intestacy as to the share of residue purporting to be given as aforesaid. In support of the claim of the defendant Richard Ofner as the person to take the legacy and share of residue, an affidavit was sworn by a clerk in the employment of a firm of solicitors stating that the will of the testator was prepared by that firm; that the deponent attended to the preparation and execution thereof; and that the same was executed in his presence, and he was one of the witnesses to such execution. The deponent further stated that on Nov. 8, 1905, in confirmation of verbal instructions for the preparation of the will then given to the firm of solicitors, the testator handed to the firm a memorandum which was made an exhibit to the affidavit, and which was in the following terms:

"This is the last will of me William Ofner . . . I direct that my just debts, funeral, and testamentary expenses be paid and satisfied by my executors herein named as soon as conveniently may be after my decease. I give and bequeath . . . to my grandneven (sic) Dr. Alfred Ofner, of Prague, £200, provided he assist in distribution of my legacies, if not but £100; to his brother Robert Ofner, £100. The remainder of my moneys to be divided among those that partakes of my legacies."

The summons was adjourned into court and came on to be heard before SWINFEN EADY, J., on May 7, 1908, when the learned judge held that the instructions for the will could not be looked at with the view of interpreting what the will meant, or as to the person intended to be benefited by the will. He was precluded by many authorities from referring to the instructions for the will for the purpose of determining that the legatee whom the testator really intended to take was misdescribed in his will. Under those circumstances he was of opinion that there was such ambiguity in the will that he could not discover or determine any person to whom the testator intended to give the legacy of £100 and share of residue. He certainly could not accede to the contention that it was intended for another grandnephew. *Re Coleman and Jarrom* (1) was in point, and it followed that he should consider this as a class gift, and, as it was not established that there was such a person as "Robert Ofner" living at the testator's death, the gift would take effect and the residue be divisible among the other members of the class. The result was that there was no intestacy, and the other members of the class took accordingly. From that decision the defendant Richard Ofner appealed.

G. M. Devonshire for the appellant.

A. M. Latter for the executors and other defendants to the summons.

SIR HERBERT COZENS-HARDY, M.R.—This case raises a question of considerable interest and I think of considerable importance. I have arrived at

the conclusion that the appellant is right. The testator, who was a native of Austria, made his will in 1905, and gave certain bequests and certain residue. We are entitled, of course, to know what was the state of the family at the date of the will. We know that he had only four grandnephews, Dr. Alfred Ofner, Richard Ofner, and Botho Ofner. By his will he appointed his grandnephew Dr. Alfred Ofner one of his executors; if Dr. Ofner proved the will he was to receive a legacy of £200, and if not only £100. He then gave a legacy in these terms: "To my grandnephew Robert Ofner the sum of £100." In fact there was no grandnephew of the name of "Robert Ofner." One cannot suppose that the testator intended a gift to a non-existing person, and, according to the language of Wood, V.C., in *Bernasconi v. Atkinson* (2) the courts have the right to ascertain all the facts which were known to a testator at the time he made his will, or, as it has been expressed, to place itself in the testator's position in order to ascertain whether there exists any person or thing to which a description in such a case as the present can be reasonably and with sufficient certainty applied, the presumption necessarily being that the testator intended some existing matter or person.

It seems to me we start with this, that the testator did intend some existing person by the words "my grandnephew Robert Ofner." There must, therefore, be a misdescription somewhere, and what we have to discover is whether there is any person whom the testator has misdescribed by the term "Robert Ofner"—whether, in fact, "Robert" was a name which the testator incorrectly used to describe the person who was really Richard. We have heard a very interesting argument to the effect that no evidence is admissible on that point unless it goes to the extent of proving a habit of the testator to call his grandnephew Richard by the name of "Robert," and we have had a further argument that a document consisting of instructions for the will cannot be looked at to assist us in ascertaining whether there was a misdescription. I am unable to agree with either of those propositions. Of course, if you can prove a habit of the testator you may do that because it is so much clearer than anything else, but I shrink from saying that evidence is not admissible unless it goes to the extent of proving habit. If, for instance, you can prove that the testator had at or about the date of his will written a letter to Richard and had addressed it to him as "Robert," and if you have nothing more than that I think that such evidence would be admissible to show that Richard was the person meant by "Robert." The weight of a particular document is a different matter from its admissibility. When you find a document practically contemporaneous with the will and a document of intrinsic importance in itself I shrink from saying not only that it is not an admissible document, but also that it is not a document which in the absence of all countervailing evidence ought to be acted upon by the court. But it is said that, even if that is true as to anything else, it cannot be true if you are dealing with instructions for a will.

That leads me to refer to the document which is sought to be admitted as evidence in the present case—the only document which we have here. It is a document which has been proved to be wholly in the testator's own handwriting. In that document, which the testator handed to his solicitors as instructions for his will, he states that, after giving the legacy of £200 to Dr. Alfred Ofner if he proved the will, and, if not, £100, he gives a legacy "to his brother Robert Ofner." What are we looking at that document for? We are not looking at it to gather what he intended to do, but merely to find whether the testator thought that the brother of Dr. Alfred was named "Robert" and he called him so, and that therefore the name in the will "Robert," who otherwise is a non-existing person, must apply to and ought to apply to Richard? To my mind, we are not asked to use these instructions for any improper purpose. I regard them exactly the same as—neither better nor worse than—a letter written on a former occasion by the testator in which he had in terms referred to the brother of Dr. Alfred Ofner as Robert Ofner. The instructions seem to me to show that when he used in

his will the inaccurate term "Robert Ofner" he really meant Richard Ofner, the person whom he, by the practically contemporaneous document described as the brother of Dr. Alfred Ofner.

Our attention has been called to a number of authorities. I shall be content to base my judgment upon what was said by WOOD, V.-C., in *Bernasconi v. Atkinson* (2), a case which, so far as I am aware, has never been questioned, and which was cited, I think, with approval by all the best judges of the House of Lords in *Charter v. Charter* (3). The learned Vice-Chancellor said this (10 Hare, at p. 354):

"I find by a letter which is put in evidence, that the testator addressed the plaintiff by the name of Vincent Bernasconi [not his true name]. I am entitled to look at the letters for this purpose, but not to ascertain the intention of the testator."

I look at these instructions for the will to find that the testator treated Dr. Alfred's brother as being of the name of "Robert." I look at that document for that purpose only, and, looking at it for that purpose only, I do not feel bound to declare, as SWINFEN EADY, J., has, that the whole gift is void for uncertainty, but I find sufficient evidence here to enable me to say that by the name "Robert" used in the will, the testator meant Richard, the brother of Dr. Alfred. I think that there are ample authorities to be found in support of this view, authorities which perhaps more naturally arise in respect of gifts to charities which are misdescribed. We are all familiar with cases in which a legacy is given to a charity by an inaccurate name, and evidence is tendered that the testator described the charity by a wrong name, and made a bequest to it in a wrong name. The evidence is admissible to show what was the particular charity intended by inaccurate description used by the testator in his will. You do not admit the evidence for any other purpose than that—to identify the person or object who or which has been misdescribed. Of course, you have first to prove that there is no person or object answering to the description by the words used according to their strict tenor.

Having got to that point, it seems to me that the court is perfectly entitled to do what we are asked to do here—that is to say, look at a document substantially contemporaneous and of an important character which shows who the person was whom the testator had in his mind and intended by the misdescription. In the absence of other evidence I think that that is sufficient, and, that being so, I think—with great respect to SWINFEN EADY, J.—that this appeal must be allowed. FARWELL, L.J., reminds me that SWINFEN EADY, J., had not before him the evidence which we have, because he said quite properly, that it was not proved before him that the document tendered in evidence was in the testator's handwriting. If it had been, entirely different considerations would have applied. But having this evidence before us, I think that we ought to act upon it, and declare that Richard Ofner is intended by the misdescription of "Robert" Ofner in the testator's will. Richard Ofner asks that it may be declared that he is the person designated by the testator in his will. He is entitled to the legacy and the share of residue, and the costs of this appeal ought to come out of the estate.

FLETCHER MOULTON, L.J.—I am entirely of the same opinion. In this will we find a large group of legacies to the relatives of the testator described each by his or her relationship. In the middle of that group we find a legacy "to my grandnephew Robert Ofner." It is established before us that there was no one in the family of the name of Robert, and, therefore, unless we are to suppose that he called a relative a person who was not a relative at all, we must come to the conclusion that the word "Robert" is an error. But I can see no reason to think that the description "grandnephew" is in any way erroneous. Therefore, we have the legacy to a grandnephew described by a wrong name.

It is clear from this that the testator believed that he had a grandnephew named Robert, but who that grandnephew was remains for the present an uncertainty. In a document which we now know is entirely in the testator's handwriting, written almost at the same time as the will and under circumstances when a man would be likely to write with at least ordinary accuracy on account of the importance of the occasion, he speaks of his grandnephew Dr. Alfred Ofner and his brother Robert Ofner. In other words, when writing that document the testator thought that the grandnephew he had who was the brother of Dr. Alfred Ofner had the name of "Robert." Both these documents are documents in which there is every probability that the testator used his best knowledge, and I unhesitatingly come to the conclusion that he was under an erroneous impression that the brother of Dr. Alfred Ofner was called "Robert," whereas in truth he was called "Richard." To correct that does not alter the will; it is only the correction of a misdescription which our examination of the will and the extrinsic evidence enables us to correct. It is suggested that we cannot look at this document because it consisted of instructions for this particular will. The fact that the document consists of instructions for a will does not help its admissibility in this case so far as the point with which I am dealing is concerned. But it does not take away from its admissibility. It remains a document written under circumstances which lead us to imply that it was written with at least ordinary care, and it was written at or about the same time that the will was prepared. I do not look at it for one moment as indicating a testamentary intention. I simply look at it as showing that the testator bona fide thought that the brother of Dr. Alfred Ofner was named "Robert," and I conclude, in the absence of all contradictory evidence, that he remained in that belief when he made his will, and that, therefore, his "grandnephew Robert" means the grandnephew Richard, the brother of Dr. Alfred Ofner. For these reasons I am of opinion that this appeal must be allowed.

FARWELL, L.J.—I am of the same opinion. In construing a will the court has to ascertain not what the testator actually intended as distinguished from what his words have expressed, but what is the meaning of the words which he has used. As **WIGRAM, V.C.**, puts it in his book on **EXTRINSIC EVIDENCE**, the question must be whether any evidence is admissible which in its nature and effect simply explains what the testator has written; no evidence can be admissible which in its nature and effect is applicable for the purpose of showing what he really intended. Applying that to the present case, one knows that evidence has always been admitted, and properly admitted, to show who are the persons mentioned in a testator's will. When you ascertain that one of those persons by the name by which he is called has no existence, evidence is admissible to show what the testator knew about the family, and so on; and evidence is admissible to show that he has always been in the habit of calling John Richard, or vice versa. A man who has always called John Richard is presumed to have meant Richard when in his will he says John. That is construing the words which he has used. In my opinion, the question is not confined to that of habit. There are many cases, and probably this is one of them, in which the testator lived in England and had grandnephews living abroad whom he did not know very intimately, nor was he in the habit of communicating with them or of speaking of them. At any rate, no evidence is before us that the testator in the present case did so. Evidence of the one instance in which he has on an occasion of importance spoken of Richard as "Robert" is admissible to show that Richard in his mind meant "Robert" in all instances when he had occasion to name him.

It is admissible, and then arises the question of the weight of that evidence. It might very well be, and I think it probably would be, that if evidence had been forthcoming in contradiction showing that the testator had been in the habit of writing to Richard as Richard we should not have been able to allow

this document to countervail, and that, perhaps, is a way of pointing the difference that I feel between using this document as a mere document and using it as instructions for the will. The document is admissible in evidence not because, but notwithstanding that it consists of instructions for the will. You could not use it as evidence in contradiction of the habit of calling Richard by that name in letters and so on simply because it consists of instructions for the will, for that would be to put it forward as evidence of intention as distinct from what it meant. You could only use it as evidence that might be weighed in the balance with other matters to countervail the general use suggested of the testator calling his grandnephew "Richard" to show that there were sufficient instances in which he called him "Robert." This is certainly not new. There is *Re Ely, Tottenham v. Ely* (4), which is rather a special case. But the point is well put by Wood, V.-C., in *Re Feltham's Will Trusts* (5), where the learned Vice-Chancellor said this (1 K. & J. at p. 532):

"Further, which is extremely important, there is the fact of her making a former will. I cannot rely on the circumstance that she therein gave him a legacy; but by will, which was an instrument solemnly executed, she described one of her legatees as Thomas Turner, of Regency Square, Brighton, surgeon. No one could doubt that in that instrument the testatrix meant by this description the gentleman who really resided in Regency Square, and was a surgeon. That will was made only three or four years before the will now in question. Therefore, looking at this evidence, which is plainly admissible—namely, that in a solemn instrument she had previously described Joseph Turner indubitably by the name of Thomas, and the only question being, Is the name 'Thomas' or the description incorrect in this will?—I have no hesitation in concluding that the same person who three years before was described by her with the same degree of incorrectness was present to her mind when she made her second will, and, there being nothing to show that she ever learned her mistake in the interval, I must come to the conclusion that the same mistake continued in her mind, and that the misdescription was in the name and not in the address of the legatee."

To apply that conclusion here I regard this document in the testator's handwriting as a solemn instrument—an instrument of importance, the only one that we have before us in which the testator spoke of Richard as "Robert." That being so, I think that there is sufficient evidence in this particular case to show that when the testator used in the will the name "Robert" by that he expressed Richard.

Appeal allowed.

Solicitors: *Gilbert Samuel & Co.*

[Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.]

SAXBY v. FULTON

[COURT OF APPEAL (Vaughan Williams, Buckley and Kennedy, L.JJ.), March 23, 24, 25, 1909]

[Reported [1909] 2 K.B. 208; 78 L.J.K.B. 781; 101 L.T. 179;
25 T.L.R. 446; 53 Sol. Jo. 397]

*Gaming—Loan for gaming—Recovery—Loan made abroad where gaming lawful—
Right of lender to recover in England.*

Money lent in a foreign country for the purpose of being used for gaming in that country where the game in question is not illegal may be recovered in England, for it was not lent in contravention of the Gaming Acts, which would not apply in a foreign country, nor was the making of the loan contrary to any principle of morality or justice prevailing in England or to the common law.

Moulis v. Owen (1), [1907] 1 K.B. 746, discussed.

Quarrier v. Colston (2) (1842), 1 Ph. 147, applied.

Notes. Followed: *Société Anonyme des Grands Etablissements de Touquet Paris-Plage v. Baumgart*, [1927] All E.R.Rep. 280. Considered: *Carlton Hall Club v. Laurence*, [1929] All E.R.Rep. 605. Referred to: *Société des Hôtels Reunis (Société Anonyme) v. Hawker* (1913), 29 T.L.R. 578; *Sutters v. Briggs* [1922] 1 A.C. 1.

As to loans for gambling, etc., see 18 HALSBURY'S LAWS (3rd Edn.) 179-183; and for cases see 25 DIGEST 420, 421.

Cases referred to:

- (1) *Moulis v. Owen*, [1907] 1 K.B. 746; 76 L.J.K.B. 396; 96 L.T. 596; 23 T.L.R. 348; 51 Sol. Jo. 306, C.A.; 25 Digest 420, 240.
- (2) *Quarrier v. Colston* (1842), 1 Ph. 147; 12 L.J.Ch. 57; 6 Jur. 959; 41 E.R. 587, L.C.; 25 Digest 421, 243.
- (3) *M'Kinnell v. Robinson* (1838), 3 M. & W. 434; 1 Horn & H. 146; 7 L.J.Ex. 149; 2 Jur. 595; 25 Digest 415, 185.
- (4) *Barjeau v. Walmsley* (1746), 2 Stra. 1249; 93 E.R. 1161; 25 Digest 414, 181.
- (5) *Robinson v. Bland* (1760), 2 Burr. 1077; 1 Wm. Bl. 234, 256; Bull.N.P. 275; 97 E.R. 717; 25 Digest 420, 239.
- (6) *Wettenhall v. Wood* (1793), 1 Esp. 17, N.P.; 25 Digest 414, 182.
- (7) *Rousillon v. Rousillon* (1880), 14 Ch.D. 351; 49 L.J.Ch. 338; 42 L.T. 679; 44 J.P. 663; 28 W.R. 623; 11 Digest (Repl.) 443, 842.
- (8) *Kaufman v. Gerson*, [1904] 1 K.B. 591; 73 L.J.K.B. 320; 90 L.T. 608; 52 W.R. 420; 20 T.L.R. 277; 48 Sol. Jo. 296, C.A.; 11 Digest (Repl.) 444, 843.
- (9) *Re Missouri Steamship Co.* (1889), 42 Ch.D. 321; 58 L.J.Ch. 721; 37 W.R. 696; sub nom. *Re Missouri Steamship Co., Monroe's Claim*, 61 L.T. 316; 5 T.L.R. 438; 6 Asp.M.L.C. 423, C.A.; 11 Digest (Repl.) 424, 728.
- (10) *Hope v. Hope* (1857), 8 De G.M. & G. 731; 26 L.J.Ch. 417; 29 L.T.O.S. 4; 3 Jur.N.S. 454; 5 W.R. 387; 44 E.R. 572, L.JJ.; 11 Digest (Repl.) 443, 841.
- (11) *Hyams v. Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 24 T.L.R. 675; 52 Sol. Jo. 551, C.A.; 25 Digest 401, 58.
- (12) *Pearce v. Brooks* (1866), L.R. 1 Exch. 213; 4 H. & C. 358; 35 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Jur.N.S. 342; 14 W.R. 614; 12 Digest (Repl.), 294, 2264.
- (13) *Applegarth v. Colley* (1842), 10 M. & W. 723; 12 L.J.Ex. 34; 7 J.P. 741; 7 Jur. 18; 152 E.R. 663; 25 Digest 416, 203.
- (14) *Young v. Moore* (1757), 2 Wils. 67.

Also referred to in argument:

Re Fitzgerald, Surman v. Fitzgerald, [1904] 1 Ch. 573; 73 L.J.Ch. 486; 90 L.T. 266; 52 W.R. 432; 20 T.L.R. 332; 48 Sol. Jo. 349, C.A.; 11 Digest (Repl.) 365, 334.

South African Breweries, Ltd. v. King, [1899] 2 Ch. 173; 68 L.J.Ch. 530; 81 L.T. 76; 15 T.L.R. 442; affirmed [1900] 1 Ch. 273; 69 L.J.Ch. 171; 82 L.T. 32; 48 W.R. 289; 16 T.L.R. 172; 44 Sol. Jo. 228, C.A.; 11 Digest (Repl.) 428, 750.

Alcinbrook v. Hall (1766), 2 Wils. 309; 95 E.R. 828; 25 Digest 410, 132.

Re Lister, Ex parte Pyke (1878), 8 Ch.D. 754; 38 L.T. 923; 26 W.R. 806; sub nom. *Re Lister, Ex parte Pike*, 47 L.J.Bey. 100, C.A.; 25 Digest (Repl.) 415, 191.

Cannan v. Bryce (1819), 3 B. & Ald. 179; 106 E.R. 628; 25 Digest 415, 189.

King v. Kemp (1863), 8 L.T. 255; 25 Digest 421, 244.

Saffery v. Mayer, [1901] 1 K.B. 11; 70 L.J.Q.B. 145; 83 L.T. 394; 64 J.P. 740; 49 W.R. 54; 17 T.L.R. 15; 45 Sol. Jo. 29, C.A.; 25 Digest 414, 175.

Bagot v. Arnott, [1867] I.R. 2 C.L. 1; 12 Digest (Repl.) 307, *1153.

Hodgson v. Temple (1813), 5 Taunt. 181; 1 Marsh. 5; 128 E.R. 656; 12 Digest (Repl.) 307, 2361.

Pellecat v. Angell (1835), 2 Cr.M. & R. 311; 1 Gale, 187; 5 Tyr. 945; 4 L.J.Ex. 326; 150 E.R. 135; 12 Digest (Repl.) 308, 2365.

Appeal by the defendant from a decision of BRAY, J.

The action was brought by the plaintiff, J. Saxby, against the defendant, Florence May Fulton, as the executrix of the late W. E. Brook, to recover £4,150, which the plaintiff alleged he had lent to the testator, with interest at 5 per cent. The main defence was that the money was lent for the purpose of gaming, i.e., for playing roulette at Monte Carlo, and that in consequence the consideration was illegal.

Atkin, K.C., and *Randolph* for the defendant.

Bankes, K.C., and *Boydell Houghton* for the plaintiff.

VAUGHAN WILLIAMS, L.J.—The conclusion at which I have arrived depends upon one point, which is, I think, sufficient to dispose of this case. In *Quarrier v. Colston* (2) the marginal note is this (1 Ph. at p. 147):

"Gambling debts contracted in this country, as well as the securities given for them, are void and cannot be recovered. But money won at play, or lent for the purposes of gambling, in a country where the games in question are not illegal, may be recovered in the courts of this country."

In that case money had been lent for the purpose of gambling at the public tables at Baden-Baden, and an IOU had been given for the amount of the loan. LORD LYNDBURST, L.C., sitting on appeal as Lord Chancellor, in delivering judgment, said (*ibid.* at p. 150):

"The defendant and the testator travelled together on the Continent. They agreed to divide their expenses; the defendant paid more than his proportion, and the difference constitutes a part of the debt. With respect to this, no objection has been made."

That is true as to a portion of the debt in the present case. So far as I understand it, no objection is here taken to the repayment to the plaintiff of so much as was the proper proportion of the hotel and travelling expenses of the testator. The judgment of the Lord Chancellor proceeds (*ibid.* at pp. 150, 151):

"Another part of the debt consisted, as stated in the answer, 'of money lent to the testator when he was playing at the public tables at Baden-Baden, and other places in Germany, which money was employed by him in gaming at such public tables.' What ground is there for saying that this cannot be recovered? First, it does not appear what the games were, or that they

would have been illegal in England; and until the late case of *M'Kinnell v. Robinson* (3) in the Court of Exchequer, it had always been supposed, and there are several decisions to that effect, that though securities given for money lent to play at certain games were void by the statute of Anne, yet that money itself might be recovered; *Barjeau v. Walmsley* (4); *Robinson v. Bland* (5); and *Wettenhall v. Wood* (6). But in the case to which I have referred of *M'Kinnell v. Robinson* (3) it was held, and I think properly held, that money lent to play at an illegal game could not be recovered. This was decided on the principle that money lent for the purpose of enabling the party to do an illegal act, and this with the knowledge of the lender, could not be made the foundation of an action. But this rule does not apply to the present case. For there is nothing to show that the public gaming tables where the money was lent were not lawful in the countries where they were held: on the contrary, the presumption is that, as they were public, they were lawful; and if we might import our private knowledge in a case of this nature (upon which, however, I do not mean to rely) it is notorious that they are, in several places in Germany, sanctioned by the government, which receives a rent from the persons by whom they are kept."

In the present case it was agreed, and this court must assume, that it was lawful to play on the tables at Monte Carlo—it was, indeed, common ground that playing on the public tables was lawful at the place where money was advanced by the plaintiff to the testator. LORD LYNTHURST continued (*ibid.* at pp. 151, 152):

"The Lord Chief Baron of the Exchequer in giving judgment in *M'Kinnell v. Robinson* (3), observes as to *Robinson v. Bland* (5) (in which it was held that money lent to play with might be recovered), that the money was not lent to play at an illegal game, gaming not being unlawful in France, where the loan was made. It does not appear, therefore, to me, that there is anything to prevent the defendant from recovering in respect of this part of the debt in his action at law."

I do not understand how it is sought to differentiate the present case from *Quarrier v. Colston* (2), and I do not think that this court ought to overrule the decision of a court which held, at the time of the decision, precisely the same position as is held by the present Court of Appeal. I am of opinion that that is a decision which covers the present case.

It is, however, right that I should call attention to the observations which have been made on *Quarrier v. Colston* (2) by the Court of Appeal in *Moulis v. Owen* (1). SIR RICHARD HENN COLLINS, M.R., said ([1907] 1 K.B. at p. 751):

"In *Quarrier v. Colston* (2), decided by LORD LYNTHURST in 1842, it was held that money lent abroad and applied by the borrower in gambling . . . could be recovered in England. This case relates to the consideration only, and from what appears in the statement of facts there was nothing to found a presumption that the rights of the parties were to be ascertained by reference to the law of England, such as arose in *Robinson v. Bland* (5) from the fact that an English bill was given."

That, again, is true in the present case, for no bill or cheque was here given upon which anyone was to be sued; it is not a case in which a bill or cheque was given in respect of money lost at cards by the loser to the winner, neither is it a case where a bill or cheque had been given by the borrower to the lender for money lent for the purpose of gambling. The present case does not differ at all from that of *Quarrier v. Colston* (2) before LORD LYNTHURST. In the present case the testator—Brook—and the plaintiff had gone abroad together, and Brook, in accordance with the practice for many—I think fifteen—years on these Continental trips, had, whenever he wanted money, treated the plaintiff as his banker, and obtained a cheque from the plaintiff for whatever sum of

money might be required. It does not appear upon the evidence whether the plaintiff got the money by cashing cheques which he had drawn; but whether he or Brook obtained the money from the manager of the hotel or from the local bank at Monte Carlo, the money, however obtained, was in ordinary course handed over to Brook, who then paid out of it such sum as was required for their expenses. I take it that it was known to the plaintiff, at all events after a time, that it was likely—I do not say practically certain—that a good deal of the money so received by Brook was applied by him to the purposes of gambling. The arrangement made between the parties was that on their return to England a statement of the money received by Brook from the plaintiff was drawn up, one-half of the expenses was debited to the plaintiff, and then the balance was paid to him. It does not seem to me that there is anything in the present case which differentiates it so far from *Quarrier v. Colston* (2). In *Moulis v. Owen* (1) SIR RICHARD HENN COLLINS, M.R., says with regard to that decision ([1907] 1 K.B. at pp. 751, 752):

“It in no way impugns the position that, when the rights of the parties to a security given for a gambling debt are to be ascertained by the law of England, the security cannot be enforced in England. It was only by dis-severing the rights on the security itself from those in respect of the consideration that LORD MANSFIELD drew the inference that the rights on the security were to be ascertained by English law, whereas no such inference arose as to the consideration. It seems quite clear that the claim on the security was decided quite without reference to French law, which in that part of the case he deals with only parenthetically. After the passage above cited as to the invalidity under the statute of Anne of all bills given on a gaming consideration, he adds (1 Wm. Bl. at p. 259):

‘And (by the way) the fact is not found whether even in France, you may not enter into and contemplate the consideration of a gaming note. I rather think you may. However, it is clear, that in England, the writing, as a writing, is void.’

It is only later on, when he deals with the claim on the consideration for money won that he relies on the identity of the law of England with that of France in this respect. The decision, therefore, in *Quarrier v. Colston* (2) in no way assists the respondent in this case, which turns on the validity of the cheque only.”

In *Moulis v. Owen* (1) the only question which arose was as to the right to recover on an English cheque drawn upon a London bank given for the purpose of enabling the defendant to pay his gaming losses and to continue playing at a club in Algiers. COZENS-HARDY, L.J., dealing in *Moulis v. Owen* (1) with the decision in *Quarrier v. Colston* (2), said ([1907] 1 K.B. at p. 755):

“In *Quarrier v. Colston* (2) LORD LYNTHURST, while adhering to the view that money lent to play an illegal game could not be recovered, held that money lent at Baden-Baden for the purpose of play could be recovered in England, the public gaming tables being lawful in Germany. It is argued that the debt and the security must stand or fall together, and that *Quarrier v. Colston* (2) which is the final decision on the point, is binding upon this court, and that we ought to hold that the security is not hit by the Act of 1835. After considerable hesitation I have arrived at the conclusion that this argument ought not to prevail. In *Quarrier v. Colston* (2) there was no security, there was nothing upon which the Gaming Act, 1710 [repealed], or the Gaming Act, 1835, could operate. There was nothing but a parol contract, which was evidenced by an IOU. LORD LYNTHURST's judgment does not govern the present case, although it leads to the strange result that a parol contract made in France may be valid if there is no security given for the loan, although, if there is a security by way of negotiable instrument payable in

England, both the security and the debt are bad. If the point decided in *Quarrier v. Colston* (2) should come for review, as it might have done if the plaintiff had sued, not upon the cheque, but upon the original consideration, it might be necessary to consider how far LORD LYNTHURST's judgment is consistent with subsequent decisions, such as *Rousillon v. Rousillon* (7) and *Kaufman v. Gerson* (8). It may be that on grounds of public policy the courts of this country ought to refuse to enforce a gaming contract, even though valid according to the law of the country where it was made. But it is not necessary for us to express any opinion upon this difficult question. I am not aware that the passage from LORD MANSFIELD's judgment, to which I have referred, has ever been dissented from. It is quoted with approval by FRY, L.J., in *Re Missouri Steamship Co.* (9), and, so far as my searches have gone, it is adopted by the leading text-writers. This being so, I think we ought to follow it in the present case."

I wish to observe that there is nothing in the observations of COZENS-HARDY, L.J., which I have read to indicate that the Court of Appeal was at liberty to disregard the decision of LORD LYNTHURST in *Quarrier v. Colston* (2), on the other hand, it seems to me that the lord justice treated it as a decision which he was bound to recognise. It may be that at some time or other *Quarrier v. Colston* (2) will be reviewed by the House of Lords, but in this case I think the Court of Appeal ought to act on it. I think I ought again to call attention to the passage I have just read, that

"in *Quarrier v. Colston* (2) there was no security, there was nothing upon which the Gaming Act, 1710 [repealed] or the Gaming Act, 1835, could operate."

I entirely agree with that statement, and think that it is just as true with regard to the present case as it was with regard to *Quarrier v. Colston* (2) as was pointed out by SIR RICHARD HENN COLLINS, M.R.

That being the authority upon which the present case may be decided, I ought to say a word or two with regard to some other points to which our attention was called by counsel for the defendant. In the first place, I start with the proposition that at common law there is nothing to prevent a person from recovering in an action money won by him at gaming. The various statutes to which our attention has been called contain exceptions to the common law. The morality of the country seems to have progressed somewhat gradually. It was found that a good deal of gambling took place at houses established for the express purpose of gambling, and under circumstances which enabled unscrupulous persons to prey a good deal upon young and inexperienced persons who were in the position of being owners of or heirs to large properties. The earlier legislation, therefore, did not proceed upon the basis that in this country gaming and the recovery of winnings or the enforcement of securities given for gaming losses were illegal; on the contrary, the earlier legislation down to the Gaming Act, 1845 [mainly repealed], was all of a nature to prevent what—for want of a better word—I may call "illegitimate" gaming. It was felt that one great step forward had been made by the attempt to convert all gaming transactions into ready-money transactions, and another step when persons were prevented charging their estates by way of mortgage or giving securities which enabled pressure to be put upon them to discharge their gaming losses. I have mentioned these matters because I feel that counsel for the defendant has not successfully persuaded me that, according to the law of England, or the law as administered in English courts, it is impossible for persons who have lent money in countries where gaming is lawful to recover the money so lent. I feel bound to say that, upon the authority of *Quarrier v. Colston* (2), that proposition has not been made out. It was then said that, supposing you put upon the various statutes in force as to gaming what was called by LORD LOUGHBOROUGH a "local and political character," it might be said that the courts ought not now to allow a plaintiff

who had lent money for a purpose which was legal abroad, but illegal in this country, to bring an action to recover the loan, because it is said that, once the fact is accepted that the loan was made to enable the borrower to gamble at Monte Carlo, where gambling is lawful, yet the plaintiff ought not to be allowed to sue in the English courts because it would be contrary to English morality. I think that, in using that argument, counsel for the defendant accepted the position that the statutes do not apply abroad, but he said that, although the statutes may be limited locally to this country, yet what was being done was the lending of money so as to carry out purposes which are unlawful in this country, and that the plaintiff was asking the English courts to assist him in doing that which is contrary to the policy of the law of this country. I do not propose to say anything at length upon this point; but counsel for the defendant cited *Hope v. Hope* (10), a case in which TURNER, L.J., with regard to the enforcement of contracts made abroad, said what seems to me to have great bearing on the point (8 De G.M. & G. at p. 743):

"The question is whether, upon the assumption which I have stated as to the French law being taken into account, the bill can in other respects be maintained. I am of opinion that it can not, and upon these grounds—I think that when the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud or evasion of the law of this country, or contrary to its policy, the courts of this country cannot, as I conceive, be called upon to enforce it."

I think these latter words ought to be specially noticed. TURNER, L.J., then pointed out that in that case there were two articles in the agreement—the first and the third—which seemed to him to be contrary to the policy of this country. One policy to which he referred was the policy which at that time made the father solely responsible for the care of his children, so that he could not divest himself of that responsibility, and another was the policy by which under the Matrimonial Causes Act, 1857, a divorce could not be obtained by agreement or collusion, so that a contract to assist divorce could not be enforced in this country. Several instances were given in the course of the argument by BUCKLEY, L.J., of cases in which it would be impossible to assume that there was any general principle of public policy compelling the English courts to refuse to allow the recovery of money lent for the purpose of gambling abroad, upon the ground that such purpose is contrary to the statute law of England. It seems to me to be impossible so to hold. The English courts can only refuse to allow the recovery of money so lent where it has in fact been lent for some purpose not only contrary to some existing English statute, but also contrary to the basis of morality which, irrespective of statute law, is assumed to prevail in this country.

I, therefore, think that the money claimed by the plaintiff can be recovered in this action. It is unnecessary to deal specifically with the question of the exact relations between the plaintiff and Brook. I have no doubt that it was the habit of the plaintiff to act as Brook's banker, and of Brook to act as the spender of the moneys during their joint tours, and that the plaintiff came to know perfectly well that his travelling companion, Brook, in later years was constantly gambling at the roulette table at Monte Carlo. Having arrived at these facts, it is not necessary for me to deal with the question whether in this particular case the moneys were advanced by the plaintiff for the express purpose of gambling, nor with the various other points raised in the course of the argument. I have said sufficient to dispose of this case. I think the appeal must be dismissed.

BUCKLEY, L.J.—I am of the same opinion. I feel some surprise, with deference to BRAY, J., that he should have thought upon the evidence that the money was not lent by the plaintiff for the purpose of gambling, but it is not necessary to decide that question, and for the purposes of my judgment I will assume in favour of the defendant that it had been so lent.

That being so, two propositions are applicable to this case. The first proposition is that as between the plaintiff and Brook money was lent by the plaintiff at Monte Carlo for a purpose which at Monte Carlo was, to common knowledge, a perfectly legal purpose, and as between these two persons there was nothing illegal at all in the plaintiff lending the money for the purpose of its being used at the roulette tables at that place. The second proposition, which is one of cardinal importance, is that by the common law of England gaming and wagering are not per se illegal. In *Hyams v. Stuart King* (11) this court recently considered many statutes which make certain contracts and securities given in respect of gaming void, and also make the consideration for the contract illegal; but there is no principle of common law nor is there any statute which makes betting or wagering of money illegal. According to our law, gaming or wagering is not in itself illegal, so that, coming to the question of public policy, it cannot be said that it is contrary to public policy for the English courts to recognise the validity of a debt contracted for the purpose of wagering abroad. *Kaufman v. Gerson* (8) is perhaps one of the best cases to which to refer, as an illustration of the law upon the question of public policy. There is nothing in the case before us, as there was in *Kaufman v. Gerson* (8), to lead this court to refuse its aid in enforcing the contract upon the ground that, although it was valid by the law of the country where it was made, yet it was contrary to some essential principle of justice or morality. The courts of this country will not lend their aid for the purpose of enforcing such a contract; but a betting or gaming contract made in a country in which betting or gaming is not illegal cannot be said to sin against essential principles of morality or justice.

Having said that, I desire to say a few words about the statutes of Anne [Gaming Act, 1710: repealed] and William IV [Gaming Act, 1835: repealed]. It is to be borne in mind that when the statute of Anne was passed that was true then which is true now—namely, that gaming was not illegal. The purpose of s. 1 of the Act I think was this—it seems to have been thought at that time that so long as a man had money in his pocket the mischief of gaming or betting was not very great, but that it was a very serious mischief for a man to incur his estate at play in a gambling den; and, therefore, as I understand this statute, all securities given for losses in any games, whether lawful or unlawful, were declared to be void. It is not necessary to read s. 2 of the statute of Anne; it has nothing to do with money lent which is the case before us. Coming then to the Act of 1835, the preamble of which, after reciting, among other statutes, the statute of Anne, and stating that the avoidance of securities or other instruments in the hands of purchasers or other persons for valuable consideration without notice of the original consideration for which they were given, was often attended with great hardship and injustice, went on to enact that so much of the statute of Anne and other recited statutes as enacted that any note, bill, etc., should be absolutely void, should thereby be repealed and that those statutes were to have the same effect as if they had provided that every such note, bill, etc., should be deemed and taken to have been made, drawn, accepted, etc., for an illegal consideration. The mischief there aimed at was that the innocent endorsee or bona fide holder for value suffered because the statute of Anne made these securities absolutely void, and it was the object of the Act of 1835 to remedy this injustice. It was argued that by the Act of 1835 the security was for all purposes to be deemed to have been given for an illegal consideration, but that is not, to my mind, the meaning of the Act, the real object and intention of which was to prevent the claim of a bona fide holder for value being unjustly defeated.

The principal argument has centred round the question whether the effect of these two Acts is to make the consideration as well as the security void; but I do not think that this is their effect, and although a number of cases have been cited to us upon this point, I think that this court in *Moulis v. Owen* (1) decided that that is not the effect of the statutes. SIR RICHARD HENN COLLINS, M.R., referring to *Quarrier v. Colston* (2), there said ([1907] 1 K.B. at pp. 751, 752):

"This case relates to the consideration only, and from what appears in the statement of facts there was nothing to found a presumption that the rights of the parties were to be ascertained by reference to the law of England, such as arose in *Robinson v. Bland* (5) from the fact that an English bill was given. It in no way impugns the position that, when the rights of the parties to a security given for a gambling debt are to be ascertained by the law of England, the security cannot be enforced in England. . . . The decision, therefore, in *Quarrier v. Colston* (2) in no way assists the respondent in this case, which turns on the validity of the cheque only."

It seems to me that SIR RICHARD HENN COLLINS, M.R., there recognised that the decision in *Quarrier v. Colston* (2) proceeded upon the ground that the view of the statute of William IV., that the consideration was made illegal for all purposes, was not maintainable. If it had been otherwise, then *Quarrier v. Colston* (2) must have been decided the other way. The Master of the Rolls was there pointing out that that case showed there was a difference between an action brought on the cheque and one brought on the consideration. COZENS-HARDY, L.J., also said in *Moulis v. Owen* (1) ([1907] 1 K.B. at p. 756):

"In *Quarrier v. Colston* (2) there was no security, there was nothing upon which the Gaming Act, 1710 [repealed] or the Gaming Act, 1835, could operate."

These words, of course, mean that the Acts of 1710 and 1835 cannot have any operation unless there is a security—that is to say, they cannot operate so as to defeat the consideration as distinguished from the security.

In deciding *Moulis v. Owen* (1) it is to be borne in mind that the Court of Appeal had no authority to review or to overrule the decision of LORD LYNTHURST in *Quarrier v. Colston* (2), sitting in a court of co-ordinate jurisdiction with this court, and the passages which I have read from the judgments in *Moulis v. Owen* (1) show that the court did not mean to do so. The decisions in both cases are, therefore, binding upon the court in the present case, *Quarrier v. Colston* (2) being, so far as its facts are concerned, analogous to this case. *Moulis v. Owen* (1) simply affirms the view that the statute of Anne and the Act of 1835 rendered—in the case of the original holder—any bill, note, or security given for a gaming debt, or for money lent for the purpose of gaming, illegal and void, wherever such gaming might have taken place. In the present case, as in *Quarrier v. Colston* (2) money was lent for the purpose of doing an act which was lawful in the place where it was lent—Monte Carlo—and at that place the legal relation of debtor and creditor was created; but it is contended that when these parties returned to this country the borrower was not liable because, although what was done abroad was legal, yet it could not have been legally done in this country, and that, therefore, being contrary to public policy, such a contract could not be enforced in this country. There is nothing in any statute which compels this court so to hold, and, further, the answer to that contention is to be found in the judgment of LORD LYNTHURST in *Quarrier v. Colston* (2). For these reasons I am of opinion that this appeal must be dismissed.

KENNEDY, L.J.—I am of the same opinion. This action is not an action on a gaming contract strictly, but it is said by the defendant to be an action brought to recover money lent for the purpose of gaming. I entirely agree

with what has been said, that no jury upon the evidence could arrive at any other conclusion, as regards the bulk of the money claimed, than that it was lent for the purpose of being used by the borrower for gaming at the public tables at Monte Carlo where roulette or other games of hazard were played. The money was, in my opinion, knowingly lent for the purpose of gaming within the meaning of the statute of Anne, if that statute applies, and certainly within the meaning of the decided cases which have been cited to us—of which *Pearce v. Brooks* (12), is a good example—with regard to contracts which are void upon the ground that they are contrary to public policy.

Assuming it to be the fact that the money was knowingly lent by the plaintiff for the purpose of its being used for gaming, the question is whether any defence on the ground either of some statutory prohibition or of the contract being contrary to public policy can be successfully set up. Dealing with the case apart from authority, there is no doubt that *prima facie*, according to the law of England, where a contract is proved or is admitted to have been made abroad in a civilised country, where it would be a lawful contract, that contract would be treated as being governed by the *lex loci contractus*, and would be enforced in the courts of this country—that is to say, the law applicable, dealing with the case as one in which international law must be regarded, is that the contract is to be treated as one governed by *lex loci contractus*. The law on this point has been stated by LORD MANSFIELD, C.J., in *Robinson v. Bland* (5), where he said (1 Wm. Bl. at p. 258):

“The general rule established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract.”

Of course, if the parties can be properly and reasonably found to have intended by their contract that the law of some other place—whether that of the flag or that of the domicile—is to govern the contract, they may make it plain that the *lex loci contractus* is not to be the governing principle, but that the *lex loci solutionis* is to take its place. I do not see anything in the facts of the present case sufficient, in my judgment, to make the transaction at Monte Carlo one which by the intention of the parties ought to be treated as one to be governed by the municipal law of England. It is quite true that the plaintiff and the testator settled the accounts on their return to this country; but that also was done in *Quarrier v. Colston* (2) and is not sufficient to defeat the plaintiff's claim. I do not, therefore, think that there is anything in the facts of this case to prevent the application of the *lex loci contractus*.

There is another exception, no doubt, which was referred to by counsel for the defendant—namely, the class of case in which the policy of the law in this country is such that we will not allow a contract, although good in the place of its making, to be good in our own courts of law—such a class of case, for example, as *Kaufmann v. Gerson* (8) and the earlier case of *Hope v. Hope* (10), where something is to be found in the transaction which may be contrary to what may be called the morality of civilised nations as we understand that morality to be. Therefore, where the contract in *Kaufman v. Gerson* (8), which was made in France, was valid and enforceable by the law of France, but was made under such pressure and coercion and under apprehension of threats that it would not be good in this country, it was held that it could not be enforced in the courts of this country. I can find nothing of that nature in the contract here, which was a contract to lend money for the express purpose of gambling. If there is any such principle as was contended for, I have failed, after careful search, to find any enunciation of it in our law, and, in my judgment, agreeing entirely with BUCKLEY, L.J., the borrowing and lending of money for the purpose of gaming is neither unlawful at common law nor immoral. It has been said that as morality progressed statutes have been passed whose object is to render such transactions unlawful; but that seems to me to show that it is the policy of our legislature

rather to deal in a disciplinary fashion with certain particular manifestations of the spirit of gambling than to make betting or games of chance in themselves unlawful. The Gaming Acts of 1845 and 1892 were referred to as the more recent legislation on the subject; but those Acts relate to actual gaming transactions. I do not think that either Act has been applied to claims for the repayment of money lent. These Acts are not sufficient in themselves to create a public policy—such as counsel for the defendant has sought to make out that they do—against the plaintiff's right to recover, and certainly there is nothing in *Moulis v. Owen* (1)—on which counsel for the defendant has to a large extent relied—to justify any such view.

The decision there turned upon the view, as COZENS-HARDY, L.J., said at the conclusion of his judgment ([1907] 1 K.B. at p. 756):

“The *lex loci solutionis* must be applied to this cheque, and the transaction must be treated as wholly subject to our local law”

The facts there were that, although the consideration for the cheque would be valid in France, yet the cheque itself was drawn upon an English bank and was payable in England, and it was held that in a transaction which culminated in the giving of a cheque payable in England the question at issue ought to be regarded as governed by the law of England. That is said at the outset of his judgment by SIR RICHARD HENN COLLINS, M.R., who, after referring to what LORD MANSFIELD had said in *Robinson v. Bland* (5) as to the transaction being entirely an English transaction and one to be treated as governed by the law of England, went on to treat the case before him as one to be governed by that law, and then said ([1907] 1 K.B. at pp. 751, 752):

“It in no way impugns the position that, when the rights of the parties to a security given for a gambling debt are to be ascertained by the law of England, the security cannot be enforced in England.”

In other words, looking at the question apart from authority, and coming to the principle of the thing, the transaction was one in which the parties to it had agreed to treat the *lex loci solutionis* as the law which was to govern it. COZENS-HARDY, L.J., also dealt with the question in a similar way in the passage which I have already read, at the end of his judgment in *Moulis v. Owen* (1). That being so, counsel for the defendant said—and rightly so—that he could not rely upon *Moulis v. Owen* (1) as a decision in his favour, but merely relied on it for the way in which COZENS-HARDY, L.J., there dealt with the question.

The result is that a claim for the repayment of a debt like the one in this case can be maintained under our law, but not a claim on an instrument given as the security for such a debt. It was said that as *Moulis v. Owen* (1) decided that such a security is one which cannot be enforced, this court ought now to decide that the debt itself cannot be enforced. Speaking for myself, I am unable to argue from the one to the other. I think the majority of the Court of Appeal in *Moulis v. Owen* (1) withheld their judgment as to the inference to be drawn, and refused to allow the plaintiff, by amendment, to sue on the consideration for the cheque. In *Robinson v. Bland* (5) a clear distinction was drawn between a claim on the consideration for money lent and a claim on the negotiable instrument or security, and for two reasons—first, on the general inference from the fact that the bill or cheque having been made payable in England the transaction had reference to a contract which had to be determined according to English law; and secondly, on the fact that where the consideration is partly valid and partly invalid, it is easier to divide the consideration and sue upon that part of it which is valid, than it is where the bill or security is sued upon. We have, however, the statute itself; and I feel it impossible not to be affected by the argument which had effect in the Court of Exchequer in *Apple-garth v. Colley* (13) in which it was pointed out, having regard to the Act of 1835, the difficulty of not holding that the consideration could not be sued upon in

a case where the security itself could not be sued upon. I feel great difficulty in dissenting from that expression of opinion by a court of very great authority, and especially as the court was approving of the view which had been held in *Young v. Moore* (14) by the Court of Common Pleas long before the Act of 1835 was passed. But, be that as it may, that view would apply only, as it seems to me, to transactions in this country to which the Act applies; and where a bill or note payable in this country has been given abroad in respect of a transaction which is not illegal abroad, but would have been illegal here, *Moulis v. Owen* (1) decides that the person to whom it was given can sue upon it in this country. They cannot be conclusive authorities where the contract and consideration were alike legal in the country where the contract was made.

There is, however, this further difficulty in the way of the defendant, which, as has been pointed out already by VAUGHAN WILLIAMS, L.J., is in itself sufficient to justify a decision against him—namely, the decision in *Quarrier v. Colston* (2) which we have no right to reverse. Whether we agree with it or not, and whether it is open or not to the considerations which were pointed out by COZENS-HARDY, L.J., in *Moulis v. Owen* (1), that decision can only be treated as exactly covering the facts of this case. The money there had been lent abroad partly for the purpose of gaming in a country where the game played was not illegal, and partly for other considerations, and LORD LYNDHURST nevertheless held that the claim in respect of the money lent for playing the game in question was a claim upon which the person who had lent the money was entitled to recover in this country. It does not seem to me, for the reasons I have given, that even if there were not that authority, the defendant could succeed; but in the face of that authority I think our judgment can only be the one which has been stated by the other members of this court. Upon all grounds—both of authority and of principle—as the debt here was contracted in a country in which the creditor's claim would be a good claim, and assuming that the debt is not one which on the ground of public policy is not to be treated as not governed by the *lex loci contractus*, and further not being a case to which *Moulis v. Owen* (1) applies, because there is neither any security nor anything else to show that the parties to the transaction intended that the *lex loci contractus* should not apply, and, lastly, because the question has been decided already by a court whose decision we have no power to overrule, I think that the plaintiff is entitled to succeed and that the appeal fails.

Appeal dismissed.

Solicitors: *Adam Burn & Son; Chester, Broome, & Griffithes.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

GOZNEY v. BRISTOL TRADE AND PROVIDENT SOCIETY

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), February 3, 4, March 1, 1909]

[Reported [1909] 1 K.B. 901; 78 L.J.K.B. 616; 100 L.T. 669;
25 T.L.R. 370; 53 Sol. Jo. 341]

Trade Union—Action against union—Competency—Proceeding to enforce agreement for application of funds of union—Claim barred by Trade Union Act, 1871, s. 4—Union not illegal association at common law—Competency of common law action.

By the rules of a registered trade union it was provided that money should be obtained by contributions from members, etc., to provide for members and their dependants payments in case of a member's sickness, death, need of legal assistance, and relief during unemployment. Members were entitled, but not compelled, to pay into a "Trade Fund" to secure "dispute pay," assistance to sue employers for compensation under the Employers' Liability and Workmen's Compensation Acts, and strike pay. One object of the union was stated to be "to regulate the relations between employers and workmen," but it was also provided that: "No officer or member of this society shall be authorised or permitted to take any active interest in, aid in any way, or otherwise assist, any trade movement except in his private capacity." In an action by a member of the union to recover the sum of 2s. 6d., the amount of a fine which he alleged had been illegally imposed on him by the union,

Held: the claim was a "proceeding instituted with the object of directly enforcing" an "agreement for the application of the funds" of the union within s. 4 (3) of the Trade Union Act, 1871, and, therefore, the court had no jurisdiction under the statute to entertain it, but apart from the statute the action was competent at common law provided that the society was not an illegal association at common law; to determine that question the purposes of the union as set out in the rules must be regarded; on construction of the rule relating to the Trade Fund it did no more than provide mutual insurance against loss of wages during a strike, a strike was not per se illegal at common law, and so the fact that payment of strike pay might facilitate strikes was immaterial; on their true construction there was nothing in the rules to encourage or procure a strike; and, therefore, the union was not an illegal association at common law and the court was entitled to entertain the claim.

Notes. Distinguished: *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K.B. 506. Applied: *Kelly v. National Society of Operative Printers' Assistants* (1914), 84 L.J.K.B. 557. Considered: *Miller v. Amalgamated Engineering Union*, [1938] 2 All E.R. 517. Referred to: *Mudd v. General Union of Operative Carpenters and Joiners* (1910), 103 L.T. 45; *Kelly v. National Society of Operative Printers' Assistants*, [1914-15] All E.R.Rep. 576; *Joseph Evans & Co., Ltd. v. Heathcote*, [1918-19] All E.R.Rep. 279.

As to actions by and against trade unions, see 32 HALSBURY'S LAWS (3rd Edn.) 529-533 (note that the Trade Disputes and Trade Unions Act, 1927, was repealed by the Trade Disputes and Trade Unions Act, 1946). For cases see 43 DIGEST 125-128. For Trade Union Act, 1871, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244.

Cases referred to:

- (1) *J. Lyons & Sons v. Wilkins*, [1896] 1 Ch. 811; 65 L.J.Ch. 601; 74 L.T. 358; 60 J.P. 325; 45 W.R. 19; 12 T.L.R. 278; 40 Sol. Jo. 372, C.A.; 43 Digest 111, 1167.
- (2) *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*, [1906] A.C. 884; 75 L.J.K.B. 961; 95 L.T. 561; 22 T.L.R. 543, H.L.; 43 Digest 95, 994.

- (3) *Swaine v. Wilson* (1889), 24 Q.B.D. 252; 59 L.J.Q.B. 76; 62 L.T. 309; 54 J.P. 484; 38 W.R. 261; 6 T.L.R. 121, C.A.; 43 Digest 91, 950.
- (4) *R. v. Mawbey* (1796), 6 Term Rep. 619; 101 E.R. 736; 26 Digest (Repl.) 417, 1271.
- (5) *Smithies v. National Association of Operative Plasterers*, ante p. 455; [1909] 1 K.B. 310; 78 L.J.K.B. 259; 100 L.T. 172; 25 T.L.R. 205, C.A.; 43 Digest 115, 1197.
- (6) *Collins v. Locke* (1879), 4 App. Cas. 674; 48 L.J.P.C. 68; 41 L.T. 292; 28 W.R. 189, P.C.; 43 Digest 21, 137.

Also referred to in argument:

- Cullen v. Elwin* (1904), 90 L.T. 840; 20 T.L.R. 490; 48 Sol. Jo. 474, C.A.; 43 Digest 105, 1098.
- Yorkshire Miners' Association v. Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431, H.L.; 43 Digest 107, 1127.
- Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163; 78 L.J.Ch. 204; 99 L.T. 945; 25 T.L.R. 1007; 53 Sol. Jo. 98, C.A.; on appeal sub nom. *Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 26 T.L.R. 177; 54 Sol. Jo. 215, H.L.; 43 Digest 104, 1089.
- Old v. Robson* (1890), 59 L.J.M.C. 41; 62 L.T. 282; 54 J.P. 597; 38 W.R. 415; 6 T.L.R. 151, D.C.; 43 Digest 94, 981.
- Wolfe v. Matthews* (1882), 21 Ch.D. 194; 51 L.J.Ch. 833; 47 L.T. 158; 30 W.R. 838; 43 Digest 107, 1123.
- Rigby v. Connol* (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 28 W.R. 650; 43 Digest 98, 1035.
- Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605; 69 L.J.Ch. 783; 83 L.T. 238; 49 W.R. 91; 16 T.L.R. 514; 44 Sol. Jo. 643, C.A.; 43 Digest 99, 1036.
- Burke v. Amalgamated Society of Dyers*, [1906] 2 K.B. 583; 75 L.J.K.B. 533, D.C.; 43 Digest 101, 1051.
- Sayer v. Amalgamated Society of Carpenters and Joiners* (1902), 19 T.L.R. 122; 43 Digest 105, 1097.
- Hornby v. Close* (1867), L.R. 2 Q.B. 153; 8 B. & S. 175; 36 L.J.M.C. 43; 15 L.T. 563; 31 J.P. 148; 15 W.R. 336; 10 Cox, C.C. 393; 43 Digest 109, 1150.
- Connor v. Kent*, *Connor v. Ritson*, *Gibson v. Lawson*, *Curran v. Treleaven*, [1891] 2 Q.B. 545; 61 L.J.M.C. 9; 65 L.T. 573; 55 J.P. 485; 7 T.L.R. 650; 17 Cox, C.C. 354, C.C.R.; 15 Digest (Repl.) 917, 8812.
- Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, 51.

Appeal by the plaintiff from a decision of a Divisional Court (CHANNELL and SUTTON, JJ.).

The plaintiff, Alfred Gozney, was a member of the Bristol, West of England, and South Wales Operatives' Trade and Provident Society, the defendants, which was registered as a trade union, and brought this action for a declaration that the defendants had been wrong in imposing on him a fine of 2s. 6d. and an order for the repayment to him of that sum.

The rules of the society, so far as material, were as follows:

"Rule 1. This society is a trade union.

"Rule 2. The object of the society shall be to raise by entrance fees, weekly contributions, fines, and levies such funds as provide for the following benefits:

"(1) Trade benefits to existing members as per r. 40 (post). . . ."

Sections 2, 3, and 4 related to payments in case of sickness, death, superannuation, etc.; ss. 6 and 7 to surgical and legal assistance; and s. 8 was "to regulate the relations between employers and workmen."

Rule 7, s. 2 (4), provided :

"Should work be offered at the current rate of wages to any member receiving travelling relief, unless it be to fill the place of those fighting for better conditions, and he refuses to accept it, his allowance shall be at once stopped and his card given up."

Rule 40, which was headed "Trade Fund," provided :

"1. Trade members paying to this fund at the time these rules come into force, whether paying 3d. per week to this fund only or 2d. per week to trade in addition to their contributions for sickness and death benefits, shall be entitled to the following benefits: Dispute pay, travelling relief, and assistance to sue employers for compensation under the Employers' Liability and Workmen's Compensation Acts. 2. Strike pay will only be paid in support of members endeavouring to secure an advance of wages or resisting a reduction of same, resisting an increase of the hours of labour, and, when desirable, endeavouring to secure a reduction of same. 3. When a dispute exists in any occupation for any of the foregoing objects in which members are concerned, notice shall at once be given to the lodge secretary. The executive committee shall at once be notified and all particulars supplied. 4. Should a strike take place, all members who are entitled to trade benefit under this rule shall receive pay at the rate of 1s. 8d. per day for each working day, not to exceed six weeks. If the strike continue, the executive committee shall be empowered to continue pay for a longer period, if they, upon consideration, deem it necessary. No members shall be entitled to strike pay when receiving sick pay from this or any other society. . . . 6. No officer or member of this society shall be authorised or permitted to take any active interest in, aid in any way, or otherwise assist, any trade movement except in his private capacity. The society's liability shall be held to be ended when the person entitled to dispute pay by this rule has received his pay."

Lush, K.C., and W. V. Ball (Compton with them) for the plaintiff.

Simon, K.C., and T. B. Napier for the defendants.

Cur. adv. vult.

Mar. 1, 1909. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R.—The plaintiff is a member of the Bristol, West of England, and South Wales Operatives' Trade and Provident Society. He commenced proceedings in the county court claiming the return of 2s. 6d., the amount of a fine alleged to have been wrongfully imposed upon him, and claiming certain declarations as to the effect of the rules of the society as the foundation of the claim for repayment. The defendants relied upon the provisions of s. 4 of the Trade Union Act, 1871, as depriving the court of jurisdiction. The county court judge adopted this contention, and gave judgment for the defendants on the ground of no jurisdiction. The Divisional Court dismissed the plaintiff's appeal on the same ground.

The defendant society is registered under the Trade Union Acts, 1871 and 1876, but it is important to observe that a trade union may be either a lawful combination or an unlawful combination by reason of some one or more of its purposes being in restraint of trade: s. 16 of the Act of 1876. It is a common mistake to suppose that every trade union is, apart from the Act of 1871, an unlawful combination. The Act of 1871 provided (s. 3) that the purposes of a trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. That is followed by s. 4, which enacts that "nothing in this Act" shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of (inter alia) any agreement for the application of the funds of a trade union to provide benefits to members. The plaintiff was entitled to sick pay under the

rules, and the fine of 2s. 6d. was deducted from his sick pay. If, therefore, the plaintiff would have to rely upon s. 3, I think s. 4 would be fatal. If, however, he has a right of action apart from the Act of 1871, there is nothing in the Act of 1871 to take away or affect his right.

It is necessary carefully to consider the rules of the society. At the very beginning is the statement: "This society is a trade union"—a statement which is innocuous. The members are "operatives," but not confined to any particular trade. By r. 2 the objects of the society are stated. [HIS LORDSHIP read the rule, and continued:] Of these objects No. 1 is the only material one, for No. 8 is colourless. Rule 40 deals with certain benefits called dispute pay, which I assume to be the same as strike pay, travelling relief, and other assistance. Sections 2, 4, and 6 of r. 40 are the only material sections. There is nothing illegal in a strike, although it may be attended with circumstances, such as breach of contract or intimidation, which make it illegal: *J. Lyons & Sons v. Wilkins* (1). Nor is there anything illegal in contributing for the support of strikers: see *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (2), per LORD LOREBURN and LORD JAMES OF HEREFORD. There is nothing in the rules in the present case which authorises the calling out of members or assisting a strike, and s. 6 of r. 40 shows that any such action is expressly prohibited. It seems to me that the society is really a mutual insurance society against sickness and loss of wages by reason of shortness of work (called travelling relief, r. 7), or by reason of voluntary abstention from work (called strike pay: r. 40, s. 4). It is a harmless friendly society and there is nothing unlawful in its objects.

The judgment of this court in *Swaine v. Wilson* (3) applies to the present case. Even if one particular rule in a society of this nature could be pointed out as being in restraint of trade, it would not prevent the court from exercising jurisdiction for a breach of other rules not open to that objection. But, in my opinion, there is no such objectionable rule in the present case. It follows that in my opinion the county court judge was wrong in declining jurisdiction. I have carefully read and considered the judgment of CHANNELL, J. His general propositions seem to me to be perfectly accurate, and he evidently felt considerable hesitation in applying them to the present case. He stated that there was less to point to as showing illegality in the rules of this society than in any one which has yet been held by the courts to be illegal, but he considered there was just sufficient to make the society illegal. With great respect to the learned judge, I think this society is just inside the limits of legality. The orders of the county court and the Divisional Court must be discharged, and the case must be remitted to the county court to be heard on its merits. The defendants must pay the costs in both courts and of this appeal.

FLETCHER MOULTON, L.J.—In order to sustain the defence raised by the defendants—that by reason of s. 4 of the Trade Union Act, 1871, the court had no jurisdiction to entertain the plaintiff's claim—the defendants must show (i) that, apart from the Trade Union Acts, 1871 and 1876, they could not be sued by the plaintiff by reason of their being an illegal association; and (ii) that the nature of the plaint brings it within the provisions of s. 4 of the Trade Union Act, 1871, so that the legalisation of the society by that Act does not give to the courts any increased jurisdiction to entertain this particular plaint. If the defendants can substantiate both these contentions the society must be taken for the purposes of this plaint to be an illegal association, and the action is unsustainable.

So far as the real subject-matter of the action is concerned—viz., the recovery of the 2s. 6d. alleged to be due to the plaintiff as sick pay—I have no doubt that it comes within the provisions of s. 4. With regard to the declarations asked, I do not propose to give any decision, as, in the view I take of the rights of the parties, it is not necessary to do so. But I am not prepared to say that the courts may not properly be asked to make declarations as to the meaning and effect of rules of trade unions even though it cannot enforce claims under them. The court has jurisdiction to give a declaratory judgment even when no relief is asked, and,

though it would, no doubt, hesitate to do so in matters which from their nature could not give rise to claims which they would have jurisdiction to entertain, this is not the case with trade union rules. In *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (2) the House of Lords granted an injunction to prevent money being paid away out of the funds of a trade union for purposes not sanctioned by the rules, and, if the holders of the funds or members who are interested in those funds and entitled to see that they are not wasted were to apply to the court in a proper case for a declaration as to the meaning of the rules as bearing on the distribution of the funds, I do not, as at present advised, see any sufficient ground for the court refusing to give its assistance. But I do not give any decision on the point, and shall treat the case as though the payment of the 2s. 6d. were the only thing sought by the action. In other words, I shall treat the defendants as having established the second contention if they can sustain the first and more fundamental one.

The case, therefore, turns on our answer to the question: Apart from the provisions of the Trade Union Acts, 1871 and 1876, would the defendant society be an illegal association? To answer this question it is necessary to examine the purposes for which the defendant society is formed, and the means whereby it proposes to effect those purposes. If either of these be illegal, it may be necessary to examine more closely into the nature of that illegality to see whether it is of such a kind as to taint the whole constitution of the society and make it an illegal society. But, if there is no illegality in either respect, it is impossible to refuse to it a legal status which would entitle the plaintiff to bring it before the courts. It follows, therefore (and both parties agree as to this), that the question must be decided entirely by an examination of the contents of the printed book of rules of the society. These rules define its constitution and objects, and set forth the detailed rules adopted by it for carrying out these objects. Nothing turns on the name and constitution of the society. It is true that it is stated in limine that "the society is a trade union" and it is registered as such. But this is a perfectly neutral statement, because, since the alteration of the statutory definition of a trade union by the Act of 1876, it no longer implies that the society would have been an unlawful combination at common law before the Act of 1871 was passed. No. 8 of the objects in r. 2 is, in my opinion, equally neutral in its bearing on the question before us. It states that one of the objects of the society is "to regulate the relations between employers and workmen." This connotes nothing illegal. It would apply to a society which aimed at promoting the practice of appeals to arbitration in trade disputes. Unless illegal means are used, it is impossible to suggest that it is illegal to try to regulate such relations, and it is not suggested that there is any indication of an intention of using illegal means, unless it be contained in r. 7, s. 2 (4), or in r. 40, which I am about to examine particularly.

It will be convenient forthwith to deal with r. 7, s. 4, for it is a very subsidiary matter, and, though relied upon by counsel for the defendants, it was not very strenuously pressed. [His LORDSHIP read r. 7, s. 2 (4), and continued:] The object of this rule is to prevent the funds of the society being drained by payments to members who can get work on normal terms, but prefer to be idle. That those who act thus without reasonable excuse should no longer receive payment from the society on the ground of being put out of work is just. The only objection raised to the rule is that it shows that the society regard it as a reasonable excuse that the work offered is to fill the place of those fighting for better conditions. I can see no reason why the society should not look upon this as a reasonable excuse, seeing that to accept the work would be to draw down upon the member the reprobation of his fellow-workmen, and probably to injure seriously his chance of future employment and increase the probability of his becoming a permanent burden on the society. In my opinion, the rule without the exception would be both unjust in its working and unwise. There is certainly nothing illegal in a society like this recognising the existing state of our social organisation and acting so as to protect its funds, so far as it can do so, without exposing its members to annoyance.

The main argument on behalf of the defendants rested on r. 40, and rightly so. This rule is clearly of great importance. The first in numerical order of the "objects of the society" is to provide "trade benefits to existing members as per r. 40," and r. 40 provides, among other things, for strike pay. To understand the matter properly it is necessary to state that the society has two types of subscriptions, the produce of which go into separate funds. The one is to provide sick pay and the like, and, so far as this subscription is concerned, the society is for all practical purposes a mere friendly society. But members of the society may, but not must, subscribe to the trade fund and thereby become entitled to trade benefits under r. 40, and perhaps (though this is not quite clear) to travelling allowance under r. 7. The formation and application of this trade fund is, therefore, a separate and distinct object of the society. It was pressed upon us on behalf of the plaintiff that nevertheless it was not the main object of the society, and certain authorities were quoted which speak of the main object as that which must be looked to. I do not think that such a contention is sound. So soon as it is clear that one of the objects of a society is a separate and distinct object, and that it is carried out independently, no question of its order of importance can have any legal bearing or effect. For all legal purposes such objects are co-ordinate. They possess the same status. It may be different in cases where one is ancillary and subordinate to another and is solely for the purpose of more effectively accomplishing it. The courts may then take the latter as the real or main object and consider with regard to the other whether it so alters the primary object of the society as to affect its legal status. But no such questions can come in where the objects are independent, and, therefore, co-ordinate, and I shall consider the questions arising out of r. 40 as though the giving of these trade benefits were a principal object of the society. It is not suggested on the part of the defendants that there are any provisions for making or enforcing agreements for strikes or for taking any part therein. On the contrary, by r. 40, s. 6, it is specifically provided that no officer or member shall be authorised or permitted to take any active interest in, aid in any way, or otherwise assist any trade movement except in his private capacity.

But under s. 2 and s. 4 of r. 40 it is provided that when a strike takes place for the purpose of bettering or defending existing conditions of labour, trade members shall receive strike pay at the rate of 1s. 8d. per day for the first six weeks, and the executive committee are empowered, should the strike continue, to extend this period if after consideration they deem it necessary so to do. Counsel for the defendants contend that these rules, by providing for the payment of strike pay, facilitate strikes, because strike pay prevents workmen from being driven to abandon them by the imminence of starvation to themselves and their families. This, they say, is sufficient to make an association which has the giving of strike pay as one of its objects an illegal association independently of the relieving provisions of the Trade Union Acts. This appears to me a tremendous conclusion to be based upon such slight premises. Strikes are well-known occurrences in the labour world, and every workman who is prudent and realises his duty towards those who depend on him will take steps to provide against the suffering they bring. Every time a workman practises thrift he facilitates his taking part in future strikes, and no doubt that intention is present when he thus acts, and it is strange that such a motive should be held to be tainted with illegality. I cannot see that it makes any difference that this object is effected by a specific provision with regard to strikes, for instance, by an insurance against them whether on the mutual principle or otherwise. Every workman, however pacific in his nature, must know that he may find himself involved in a strike, and to say that he may not insure himself against the inability to sustain himself and his family should one occur is, to my mind, so unreasonable that it would require to be supported by overwhelming authority before I could accept it. So far from this being the case, I can find no authority at all in its favour, and what a workman does by becoming a trade member of the defendant society is (so far as this matter is concerned) neither more nor less than to join a mutual insurance society against loss of wages during a strike.

The real fallacy of the argument on the part of the defendants lies deeper. It proceeds on the proposition that strikes are per se illegal or unlawful by the law of England. In my opinion, there is no foundation for such a proposition. It is true that occasional dicta are to be found to the effect that combinations to better the conditions of labour are unlawful at common law, but the courts have never accepted the law thus laid down, and very eminent judges have expressed views to the contrary. But the point is, in my opinion, best decided by an examination of the actual decisions of the courts. There is no trace of any such doctrine during the centuries when the common law of England was formed, nor, in fact, until the end of the eighteenth century. This was not due to any friendliness towards freedom of action on the part of workmen in this respect. On the contrary, during the seventeenth and eighteenth centuries a long succession of legislative enactments were passed restricting with a severity which shocks our modern ideas all attempts on the part of workmen to better these conditions of labour. Yet during the whole of this period no court treated combinations to better the conditions of labour as being contrary to common law, and none of these statutes purported to declare or rest upon the common law. If we except an obiter dictum by GROSE, J., in *R. v. Mawbey* (4) (6 Term Rep. at p. 636) in 1796 (which, to my mind, was not intended to refer to common law, but to the effect of statutes then in force), I cannot find that there were any judicial dicta in support of the suggested proposition until after the legislature swept away all these statutes by the Combinations of Workmen Acts, 1824 and 1825 (repealed). It does not surprise me that after the courts had for such a long series of years been occupied in enforcing statutable prohibitions of very varied kinds against combinations among workmen there should come to be an idea in some minds that the common law itself must have disapproved of that which legislation so persistently persecuted. But conclusions as to the common law which first appear in recent times and are based on no accepted principle of earlier date are to be looked upon with great suspicion. Even since 1824 the weight of authority is against this doctrine. Strikes per se are combinations neither for accomplishing an unlawful end nor for accomplishing a lawful end by unlawful means, and I, therefore, come unhesitatingly to the conclusion that the fact that the arrangements for giving strike pay do in a sense facilitate strikes is quite immaterial for the purposes of our decision, that the defendant society does not become illegal by reason of its having this as one of its objects, and that, therefore, the plaintiff was entitled to have his case heard by the judge of the county court.

I have not, so far, referred to the Conspiracy and Protection of Property Act, 1875, and I do not propose to rest my judgment in any way upon it. It is unnecessary so to do, because I hold that strikes in themselves are not unlawful by common law. But, if I had come to a different opinion on this point, the only ground upon which an agreement simultaneously to decline to work on proposed conditions could be held to be unlawful would be that it was one of the instances where a combination by two or more persons to do an act permissible to a single individual can be held to be unlawful. It is clear that any single individual is within his rights in refusing to work on any proposed conditions if he chooses so to do. If I had been of opinion that strikes came within the above category for this reason, I should still have held that the appeal must be allowed, because by s. 3 of the Conspiracy and Protection of Property Act, 1875, an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. This would render agreements to strike simpliciter lawful, because it removes the only ground on which they could be held unlawful.

In conclusion I ought perhaps to notice an argument which was strongly pressed upon us on behalf of the defendants, that the power of the executive committee to prolong the period during which strike pay may be paid made them responsible in some way for the strike itself and rendered them an illegal association. I must confess that I cannot follow this argument. Supposing that the regulation had

been that the strike pay should last during the whole period of the strike, unless the executive committee chose to stop paying it after the expiration of six weeks, the effect of the regulation would be substantially the same, so that, if we were to accept this argument, it would be equivalent to saying that any discretionary power in the executive committee, whether to pay or to stop payment, rendered them responsible for the strike. This appears to me to be absurd, but it is not necessary to examine the regulation further, inasmuch as the grounds of my decision are not affected by it. I am, therefore, of opinion that this appeal should be allowed with costs here and below, and that the action should go back to the county court to be tried.

BUCKLEY, L.J.—I desire to say at the outset that I do not in any way rest my decision upon the Conspiracy and Protection of Property Act, 1875. The case falls to be decided, in my judgment, upon a proper understanding of the nature of this society and of its rules. The society is composed of members who are not necessarily members of any one trade, but who may be members of any one of a number of different trades, or may not be engaged in any trade at all. They are persons who are to act in combination for the objects defined in the rules. Combination is, of course, not in itself illegal. A combination to save a man from drowning or to procure the arrest of a fugitive from justice, or for any lawful object, is perfectly legitimate. Conspiracy (which is the general expression for illegal combination) means the combination of persons to do an illegal act, or to do a legal act by illegal means. There are certain acts which one person may lawfully do alone, but which several persons cannot lawfully do in combination. Further, as matter of general principle, some rules, even in restraint of trade, are, if reasonable, valid. The maintenance of a strike is not necessarily illegal. I adhere to what I said in *Smithies v. National Association of Operative Plasterers* (5) as to the true effect of the decision of the House of Lords in *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (2). If a strike had taken place, even in breach of contract, but the broken contracts have expired, those who help to maintain the strike by supporting the workmen, after their current contracts have expired, in a refusal to enter into new contracts of service on new terms are not doing anything illegal. Further, if the general objects of the society are not illegal, it is legitimate, upon the authority of *Collins v. Locke* (6) and *Swaine v. Wilson* (3), to inquire, notwithstanding the existence of some rules which might be in restraint of trade and thus illegal, whether the general objects are not free from that objection.

Looking at these rules, and having regard to the above considerations, my view of them may be shortly expressed by saying that, so far as trade benefits are concerned the rules amount to no more than insurance of the members against the consequences of a strike. Provisions to encourage or procure a strike may be illegal. Provisions for the assistance of the victims of a strike may be perfectly legal. In these rules I can find no provisions addressed to the procurement or even the sanction of a strike. The rules do not, it is true, as did the rules in *Swaine v. Wilson* (3), provide that one of the objects shall be to render assistance to members when out of employment; but r. 7 is really a rule in this direction. It contemplates that a member is in search of work, gives him assistance when out of employment, and provides by s. 4 that his allowance shall be stopped if he refuses work at the current rate, except in one event—namely, that he is asked to fill the place of one fighting for better conditions. Here is a scintilla of assistance to maintaining a strike. This may fall into the observations which I have to make upon the principal rule in this connection—namely, r. 40. The effect of that rule, I think, is that if a strike takes place (s. 4) members are to have assistance, but that that assistance even is not available in the case of all strikes, but only (s. 2) in support of certain strikes; while by s. 6, which seems to me of first-class importance in this connection, it is provided that no officer or member shall take any active interest in, or aid in any way or otherwise assist any trade movement except in his private capacity. This is a direct veto upon procuring or inciting a strike. That the rules

to a certain extent assist a strike by giving assistance to persons when there is a strike is true. But, upon the authority of *Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* (2), this is within proper limits not illegal. I find nothing here to exceed proper limits. My conclusion, therefore, upon reading these rules, is that there is not here any such provision in restraint of trade as to render the society illegal. Under these circumstances the questions which have been argued upon the several Acts of Parliament do not arise. The decision appealed from is one which affirms that there was no jurisdiction to entertain the action. In my opinion, this decision is erroneous, and the case ought to go down for trial.

Solicitors: *Smith, Rundell & Co.*, for *W. R. Edwards*, Aberdare; *Rawle, Johnstone & Co.*, for *Benson, Carpenter, Cross & Williams*, Bristol.

[Reported by *W. C. Biss, Esq., Barrister-at-Law.*]

UNITED MINING AND FINANCE, LTD. v. BECHER

[KING'S BENCH DIVISION (Hamilton, J.), April 9, 12, 13, 14, 20, 1910]

[Reported [1910] 2 K.B. 296; 79 L.J.K.B. 1006; 103 L.T. 65]

Solicitor—Undertaking—Enforcement by court—Proof that undertaking given in capacity as solicitor—Undertaking to person not solicitor's client—No legal proceedings pending—No misconduct by solicitor.

A solicitor, acting for a vendor of mining rights, gave to the purchasers an undertaking to pay to the vendor on the execution of the contract of sale money deposited with him by the purchasers, or, if the negotiations for the contract failed, to repay the money to the purchasers.

Held: the undertaking was given by the solicitor in his capacity as solicitor, and, therefore, the court had jurisdiction to enforce the undertaking by a summary order although the person to whom the undertaking was given was not the client of the solicitor, there were no legal proceedings pending when the undertaking was given, and there was no misconduct on the part of the solicitor.

Notes. As to a solicitor's liability on undertakings, see 36 HALSBURY'S LAWS (3rd Edn.) 195-198; and for cases see 42 DIGEST 329 et seq.

Cases referred to:

- (1) *Re A Solicitor, Ex parte Hales*, [1907] 2 K.B. 539; 76 L.J.K.B. 931; 97 L.T. 212; 23 T.L.R. 573; 51 Sol. Jo. 626, D.C.; 42 Digest 331, 3736.
- (2) *Re Pass* (1887), 35 W.R. 410; 42 Digest 337, 3806.
- (3) *Re Gee* (1845), 2 Dow. & L. 997; 10 Jur. 694; 42 Digest 337, 3805.
- (4) *Re Hilliard, Ex parte Smith* (1845), 1 New Pract. Cas. 185; 2 Dow. & L. 919; 14 L.J.Q.B. 225; 5 L.T.O.S. 58, 59; 9 Jur. 664; 42 Digest 330, 3726.
- (5) *Re Marchant*, [1908] 1 K.B. 998; 77 L.J.K.B. 695; sub nom. *Re Marchant, Ex parte Frarey*, 98 L.T. 823; 24 T.L.R. 375; 52 Sol. Jo. 316, C.A.; 30 Digest (Repl.) 161, 151.
- (6) *Re Fairthorne* (1846), 3 Dow. & L. 548; 1 New Pract. Cas. 391; 1 Saund. & C. 40; 15 L.J.Q.B. 131; 6 L.T.O.S. 377; 10 Jur. 287; 42 Digest 332, 3742.
- (7) *Peart v. Bushell* (1827), 2 Sim. 58; 57 E.R. 705; 42 Digest 336, 3803.
- (8) *Re A Solicitor* (1888), 33 Sol. Jo. 76; 23 L.J.N.C. 143; 42 Digest 337, 3808.
- (9) *Murietta v. South American, etc. Co., Ltd.* (1893), 62 L.J.Q.B. 396; 9 T.L.R. 389; 5 R. 380, D.C.; 29 Digest 471, 199.

A Also referred to in argument:

Cocks v. Harman (1805), 6 East, 404; 2 Smith, K.B. 409; 102 E.R. 1341; 13 Digest (Repl.) 45, 597.

Re Lowe (1807), 8 East, 237; 103 E.R. 333; 42 Digest 327, 3680.

Ex parte Cobeldick (1883), 12 Q.B.D. 149; 49 L.T. 741; 32 W.R. 239, C.A.; Digest Supp.

B *Re Grey*, [1892] 2 Q.B. 440; 61 L.J.Q.B. 795; 57 J.P. 246; 41 W.R. 3; 8 T.L.R. 694, C.A.; 42 Digest 359, 4097.

Ex parte Evans (1840), 9 Dowl. 106; Woll. 2; 4 Jur. 991; 42 Digest 332, 3751.

Allaway v. Duncan (1867), 16 L.T. 264; 15 W.R. 711; 26 Digest (Repl.) 45, 302.

Re Kerly, Son & Verden, [1901] 1 Ch. 467; 70 L.J.Ch. 189; 83 L.T. 699; 49 W.R. 211; 17 T.L.R. 189; 45 Sol. Jo. 206, C.A.; 42 Digest 334, 3783.

C *Swyny v. Harland*, [1894] 1 Q.B. 707; 63 L.J.Q.B. 415; 70 L.T. 227; 42 W.R. 297; 10 T.L.R. 276; 38 Sol. Jo. 256; 9 R. 210, C.A.; 42 Digest 336, 3797.

Originating Summons taken out by the United Mining and Finance Corporation, Ltd., for an order for the repayment to that company by the respondent, H. Percy Becher, of the sum of £2,000, in pursuance of his written personal undertakings contained in two letters, dated respectively Oct. 30, 1909, and Nov. 5, 1909, addressed to Messrs. Christopher & Son, the solicitors for the corporation. The letters were as follows:

E "Oct. 30, 1909.—Dear Sirs,—Ivanitzky and the United Mining and Finance Corporation, Ltd.—I beg to acknowledge receipt of your cheque value £1,000, the proceeds of which are to be held by me pending Mr. Ivanitzky's decision upon the cable which I have sent to him to-day, and if the terms are arranged with him, pending the completion of the necessary supplemental agreement to carry out those terms. I undertake to repay the sum of £1,000 to you at any time after Nov. 8 in the event of terms not having been arranged with Mr. Ivanitzky by that date, or in the event of the further agreement necessary to carry out any new terms not having been signed by that date. . . .—Yours faithfully, H. PERCY BECHER.—Messrs. Christopher & Son."

F On Nov. 5, 1909, Messrs. Christopher & Son wrote to Mr. Becher as follows:

G "Dear Sir,—By the direction of Mr. Charles McCully we send you herewith our cheque for £1,200, being £1,000 further on account of the £6,000 payable to Mr. Ivanitzky under the agreement of Oct. 8 last, and £200 in payment to you on account of fee and expenses for going to Russia to-morrow for the purpose of completing the proposed alterations in the agreements. The £1,000 is handed to you on the condition that you do not part with same until a supplemental contract, satisfactory to our client, has been entered into and the required alterations in the draft agreement agreed, and that you undertake to repay this sum of £1,000 to us at any time on demand after Nov. 8 in the event of terms not having been arranged with Mr. Ivanitzky by that date, or in the event of the further agreement necessary to carry out any new terms not having been signed by that date, and the alterations in the draft agreed. The £200 is to be returned to us forthwith if you do not go to St. Petersburg to-morrow. Be good enough to send us a letter confirming this arrangement.—Yours faithfully, CHRISTOPHER & SON."

I In answer to this Mr. Becher wrote to Messrs. Christopher & Son:

"Nov. 5, 1909.—Dear Sirs,—I have your letter of to-day's date covering cheque for £1,200, receipt of which I acknowledge in the terms of that letter. With regard to the repayment of the £1,000, I note you have put it as liable to be repaid on demand after the 8th inst., but as that is Monday next and I shall not get to St. Petersburg till late on Monday evening, it is of course understood that this will be allowed to remain in my hands for a reasonable time to give

an opportunity of negotiating the alterations.—Yours faithfully, H. PERCY BECHER.” A

On the same date—Nov. 5, 1909—Mr. Becher wrote to Mr. Sargent, the secretary of the applicant corporation, as follows:

“I hereby acknowledge that your solicitors have paid me the following sums: On Sept. 27 £1,000 which with your consent was paid over to Mr. Ivanitzky, being the £1,000 payable to him on the signing of the agreement of Oct. 8 last. On Oct. 30 a further £1,000 to be held by me as a deposit against the completion of the supplemental agreement, to be paid to Mr. Ivanitzky on the completion of that agreement, or repaid to you in the event of negotiations for that agreement falling through. To-day, Nov. 5, 1909, they have handed me the further sum of £1,000 upon the same conditions.—H. PERCY BECHER.” B C

No terms were arranged within the time limited by the undertakings. The applicants then instructed their solicitors to write to the respondent for the return of the money, which they did by the following letter of Dec. 23, 1909, addressed to Mr. Becher:

“Dear Sir,—We are instructed by the United Mining and Finance Corporation, Ltd., to ask you to at once repay to us the two sums of £1,000 each which you hold for them repayable on demand in accordance with the terms of your letters of Oct. 30 and Nov. 5 last. We presume this money has been on deposit and that there will be some deposit interest payable to our clients.—CHRISTOPHER & SON.” D

Further correspondence took place, and the respondent declined to pay the £2,000 to Messrs. Christopher & Son as requested by them, on the ground that there might be a doubt whether in the circumstances of the case Mr. Ivanitzky was not entitled to the money. He stated that he had thought it advisable to take the opinion of counsel as to his position in the matter, and on Jan. 7, 1910, he wrote to Messrs. Christopher & Son that, if his counsel advised that he could with safety to himself pay over the money to them, less the amount due to him from the corporation, he would send a cheque for the amount immediately, but that he could not do anything that might render him liable in any way to Mr. Ivanitzky. The respondent's case was that while he was anxious to fulfil his undertakings with Messrs. Christopher & Son, he at the same time occupied the position of being Mr. Ivanitzky's solicitor, and had his duty to perform to him as his client, and that therefore he had no right to take any steps which might in any way prejudice Mr. Ivanitzky's rights as to these sums. He suggested that the applicants should bring an action against him to recover this money, in which case he could interplead and pay the money into court, and so the rights of all the parties could be determined. He further stated that he was advised by counsel that in the circumstances of the case his undertakings were not enforceable against him. The above originating summons was then taken out on Jan. 11, 1910. It was admitted throughout that the respondent had not been guilty of any dishonourable or discreditable conduct. E F G H

Montague Lush, K.C., and *A. Houston* for the respondent.
Gore-Brown, K.C., and *Henry Hurrell* for the applicants. I

HAMILTON, J.—This case raises a point on the jurisdiction of the court over its officers, as to which it is contended that the authorities are conflicting. It has also raised a question of fact and questions of discretion which require careful attention, and, of course, are of some seriousness to Mr. Becher, the solicitor against whom the summons is taken out. Finally, it raises a question as to the right to £2,000, no unsubstantial sum.

The case comes before me in this way. The applicants, who are the United Mining and Finance Corporation, Ltd., by a summons dated Jan. 11, 1910, and

A served on or before Jan. 15, called upon Mr. Becher, a solicitor, as respondent to that summons, to appear upon their application for an order for the repayment to the applicants by the respondent of the sum of £2,000 in pursuance of his written personal undertakings as contained in two letters dated Oct. 30 and Nov. 5, 1909, and addressed to the solicitors of the corporation, Messrs. Christopher & Son. When the matter came first before the master a discussion occurred, the result of which was that the master thought that an issue ought to be tried, and thereupon an issue was directed which was put down in the non-jury list, and it came on before me. It was discovered upon examination to be an issue which, construed according to its terms, raised no question which would decide anything between the parties. Accordingly, at my suggestion, counsel consented, to save expense and complexity, that the order for the issue should be discharged, and that I should hear the summons as though, when it came before the master, he had referred it to me to be disposed of. When the summons came again before me, at the beginning of the hearing counsel for Mr. Becher took a preliminary objection which, as it went to the whole question of jurisdiction, it was necessary to have argued out and decided before hearing any of the facts. I decided it, but without giving my reasons, in favour of the applicants, and held that I had jurisdiction.

D The point taken was this. Counsel said that in this case it is admitted that Mr. Becher is not the solicitor for the applicants; it is also admitted that he has not been guilty of dishonourable conduct, there is no suggestion of moral turpitude attached to anything that he has done—he may be right or wrong in his contentions, but the applicants do not suggest that he has done anything discreditable to himself; and, thirdly, it was pointed out that the undertaking was not given in the course of any pending legal proceeding, but was connected with more or less legal documents and negotiations in which solicitors were concerned, so that there is neither an undertaking given directly to the court to induce the court to make some order or forbear to make some order, nor was it an undertaking given to a party in the suit, nor, indeed, in the presence of the court, but still in principle an undertaking given to the court. Accordingly, it was contended that there was no jurisdiction, those facts being so, to entertain the application, and a passage was cited from the judgment of A. T. LAWRENCE, J., in *Ex parte Hales* (1), in which the learned judge said ([1907] 2 K.B. at p. 545):

G "I quite agree with Mr. SHEARMAN's contention on behalf of the respondent that mere dishonourable conduct does not give the court jurisdiction to apply this summary remedy. The dishonourable conduct in such cases in order to give the court jurisdiction must be dishonourable conduct to the applicant in the course of legal proceedings, and if the applicant can show that there has been dishonourable conduct to him, prejudicing his position, it is then that he can come to the court and say, 'I ask for the interposition of the court by way of this summary remedy.'"

H In that case the following points are to be observed: first of all, that passage does not appear to have been founded upon any exhaustive citation of the authorities which have been cited before me, although one of them, *Re Pass* (2), was cited to the court; secondly, it does not appear that the particular point as to jurisdiction was fully raised in *Ex parte Hales* (1); thirdly, I do not observe that DARLING, J., who, with A. T. LAWRENCE, J., constituted the court, stated that proposition in his judgment; and, fourthly, I think I am right in saying that it was not necessary to the decision in that case to define exhaustively what the conditions are under which this jurisdiction is to be exercised, nor does it appear to me that A. T. LAWRENCE, J., was then intending exhaustively to define all the conditions which must exist for the exercise of this discretion.

I I shall, however, pay the greatest attention to that passage. If there were no authorities to the contrary, I should be very loth not to follow it, but it appears to me that there are clear authorities to the contrary. A passage was read which summarises the law conveniently in CORDERY ON SOLICITORS (3rd Edn.), pp. 150, 151,

where it is pointed out that the court will summarily enforce undertakings given by a solicitor in that character, adding

"and it matters not that his services are gratuitous, or that the undertaking is given after judgment, or even that it is not given in an action, but in a mere mortgage or loan transaction. But the solicitor must be acting professionally."

Three, at least, of the cases which have been cited are instances in which a solicitor had under this jurisdiction of the court been directed to make payments of money, although moral turpitude was not alleged, on the application of a party who was not his client and who was unaware that the act was done not in the course of any pending legal proceeding. In *Re Gee* (3) the conclusion I have referred to was arrived at, and COLERIDGE, J., in giving his judgment, said this (2 Dow. & L. at p. 1000):

"The question in either case is, Has the undertaking which it is sought to enforce been given by the attorney in his character of attorney in the transaction in dispute?"

Re Hilliard (4) does not appear to have been cited in *Re Gee* (3), according to the report of the latter case, but, as it was a considered judgment of the same learned judge, COLERIDGE, J., delivered only a short time previously, both being in the year 1845, I do not think it can be supposed that COLERIDGE, J., when giving his judgment in *Re Gee* (3), considered that there was anything in his judgment in that case to conflict with his decision in *Re Hilliard* (4), in which he had said (2 Dow. & L. at pp. 920, 921) that in exercising this discretion

"the court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mood; but with a view to securing honesty in the conduct of its officers in all such matters as they undertake to perform or see performed when employed as such, or because they are such officers."

A little further on, he said:

"I have no desire to narrow the jurisdiction of the court as to these undertakings on any such ground as the present. They are very often most beneficially made for both parties in a cause, and there would be great injustice in letting the attorney loose from them after the party has foregone the advantage or paid the price which was the consideration; while there is no hardship on the attorney in enforcing them; he is never compelled to enter into them; if he does, he should secure himself by his arrangement with his client, and he must be taken to know the legal consequences of his own act."

The ground referred to there was the Statute of Frauds, which I suppose was more appropriate to be raised in an action, an alternative mode of proceeding, than upon this sort of summons.

I think that judgment, which has been frequently referred to since, shows two things. The first is that it is not a mere question of a speedy, convenient, or inexpensive mode of trial. There was a passage cited to me from a judgment of VAUGHAN WILLIAMS, L.J., in *Re Marchant* (5) ([1908] 1 K.B. at p. 1001), where the lord justice thus describes this procedure as "what I may call an action commenced in this convenient way by an originating summons." I do not think that passage was intended to decide, or did purport to decide, that the propriety of resorting to the disciplinary jurisdiction of the court or to an action can be decided by any mere relevance to the speed or convenience to one of the parties, if not to both, of the one proceeding over the other. The second point to be noticed on this judgment in *Re Hilliard* (4) is that, although COLERIDGE, J., places the jurisdiction in terms upon the view that its object is to secure honesty in the conduct of its officers, honesty in that regard is not a purely moral quantity, but evidently is, as seen from his decision in *Re Gee* (3) and other cases, a term applicable to the proper and professional observation of undertakings professionally given. The

conduct which is required of a solicitor is to that extent, perhaps, raised to a higher standard than the conduct required of ordinary men, in that it is part of the special control a court exercises over them that in certain cases they may be called upon summarily to perform their undertakings, even although their contentions to the contrary are entirely free from any taint of moral misconduct. Other instances of the principle have been cited to me, namely, *Re Fairthorne* (6) and *Re Pass* (2), which was a judgment of the Divisional Court, consisting of LORD COLERIDGE, C.J., and MATHEW, J. The latter was a case in which there was no moral turpitude, there were no pending legal proceedings, and the undertaking was not given to the solicitor's own client, and yet it was held that the undertaking could be enforced against the solicitor in a summary way. The way it was expressed in *Re Fairthorne* (6) was this (15 L.J.Q.B. at p. 132):

"The question, therefore, in this as in every other case, is whether the attorney was acting in that character when he gave the undertaking."

The expression in LORD COLERIDGE, C.J.'s judgment in *Re Pass* (2) was (35 W.R. at p. 411):

"It is clear that Mr. Pass entered into the undertaking as a solicitor, and the trustees might not have accepted the guarantee had it not been entered into by him as such, for a special advantage is derived from a guarantee given by an officer of the court that it is enforceable by the creditor in a summary manner, without the trouble and expense of bringing an action against the guarantor."

That language goes further, I think, than any previous language cited to me has gone in the direction of saying that the convenience of enforcing solicitors' undertakings summarily is one of the principal tests with regard to the exercise of the jurisdiction.

It appears to me that in the face of those authorities, unless I am in a position to disregard them, I must hold that the jurisdiction, at any rate in the circumstances of this case, is clearly made out. Only two authorities really purporting to be in point have been cited to the contrary, although I have had various passages read laying down a proposition which I do not think anybody disputes—that where a solicitor disregards his duty or is guilty of improper conduct, the court has *eo ipso* jurisdiction over him to compel him to do what is right. The two decisions that were relied on are *Peart v. Bushell* (7), which was a decision of HART, V.-C., in 1827, where he purports to have said that it did not come within his jurisdiction to order a solicitor to perform an undertaking which he had given at the sale of an estate to cause satisfaction to be entered up upon any judgment that might be found against one of the parties through whom the vendor traced his title. The observations I make as to that case are that no authority whatever was cited before the learned Vice-Chancellor, and the report of the case is said by MR. SIMON to be ex relatione some anonymous person whose name he does not give, and in the teeth of the other cases I am unable to say that *Peart v. Bushell* (7) is an authority that would bind me. The other case was a decision of CHITTY, J., in *Re A Solicitor* (8). As far as can be made out from the meagre report in the LAW JOURNAL NOTES OF CASES, and I think it is confirmed by what I understand to be the language of the report in the SOLICITORS' JOURNAL, the decision in that case was on the discretion of the court, not upon its jurisdiction, and, therefore, it does not touch the present point.

I Were it otherwise, it does not appear to me that I can refuse to follow the cases of *Re Gee* (3), *Re Fairthorne* (6), and *Re Pass* (2). The expression is "in his capacity as a solicitor," and that is an expression which it is, no doubt, not very easy to define with any extreme precision, but I think the jurisdiction involves that the applicant should prove, if he is put to the proof, that the undertaking was given by the solicitor in his capacity as a solicitor, and that the event has happened upon which he ought to perform it, and even after that it is competent to the solicitor to urge that there are grounds upon which the court should refuse to exercise its discretion in the matter. Accordingly, it becomes necessary to deal with the facts

and to ascertain, first of all, whether the applicants make out their case. I do not propose to read again the terms of the letters which constitute the undertakings. They clearly do make the repayment of the money to the corporation dependent upon certain events, and I think they clearly would make the money in Mr. Becher's hands money had and received to his client's use, if those events had happened. Therefore, the first question is whether the events happened or did not happen. The applicants are a limited company having a subscribed capital of £7, and whether it be paid up or not, I do not know. I am told that it has offices for which, Mr. Becher says, they pay £1,000 a year; whether they had at any particular time funds or not is not proved. It is shown that in November, 1909, they had under £200 to their credit at the bank, but I think it is also clear that this corporation, although it may not have got money, were able to get it under circumstances making it worth the while of its friends to provide the funds. On the other hand, there was a Mr. Ivanitzky, and his solicitor, Mr. Becher, describes him to me as one of the wealthiest and most prominent citizens of Tomsk in Siberia, and the owner of a number of claims to gold mines which he was desirous of selling. Considerable negotiations had passed for the purchase of these gold mines from Mr. Ivanitzky and his wife by the company which was to be formed by the present applicants. The applicants had caused the mines to be inspected; apparently they were being worked, but with inadequate machinery which was not in repair. The matter progressed so far that each of the parties consulted their solicitors, and before any agreement could be signed the corporation's solicitors had to lodge £1,000 with Mr. Becher, Mr. Ivanitzky's solicitor, being the amount which would become payable on the signing of the contract, and when that contract was signed it was obviously an essential part of it that the purchase money to be paid was to remain in a bank at Tomsk until at the date of the completion Mr. and Mrs. Ivanitzky could produce their title and show it to be a satisfactory one. It is said that the £1,000 prior to signing the contract was asked for, not because the means of the corporation were distrusted, but because Mr. Ivanitzky thought they were dallying with the matter. A contract was signed, and among the conditions of that there was involved the payment by the corporation of a sum in the month of October, 1909, of £6,000, on the completion of the contemplated sale to the intended company, which the corporation was to form by the middle of December, 1909. For certain reasons it was not convenient to the corporation to produce their money as early as their contract bound them to do. Mr. Ivanitzky was then in the position to forfeit the sum that had already been paid, and it was necessary to negotiate with him for an extension of the time within which the contract might be performed, and that involved the preparation of a supplemental agreement to embody formally any arrangements by way of variation of the principal agreement. A good many communications passed, the result of which was that at the instance of the corporation Mr. Becher, whom the corporation knew to be the solicitor to Mr. Ivanitzky, was to go to St. Petersburg to endeavour to persuade his client to enter into a varied arrangement with regard to the payment of the purchase money, and it was again as a guarantee of good faith that these two undertakings were given and two sums of £1,000 were lodged with Mr. Becher for that purpose.

Pausing there, I should have no doubt, having regard to this transaction, that Mr. Becher received those sums of money in his capacity as a solicitor. Whatever that expression may mean, I think it must at least go as far as this, that when a solicitor in the course of business which he is conducting for clients with third parties in the way of his profession gives an undertaking to those third parties incidental to those negotiations and to that business, his undertaking is one which is given in his capacity as a solicitor, and not as a mere layman undertaking the office of stakeholder or guaranteeing the payment of money or something of that kind. It seems to me that the part which solicitors are well known to play in the elaborate negotiations which constantly have to be embodied at various stages in legal forms of a highly technical character constantly involves for the purpose of facilitating the business the giving of subsidiary undertakings of this and a similar

character, and such undertakings are in their capacity as solicitors, and the money is entrusted to them largely because they are solicitors, and are, therefore, deemed, and found to be, especially worthy of trust. I should have inferred from the course of business, without any hesitation, that the money was received on the undertaking given by Mr. Becher in his capacity as a solicitor. A question was put to Mr. Christopher, who actually paid the money, as to what he relied upon when he paid the money to Mr. Becher. The question was objected to, but the answer was that he relied upon the fact that Mr. Becher was a solicitor. I think that the objection is groundless, because it appears to me to be material to inquire upon the question whether the money was paid to him in his capacity as a solicitor what the reliance was of the person who paid the money, and it does not seem to me to be open to the objection taken that this was inquiring into the state of his mind. But, entirely apart from that answer, I should have arrived without hesitation at the same conclusion as a matter of fact.

Having reached this point—namely, payment of the money and the giving of the undertakings—the question then is whether the event has happened which makes this money money had and received to Mr. Ivanitzky's use, or makes it money repayable under this undertaking to Messrs. Christopher & Son, on behalf of the United Mining and Finance Corporation. It is quite clear that two things were stipulated, one that in the event of terms not having been arranged with Mr. Ivanitzky by Nov. 8—a time subsequently extended to a reasonable opportunity for Mr. Becher to get to St. Petersburg and see his client—or in the event of a further agreement necessary to carry out any new terms not having been signed by that date, in either of those events happening the money was repayable to Messrs. Christopher's clients. It is clear a further agreement would be necessary, and no further agreement has been signed by the corporation, but if they ought to have signed it and have prevented the condition being satisfied and the event occurring by refusing to do what they ought to have done, they cannot rely upon that. My conclusion is that the event has happened in which the money is repayable and the undertaking should be fulfilled.

Now comes the question whether, in the exercise of my discretion, I ought to order Mr. Becher to pay this money in the events which have happened. His contention is that resort to these proceedings is oppressive; that there was nothing to prevent the resort by the corporation to the ordinary remedy by action upon his undertakings; that he has always been willing, and more than willing, desirous, of being sued in order that as soon as he had appeared to the writ he might take out interpleader proceedings and obtain leave to pay this money into court and get rid of it. His case has been that this £2,000 is a nuisance to him, and I think by this time it probably is; that he is most anxious to get rid of it, but that he is hampered by two considerations—his duty to his client in Siberia, and his fear that his client in Siberia may make claims upon him. I must examine these contentions because, although it was argued that the terms of these undertakings oust any considerations of this kind, they are absolute undertakings to repay the money if an event does not happen which has not happened, and that, therefore, they ought to be so construed as to exclude any right to contend that one procedure rather than another should be followed. I am against that contention. I think the question of the discretion duly arises upon this summons. In the first instance, it appears to me that the corporation were justified in taking out this summons. There is no trace in the communications which passed by writing down to the time when the summons was issued of the respondent saying that he was anxious to disembarass himself of this money; that he could only do so if the corporation would sue him; that he was willing to be sued; and that he should not resist any action taken except for the purpose of interpleader. [The learned judge having dealt with the facts as to the likelihood of Mr. Ivanitzky making a claim to this sum of £2,000, and of the applicants' right to interplead, continued:] Before the summons was issued, I do not think that Mr. Becher had intimated that he wished to interplead, and, according to his own account, he was not in a position to have sworn the

affidavit necessary to enable him to interplead, because by R.S.C., Ord. 57, r. 1A, he would have had to swear that he either was or expected to be sued by two or more parties making adverse claims to the money, and prior to the issue of the summons he did not expect to be sued by Mr. Ivanitzky for the money, because Mr. Ivanitzky had apparently said nothing at all about it, and, as I gather, had gone back to Siberia considering the whole matter at an end. Since he has received the letter of Jan. 28 from Mr. Ivanitzky, he says he does expect to be sued by him, an inference which I do not draw from the letter; and the reason he gives why he did not take out an interpleader summons in February, 1910, was that by that time he could not have conscientiously sworn that he expected to be sued by the corporation, as the corporation, instead of suing him, had taken out this originating summons and were going on with it, and, therefore, he could not have truthfully sworn the required affidavit. I feel great difficulty about that argument. It is suggested that the subsequent rules in Ord. 57 show that I ought to construe "sued" in that rule as meaning sued in a proceeding commenced by a writ of summons, but as it is clear that by the definition of "suit" in s. 100 of the Judicature Act, 1873, "suit" includes "action," and as it is also clear that "action" means a "civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court," the interpretation I should attach to the word "sued" there is that it means pursued in any legal proceeding authorised by the rules of court, in which case he was at that time not expecting to be sued, but actually was sued. Besides, the reasonable expectation that he must have formed would be that if he won on the originating summons the corporation would then begin an action, and, consequently, he was in a position to say that he expected to be sued. It appears to me, therefore, that the respondent had every opportunity of obtaining whatever relief was obtainable by interpleading at any time after the receipt of Ivanitzky's letter.

Reference has been made to Ord. 11, r. 8A, and it has been said, and I think rightly said, that the respondent had no opportunity under that rule of obtaining the relief he desires to have—namely, to get Mr. Ivanitzky's claim barred before he is ordered to pay the money to the corporation. It seems to me to be manifest that some risk he must run, even in an action or on an interpleader summons; and I do not see what order can be made in his favour that would not expose him to any proceedings in Russia which the laws of that empire leave open to Mr. Ivanitzky. Then it is contended that no interpleader order could have been made in his favour upon the ground that he had colluded in the sense in which that word is used in *Murietta v. South American, etc. Co., Ltd.* (9). It is a question of fact which has given me some difficulty, but I think that the burden of proving it rests on the corporation, and I am not satisfied that Mr. Becher has played the game of Mr. Ivanitzky in the sense necessary. The cases upon the subject appear to me to be *Murietta's Case* (9) and another case where an under-sheriff, who happened also to be a solicitor, having process put into his hands for execution, communicated that fact to the creditor of the execution debtor, being one of his own clients, whereupon the creditor took proceedings and defeated the execution. In that case he had allowed his zeal as a solicitor to conflict with his duty as an under-sheriff. I do not think I can say that there is here any collusion in the requisite sense upon the authority of those two cases, one of which is a case of a plain dereliction of duty on the part of an officer, and the other of which is a clear and express contract by which the party claiming to interplead bound himself to play the game of one of the claimants, and was to derive a personal interest in the fruits from the stakes of the game.

I cannot see that these proceedings are oppressive in any respect, or that the corporation are making some oppressive use of the machinery of the court; but I think that, when a solicitor gives an undertaking of this character, under the practice the parties to whom the undertaking is given are entitled to resort to this ready mode of determining disputes which he is entitled to raise, and, if he fails in them, to procure an order for payment. Accordingly, the conclusion at which I have arrived is that there is no reason, as a matter of discretion, why I should not

order the undertakings to be fulfilled in accordance with the events that have happened, in the terms of the undertakings; and the natural result of that is that Mr. Becher will have to pay the costs of this summons. I was pressed by his counsel in strong terms that Mr. Becher felt that there might be misconstruction placed upon his conduct if an order was made against him on this form of summons, and although in fact the corporation have disclaimed any accusation of dishonourable conduct, a disclaimer which I have accepted and acted upon throughout, it might be misunderstood if he was ordered to pay a sum of money as a solicitor of the court. I am prepared, in order to relieve him from any danger of that kind, as far as I can, to say that this order shall not be drawn up for forty-eight hours. If in the interval he pays the £2,000, or whatever is due, to the corporation, then no order shall be drawn up except that the respondent pay all the costs of the summons. If for any reason he thinks it better that the order should be drawn up at once, then the order will be that he pay the £2,000 in pursuance of the undertakings, and do pay all the costs of this application. There will be an order for payment to the corporation of £2,000, with such interest as this money has earned on deposit or would have earned if placed and kept on deposit throughout, subject to the deduction of any sums due by the corporation to the respondent in connection with this transaction and journey to St. Petersburg, to be referred to the master if not agreed, and for the payment by the respondent of all the costs of the summons and proceedings herein.

*Judgment for applicants.**

Solicitors: *Christopher & Son; H. Percy Becher.*

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

WHITEHORN BROTHERS *v.* DAVISON

[COURT OF APPEAL (Vaughan Williams, Buckley and Kennedy, L.JJ.),
November 29, 30, December 1, 1910]

[*Reported* [1911] 1 K.B. 463; 80 L.J.K.B. 425; 104 L.T. 234]

Criminal Law—False pretences—Larceny by a trick—Goods entrusted to person for sale—Transaction procured dishonestly.

Where there is a bailment and delivery of goods for the purpose of the person to whom the property is delivered exercising a disposing power over the property, e.g., by re-selling it, the transaction, if procured dishonestly by the person obtaining delivery of the goods with intent to convert them to his own use, is not obtaining the property by larceny by a trick, though it may be obtaining it by false pretences.

Pledge—Validity—Jewellery obtained by false pretences under voidable contract of sale—Pledge before contract avoided—Action by owner to recover jewellery from pledgee—Onus of proof of good faith or lack of good faith of pledgee—Matters to be proved—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 23.

Where goods have been obtained by false pretences under a contract for sale which is consequently voidable, and, before the contract has been avoided, the

* The solicitor appealed to the Court of Appeal (see [1911] 1 K.B. 840) where an order was made that the £2,000, which had been paid into court, should be paid out to the applicants, the questions on which the case has been reported not being dealt with by the Court of Appeal.

person who has so obtained possession of the goods pledges them with a pledgee who takes the same in good faith and without notice of the fraud, the onus is upon the owner of the goods who seeks to recover them from the pledgee to show that the pledgee has taken the goods otherwise than in good faith or with notice of the fraud, and is not upon the pledgee to show that he took the goods in good faith and without notice of the fraud. Even if s. 23 of the Sale of Goods Act, 1893, applies to such a case it throws no light on the question upon whom the onus lies of proving lack of good faith or notice. To establish those matters the plaintiff must prove either that there was notice of the fraud, or that the evidence was such that the defendant himself suspected the goodness of the security which was being offered him, or that he made no inquiry about the security because he feared that he might get an answer which might show absence of good faith.

Notes. Considered: *Heap v. Motorists' Advisory Agency*, [1922] All E.R. Rep. 251; *Folkes v. King*, [1922] All E.R. Rep. 658; *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertson (London), Ltd.*, [1934] All E.R. Rep. 270; *Butterworth v. Kingsway Motors, Ltd.*, [1954] 2 All E.R. 694. Referred to: *Talbot v. Von Boris*, [1911] 1 K.B. 854; *Bradley and Cohn v. Ramsay* (1912), 106 L.T. 771; *Mehta v. Sutton* (1913), 108 L.T. 214; *Blundell-Leigh v. Attenborough*, [1921] All E.R. Rep. 525; *Lake v. Simmons* (1926), 95 L.J.K.B. 586; *Lowther v. Harris*, [1926] All E.R. Rep. 352; *Ellis v. John Stenning & Sons, Ltd.*, [1932] All E.R. Rep. 597.

As to obtaining property by larceny by a trick and false pretences, see 10 HALSBURY'S LAWS (3rd Edn.) 771, 772, 819 et seq.; and for cases see 15 DIGEST (Repl.) 1037, 1038, 1162 et seq. As to the pawning of goods obtained by false pretences, see 29 HALSBURY'S LAWS (3rd Edn.) 23; and for cases see 37 DIGEST 21, 22.

Cases referred to:

- (1) *Parker v. Patrick* (1793), 5 Term Rep. 175; 101 E.R. 99; 37 Digest 16, 136.
- (2) *Cundy v. Lindsay* (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; 26 W.R. 406; 14 Cox, C.C. 93; sub nom. *Lindsay & Co. v. Cundy*, 47 L.J.Q.B. 481, H.L.; 39 Digest 534, 1454.
- (3) *Jones v. Gordon* (1877), 2 App. Cas. 616; 47 L.J.Bey. 1; 37 L.T. 477; 26 W.R. 172, H.L.; 6 Digest (Repl.) 181, 974.
- (4) *Oppenheimer v. Frazer and Wyatt*, [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 280, C.A.; 15 Digest (Repl.) 1037, 10, 196.
- (5) *Hardman v. Booth* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L.J.Ex. 105; 7 L.T. 638; 9 Jur.N.S. 81; 11 W.R. 239; 158 E.R. 1107; 39 Digest 534, 1453.

Also referred to in argument:

- Kirkham v. Attenborough, Kirkham v. Gill*, [1897] 1 Q.B. 201; 66 L.J.Q.B. 149; 75 L.T. 543; 45 W.R. 213; 13 T.L.R. 131; 41 Sol. Jo. 141, C.A.; 39 Digest 508, 1252.
- Weiner v. Gill, Weiner v. Smith*, [1906] 2 K.B. 574; 75 L.J.K.B. 916; 95 L.T. 438; 22 T.L.R. 699; 50 Sol. Jo. 632; 11 Com. Cas. 240, C.A.; 39 Digest 509, 1263.
- White v. Garden* (1851), 10 C.B. 919; 30 L.J.C.P. 166; 17 L.T.O.S. 41; 15 Jur. 630; 138 E.R. 364; 15 Digest (Repl.) 1045, 10, 288.
- Stevenson v. Newnham* (1853), 13 C.B. 285; 22 L.J.C.P. 110; 20 L.T.O.S. 279; 17 Jur. 600; 138 E.R. 1208, Ex. Ch.; 35 Digest 71, 637.
- Tatam v. Haslar* (1889), 23 Q.B.D. 345; 58 L.J.Q.B. 432; 5 T.L.R. 593; sub nom. *Tatham v. Haslar*, 38 W.R. 109; 6 Digest (Repl.) 166, 1154.
- Truman v. Attenborough* (1910), 103 L.T. 218; 26 T.L.R. 601; 54 Sol. Jo. 682; 39 Digest 510, 1265.
- Load v. Green* (1846), 15 M. & W. 216; 15 L.J.Ex. 113; 7 L.T.O.S. 114; 10 Jur. 163; 153 E.R. 828; 5 Digest (Repl.) 851, 7156.

- Kingsford v. Merry* (1856), 1 H. & N. 503; 26 L.J.Ex. 83; 28 L.T.O.S. 286; 8 Jur.N.S. 68; 5 W.R. 151; 156 E.R. 1299, Ex. Ch.; 37 Digest 18, 146.
- Percy Edwards, Ltd. v. Vaughan* (1910), 26 T.L.R. 545, C.A.; 39 Digest 507, 1251.
- Spackman v. Foster* (1883), 11 Q.B.D. 99; 52 L.J.Q.B. 418; 48 L.T. 670; 47 J.P. 455; 31 W.R. 548, D.C.; 32 Digest 344, 271.
- Miller v. Dell*, [1891] 1 Q.B. 468; 60 L.J.Q.B. 404; 63 L.T. 693; 39 W.R. 342; 7 T.L.R. 155, C.A.; 32 Digest 344, 272.
- Goodman v. Harvey* (1836), 4 Ad. & El. 870; 6 Nev. & M.K.B. 372; 6 L.J.K.B. 260; 111 E.R. 1011; 6 Digest (Repl.) 131, 970.
- Moss v. Sweet* (1851), 16 Q.B. 493; 20 L.J.Q.B. 167; 16 L.T.O.S. 341; 15 Jur. 536; 117 E.R. 968; 39 Digest 511, 1276.
- Payne v. Wilson*, [1895] 1 Q.B. 653; 64 L.J.Q.B. 328; 72 L.T. 110; on appeal [1895] 2 Q.B. 537; 65 L.J.Q.B. 150; 73 L.T. 12; 43 W.R. 657, C.A.; 3 Digest (Repl.) 118, 375.
- Bailey v. Bidwell* (1844), 13 M. & W. 73; 153 E.R. 80; 6 Digest (Repl.) 168, 1178.
- Oakly v. Boulton, Maynard & Co.* (1888), 5 T.L.R. 60, C.A.; 6 Digest (Repl.) 168, 1168.

Application for judgment or a new trial in an action tried by BRAY, J., without a jury.

The plaintiffs were manufacturing jewellers carrying on business at Featherstone Buildings, Holborn, London, and the defendant was a pawnbroker carrying on business at 148, Strand, London.

On July 31, 1909, one Bruford, who was known to the plaintiffs as a jeweller and dealer in pearls, asked a member of the plaintiffs' firm, named Bakewell, whether the plaintiffs had in stock a two-row pearl necklace at a price of about £1,000. Bakewell's reply was that they had not, but that they had a three-row pearl necklace at £1,400. Bruford said that he was sending some things to a very good client of his in the country, and he would like to send with them the three-row necklace. The plaintiffs then sent the three-row necklace to Bruford, with an "approbation note" as follows:

"London, 31/7/1909. Whitehorn Brothers, 19, 20, and 21, Featherstone Buildings, Holborn, W.C. On sale or return: Mr. Bruford, 56, Maddox Street, W. Necklace. Pearl, 3 row. [The necklace being then described.] Net cash."

Bruford having thus got possession of the necklace, on Aug. 5 pledged the same with the defendant Davison as a security for an advance of £875 made to him by the defendant, and also as a collateral security for the payment of all other advances made to him by the defendant and of all debts then or thereafter owing from him to the defendant. The plaintiffs made inquiries of Bruford during that and the following week as to the necklace, and his reply was to the effect that he had not yet heard from his client, but at the end of the second week he communicated to the plaintiffs by the telephone that his customer had selected the necklace, that it had been marked by the plaintiffs "net cash," but that his customer, who was a sound man, generally took six months' credit on an open account. Bakewell then saw Bruford at his place of business, and Bruford repeated what he had said about his customer. On Aug. 16, Bakewell telephoned to Bruford that as it was the first transaction between them and the amount was large, the plaintiffs wished to make it a cash transaction, and in that case they offered to allow 4 per cent. off the amount. Bruford said that he would consult his customer, and let the plaintiffs know the result. After various conversations between Bruford and another member of the plaintiffs' firm (Bakewell having gone away for his holiday), Bruford said that he had sold the necklace to a customer, but that he could not appear to question his bona fides by asking him for cash. After further negotiations the necklace was invoiced to Bruford as sold to him on Aug. 20, 1909, and the plaintiffs took from Bruford as the price of the necklace two bills, dated Sept. 1, 1909, one for £750 at

five months, and the other for £750 at six months. Bruford absconded, and the bills were dishonoured. The defendant had made a further advance on a pledge of goods to Bruford on Sept. 10, 1909. The plaintiffs subsequently demanded the pearl necklace from the defendant, but he refused to give it up.

The plaintiffs then claimed from Davison the return of the necklace or £1,400 its value; damages for its detention; alternatively, damages for its conversion. At the trial the witnesses for the plaintiffs sought to make out that the term "net cash" in an approbation note of this kind meant that the property in the article was not to pass from the plaintiffs until they had received cash, but the learned judge in the course of his summing up told the jury that they had to look not merely at the intention of the plaintiffs, but at the intention of both parties, and that they must consider whether upon the evidence the trade meaning of the term "net cash" would convey to the person receiving the approbation note the meaning that the property in the necklace was not to pass until the plaintiffs had received cash. The learned judge left the following questions to the jury: (i) Did Bruford obtain possession of the necklace by fraud with the intention at the time of stealing it?—Answer: Yes. (ii) Was it one of the terms of the sale or return transaction of July 31 between the plaintiffs and Bruford that the property in the necklace should not pass until the plaintiffs were paid cash?—Answer: Yes. (iii) Did the defendant advance money on the necklace in good faith, and without any notice of Bruford's fraud (a) on Aug. 5?—No: (b) on Sept. 10?—No. In leaving the last of these questions to the jury, the learned judge said:

"It is for the defendant to prove that he did advance money on the necklace in good faith and without notice of Bruford's fraud; that he had not any particular notice of this particular fraud I think is pretty clear, but what the plaintiffs say is this: that he did not take this in good faith. They say that he must have known, and you have a right to infer that he must have known; they suggest that he must have known of it by the large sums that he had out: he must have known that there was a doubt whether Bruford had really these goods or not; whether he was really the owner of the goods and had the right to pledge them or not, and, that being so, he abstained and intentionally abstained from making any inquiries at all."

Upon the findings of the jury the judge gave judgment for the plaintiffs.

The defendant applied for judgment or for a new trial on the grounds (i) that there was no evidence to support the finding that Bruford obtained the necklace by larceny, or with the intention of stealing it, or, alternatively, that the answer of the jury to the first question put to them was against the weight of evidence; (ii) that on the facts proved or admitted Bruford obtained the said necklace by false pretences; (iii) that the learned judge misdirected the jury in explaining to them what constituted larceny, and in not sufficiently directing them as to the distinction between larceny and obtaining by false pretences; (iv) that, upon the true construction of the plaintiffs' approbation note, the property in the necklace passed to Bruford upon his doing any act adopting the transaction or exercising an act of ownership over the necklace, and that the learned judge was wrong in admitting evidence as to the meaning of the words "net cash" and in leaving it to the jury to say what the words "net cash" meant, and that he misdirected the jury as to the effect of the said approbation note; (v) also that the learned judge misdirected the jury (a) in not telling them that the invoicing and sale of the necklace by the plaintiffs to Bruford, and the taking by them of his acceptances for the price after the pledge to the defendant, completed the defendant's title, and vested the property in the necklace in the defendant; (b) in telling them that it was for the defendant to prove, and that the onus was upon him to prove, that, in advancing money to Bruford on Aug. 5, 1909, and Sept. 10, 1909, he acted in good faith and without notice of Bruford's fraud, and that the large sums which the defendant did so advance afforded evidence on which the jury could properly find that he was guilty of fraud, and, intentionally abstained from asking questions; (c) in not properly

directing the jury as to what constituted fraud or bad faith, or absence of good faith, and as to the mode in which and the evidence on which the jury could find that the defendant acted in bad faith; (d) that the findings of the jury in answer to the second and third questions left to them by the learned judge were against the weight of the evidence.

By the Sale of Goods Act, 1893, s. 23 :

"When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

Atkin, K.C., and *C. L. Attenborough* for the defendant.

Rawlinson, K.C., and *Reginald White (Harry Dobb with them)* for the plaintiffs.

VAUGHAN WILLIAMS, L.J.—This action was brought in detinue, with an alternate claim for trover. The parties were the plaintiffs, who were manufacturing jewellers, and the defendant, who was a pawnbroker. The subject-matter of the action is a pearl necklace which was obtained from the plaintiffs by a man named Bruford, whose reputation, according to the common admission of both parties, was up to the time of the happening of the events that constitute the subject-matter of this action, a good one. Unfortunately, this man, who up to this time seems to have been an honest commercial man, for some reason or other became short of funds in his business. He says himself that he became short of funds because he was the principal creditor of some people who carried on business in the jewellery trade, and that he was out of pocket—at all events, temporarily—to a substantial extent. He may or may not have had other losses, but that was the excuse he put forward when he pledged the pearl necklace in question which he had obtained from the plaintiffs. It is said on behalf of the plaintiffs that this pearl necklace was obtained from them under circumstances that constitute larceny by a trick. I will refer to that later on, but, having regard to the subsequent transaction in September by which the plaintiffs sold out and out this pearl necklace to Bruford, and took one bill at five months and one bill at six months for the total price of the necklace, I may say at once that I do not think that the question whether there was a larceny by a trick in this case is of material importance, and I may say in passing that if I had to deal with the question whether or not there was larceny by a trick I should have considerable difficulty in arriving at the conclusion that there was. There can be no doubt that the facts are calculated to show that Bruford by some fraudulent statement did persuade the plaintiffs to enter into a contract with him, a contract which in one view was most favourable to the plaintiffs. It was a contract under which possession of this necklace was given to Bruford, with an option to him within a reasonable time, I suppose, to accept as sold to him this necklace delivered on sale or return for cash to be paid at the time. That being so, it is a case in which undoubtedly Bruford did get possession of this necklace under a contract between him and the plaintiffs. He not only got possession of the necklace under this contract, but admittedly the object of that contract was that Bruford should have the opportunity of showing the necklace to a customer before he made up his mind whether he would accept the necklace on the terms of the invoice. In those circumstances, it is extremely difficult to arrive at the conclusion that that was larceny by a trick. It is not stealing. To get possession of an article from a vendor who is willing to sell on the terms I have mentioned is not larceny; to my mind it is obtaining goods by fraud. In those circumstances it is under the contract that possession is got, and possession of the goods is got, not with the object that the fraudulent purchaser should keep the goods in his own hand to look at them or to put in a shop, but with the object that he should have the goods for the purpose of showing them to persons who, as he thinks, would be likely to purchase them. I do not think it makes any difference that he said at the moment that he had a

customer. In these circumstances, I think there would be very great difficulty in arriving at the conclusion that the obtaining possession of goods for the purpose of being dealt with in the way I have described constitutes a stealing of the goods. Having regard to the conclusion at which I have arrived it is not necessary to go at any length into the matter. All I will say is that, looking at the long series of cases beginning with *Parker v. Patrick* (1), and coming down to *Cundy v. Lindsay* (2), I can find nothing that leads me to the conclusion that where the possession of goods is given under a contract in fact made and acted upon, that can be treated as larceny. It may be treated as obtaining the goods by false pretences, but that is a different thing, because in that case, if the goods are transferred to a third person the third person gets them under a contract which is valid until it is avoided. In these circumstances, it seems to me that there is some difficulty in the matter as between the plaintiffs and the defendant, Mr. Davison, but the opinion I have arrived at is that we cannot properly draw the conclusion that the necklace was obtained by larceny by a trick.

What happened was that the necklace having been obtained on July 31, it was pledged with the defendant on Aug. 5. Then the plaintiffs advanced the view that according to the custom of jewellers the words "net cash" in the invoice entitled them to refuse to let Bruford elect to take this necklace as purchaser, finding that he was not prepared to pay for it, and, as is explained by the evidence, they then became suspicious of Bruford. In these circumstances, the plaintiffs ask us to say that they were themselves willing to enter into a contract for the purchase of this necklace out and out by Bruford, and Bruford having early in September taken it upon those terms, two bills were given by him for the price. It is by reason of that event that I have come to the conclusion that, whether there was originally a larceny by a trick or not, there was at that time a purchase by Bruford. We have, therefore, the title of Bruford to the necklace. By that transaction there was a purchase by Bruford, which, as I think, gave him a right to part with the possession. I should myself very much doubt whether, as the evidence stands, there was any conversion of this necklace by the defendant on any of the occasions which have been referred to in August or September. That being so, the result is that unless the defendant's title is vitiated by bad faith or by notice of the fraud, he has a good title to the necklace.

Having stated the material facts as shortly as I can, I now propose to deal with the grounds of the appeal, and to refer to certain parts of the summing up of BRAY, J., so as to make the notice of appeal intelligible. The first ground of the application is,

"that there was no evidence to support the finding that Bruford obtained the necklace by larceny, or with the intention of stealing it, or, alternatively, that the answer of the jury to the first question put to them was against the weight of evidence."

The answer of the jury to that question was in the affirmative. As I have said, I am very much inclined to think that the answer was one which could not be justified in point of law, and I doubt whether it could have been given if the jury had properly appreciated what is necessary to constitute larceny by a trick. It seems to me to be plain that this was not a case of merely obtaining the possession of this necklace by a trick, but it was one where the plaintiffs chose to give Bruford possession of the necklace under such circumstances that they must have intended that the necklace should be exhibited to a customer as the goods of Bruford, and that Bruford should have the power, if he chose, of accepting the article on sale or return.

The second ground of application is,

"that on the facts proved or admitted Bruford obtained the said necklace by false pretences."

That he obtained the necklace on July 31 by false pretences I entirely agree, and, therefore, no exception can be taken to that. The third ground is,

“that the learned judge misdirected the jury in explaining to them what constituted larceny, and in not sufficiently directing them as to the distinction between larceny and obtaining by false pretences.”

As I have already intimated, I think there is a great deal of evidence in support of that ground. The fourth ground is,

“that, upon the true construction of the plaintiffs’ approbation note, the property in the necklace passed to Bruford upon his doing any act adopting the transaction, or exercising an act of ownership over the necklace, and that the learned judge was wrong in admitting evidence as to the meaning of the words ‘net cash,’ and in leaving it to the jury to say what the words ‘net cash’ meant, and that he misdirected the jury as to the effect of the said approbation note.”

These two last grounds are really immaterial, having regard to the view I take as to the title to the necklace that Bruford got by the subsequent transaction in September.

I need not read all the grounds of application, but the next I will read is 5 (b),

“that the learned judge misdirected the jury in telling them that it was for the defendant to prove, and that the onus was upon him to prove, that, in advancing money to Bruford on Aug. 5, 1909, and Sept. 10, 1909, he acted in good faith without notice of Bruford’s fraud, and that the large sums which the defendant did so advance afforded evidence on which the jury could properly find that he was guilty of fraud, and intentionally abstained from asking questions.”

I only propose to say a few words now as to the first part of that ground with regard to the onus of proof, and I will first deal with the question of onus of proof quite apart from the Sale of Goods Act, 1893, s. 23. In my opinion, where there is a contract which is voidable as having been obtained by fraud, and the party to the contract against whom it could be avoided by reason of his fraud or other conduct, has, before the avoidance of the contract has taken place, parted with the subject-matter of the contract to an innocent third person, meaning thereby that he has parted with it to a person who has honestly accepted the transfer without either knowledge that there was anything wrong in the transaction, or without the knowledge of such circumstances as would lead him to wish not to make further inquiry lest he should find out that there was something wrong, the contract cannot be avoided as against that person, and in such case I am of opinion that the onus of proving that there are such circumstances as would prevent a third person from purchasing, assuming such third person to be an innocent purchaser, rests on the plaintiff, who seeks to recover the subject-matter of the contract from him, and not on the defendant.

The cases have been discussed at so much length that it is unnecessary to read them, but if we take the cases from that of *Parker v. Patrick* (1), before LORD KENYON, down to *Jones v. Gordon* (3), and *Cundy v. Lindsay* (2), in the House of Lords, I can find no trace of anything to show that the onus of proof in such a case rests on the third person so purchasing. The very statement that appears again and again in these cases that a contract which is voidable is valid until it has been avoided, involves the conclusion that the onus of avoiding the contract must lie upon the person who impeaches the contract which up to the time of its avoidance is a valid contract; and it is only common sense to have so held. If we are to treat these two persons as innocent persons, the defrauded man and the man who honestly purchased from the fraudulent person under a contract with him, it has been pointed out in several cases that the man who ought to bear the brunt of the loss, and who is surely, *prima facie*, the man who ought to bear it, is the man who by trusting the fraudulent person puts that fraudulent person in such a position as enables him to offer the goods for sale. The contrary proposition was put by

BRAY, J., and I think his direction to that effect was wrong, but I must say that I have had some difficulty in coming to the conclusion that this question of onus was much, if at all, discussed before the learned judge, because I find no discussion about it. I rather gather from the shorthand notes that the learned judge was the first to express the view as to the onus. But whether that was so or not, there was no discussion and there was no objection taken, though I do not think that this is a case in which we could properly say that because the point was not more specifically taken before the learned judge, therefore the defendant is precluded from relying upon that ground, for in the speech of the defendant's counsel he appears to have specifically taken the point that the onus was on the plaintiffs. In those circumstances I will say nothing more on this ground of appeal than that this, to my mind, is a misdirection which would not only justify us in ordering a new trial in this case, but would make it our duty to do so.

It is then said that there was not a proper direction. As to that I will go back to the latter part of this ground of application. At the end of para. 5 (b) it is said that the learned judge misdirected the jury in telling them

"that the large sums which the defendant did so advance afforded evidence on which the jury could properly find that he was guilty of fraud and intentionally abstained from asking questions."

I have already stated the grounds upon which I think there must, at any rate, be a new trial, but the question appears to me to arise on this ground of application whether the judgment should not be entered for the defendant, and whether there was any evidence to go to the jury which would justify their finding in answer to the third question put to them, namely:

"Did the defendant advance money on the necklace in good faith and without any notice of Bruford's fraud (a) on Aug. 5 or (b) on Sept. 10?"

to which the jury answered in the negative as to both. We have to consider whether there was any evidence to justify that finding. We must bear in mind that when the jury had that matter before them it was put before them on the basis that the onus of proof of good faith and absence of notice was on the defendant. In my opinion, that was wrong, and I propose to deal with this matter on the basis that the onus was on the plaintiffs. In order to prove the absence of good faith, you must prove either the fact that there was notice, or the fact that there was dishonesty, or you must prove that the evidence is such that the defendant himself suspected the goodness of the security which was being offered to him. I will not lengthen my judgment by referring to the passage in the judgment of LORD BLACKBURN in *Jones v. Gordon* (3), in which he points out the sort of evidence you must have before you can come to the conclusion in such a case that there was notice or an absence of good faith. Putting it shortly, it comes to this, that you will be justified in finding that there was notice, or an absence of good faith, if you find anything which shows that the person taking the security made no inquiry whatever about the security or where it came from, because he feared the answer he would get and feared that he would get an answer which might show absence of good faith. That is the effect of LORD BLACKBURN's judgment. If you find that on the taking of a security there are circumstances which throw doubt on the goodness of the security, and the person taking it elects to ask no question, and then, perhaps, goes on to charge an exorbitant interest, that certainly would look suspicious. At all events, that is the test applied in that case. The test applied in this case was, it is said, unsatisfactory, and I daresay it was. [HIS LORDSHIP having reviewed the evidence, concluded:] I think that there is in this case no evidence to support this last finding of the jury, and that in the circumstances judgment ought to be entered for the defendant.

BUCKLEY, L.J.—Bruford was a pearl merchant. He had for many years before July, 1909, been, and in that month was, in good commercial credit and reputation,

but he was, or, at any rate, in July, 1909, had become dishonest. Those facts are common ground to the parties in this case. The defendant is a person who derives title under Bruford, and the question is whether the defendant got a good title.

The first question upon which I am going to say something, although I do not think that it is really necessary to decide it in this case, is whether there was in July, 1909, larceny by a trick by Bruford. In my opinion, there was not. It seems to me that there is larceny by a trick where the facts are that the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property, and the recipient has the animus furandi; and the same is true where the owner does not intend to pass the property to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing. That was the decision in *Cundy v. Lindsay* (2). On the other hand, goods are obtained by false pretences where the owner of the goods, being induced so to do by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property. The question which is material as it arises in the circumstances of this case, is this: Suppose the facts are that the owner of goods intends, not to pass the property in them, but to confer a power to pass the property in them, under which head does that fall? *Primâ facie*, it would look, inasmuch as he does not intend presently to pass the property in the goods, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that where the owner of the goods intends to confer a power to pass the property in the goods, and that only, the person who so obtains the goods is only obtaining the goods by false pretences; in other words, that it is obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession and does intend to pass the property, or does intend to confer a power to pass the property. If he gives, and intends to give the power to pass the property, and the power is exercised, the person who takes the property under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less does he do so because the authority was obtained by fraud. One may put the same thing in a different way. A man may steal a particular chattel, but he cannot steal the power to dispose of a chattel. A man can obtain the grant of a power of attorney by fraud, but he cannot steal a power of attorney. The fact is that every creation of a power is the creation of a contractual right, just as the grant of property given by a contract, and you cannot steal a contract; you can only steal a chattel.

The particular transaction here was, as I understand it, as follows. On July 31, 1909, what the plaintiffs, the true owners of this necklace, did towards Bruford was this. They sent him the necklace on sale or return, and upon the evidence I think that the transaction was this. The plaintiffs were not then intending to pass the property in the necklace to him, but they were intending to hand him possession of it knowing that he had, or believing that he had—he told them that he had, which was false—a person who wanted to buy the necklace. The plaintiffs were thus giving Bruford authority to hand over the necklace and to give the property in the necklace to that supposed customer. They were sending him goods on approbation and they were making him this offer: “You may have possession, and if you are so minded you may pass the property in these goods to the customer whom you tell us you have”; but there was no passing of the property to him. It was, therefore, such a case as I have described, as one where the owner of goods voluntarily parts with the possession of the goods to a person and intends to confer upon that person a power to pass the property in the goods. That, to my mind, is not larceny by a trick, but it is obtaining goods by false pretences.

But, however that may be, I will now assume that I am wrong as to that. The next step is this, that on Sept. 1 there was a new transaction altogether between the parties, and the way in which it arose was this. Bruford came to the plaintiffs and said that his customer was a very good customer, but that he (Bruford) could not afford to press him for the money, and that he could not insinuate to the

customer that he could not have the necklace until he paid cash, and that, therefore, he (Bruford) wished to have the necklace on credit, and would pay when he received cash from his customer. The plaintiffs assented to that, and on Sept. 1 they sold him the necklace out and out upon the terms that he gave, as he did, to them two bills dated Sept. 1, one at five months and the other at six months. The position, therefore, is this, assuming that there was originally larceny by a trick. Bruford had stolen the plaintiffs' goods; then he went to the plaintiffs, who did not know that he had stolen them, and said to them: "Will you sell me those goods?" The plaintiffs said they would, and thereupon they sold the necklace to Bruford and he paid the price for them in bills. After that transaction it seems to me to be perfectly immaterial whether Bruford obtained the necklace originally by larceny or not. No matter whether he originally stole the necklace or not, at that date there is a new contract. The defendant's title is obtained in this way. Upon the second hypothesis—that is, upon the hypothesis that the original transaction was a larceny—on Aug. 5 when the article was pledged with the defendant he had no title to it at all. Of course if Bruford had stolen the article he had what is incorrectly called a void title, which is only an incorrect way of stating that he had no title at all, and, therefore, he could not give the defendant a title. Upon this hypothesis, therefore, the defendant on Aug. 5 got no title at all, but after September when Bruford became the owner of the article and the owner of the property in the article his title would then go to feed the defendant's title, and as from that time it appears to me to be perfectly immaterial whether the article was originally stolen or not. At that time the defendant had a good title. The transaction of Sept. 1 may have been, and upon these facts I think it was, obtained by fraud. It was the original fraud of July 31, and, therefore, that which the defendant had now got was a voidable title. He had a title, but it was voidable under the circumstances. It was voidable as against Bruford, his vendor, and was, therefore, voidable as against him unless he was a purchaser for value without notice.

The whole question in the case, therefore, to my mind, resolves itself into this. Upon either of the two views as to larceny or false pretences, can the title which the defendant had thus obtained be set aside upon the suit of the plaintiffs on the ground that he was not a purchaser for value without notice of the fraud? I apprehend it is perfectly plain that by a voidable title is meant, in the first place, a title. It is one which is a good title, and which, if the person entitled to rescind does not elect to rescind, will continue to be a good title. It is a perfectly good title until the person entitled to rescind elects to rescind it and does rescind it, and thereupon that which was a title and a voidable title becomes an avoided title. That being so, where a person seeks thus to displace another from the enjoyment of property, which is property in him by virtue of a title, though a voidable title, I apprehend that on every principle of law it lies upon the plaintiff, who comes to displace that title, to prove all the material circumstances which go to show that he is entitled to re-take that property from the person who has got it. I need not elaborate that proposition, because authorities might be found for it over and over again. I can see no ground whatever for arguing to the contrary, except the form of the language in s. 23 of the Sale of Goods Act, 1893. I agree that the form of expression which is contained in s. 23 does raise a question which certainly is capable of argument:

"When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

I agree that those words introduced by way of proviso certainly give rise to an argument that in those circumstances it is for the buyer to prove his title, and not for the seller, who is seeking to avoid the sale, to disprove the title of the buyer, but, on considering the matter, I have come to the clear conclusion that that is not the meaning of the section. I think the meaning is this. In one event the buyer is to have a good title; in another event he is not to have a good title, and that

seems to me to be the meaning of the proviso. I think the section throws no light on the question upon whom the onus lies of proving the facts which are relevant to be determined. Those two events have happened, and I think the onus is entirely on the plaintiffs to show that the facts were such as entitled them to take out of the defendant the good title which, *primâ facie*, the defendant had got. It was a voidable title—a title which could be avoided—but it was for the plaintiffs to avoid it.

That being so, and the onus being upon the plaintiffs to prove one of two things, that the defendant took the necklace either not in good faith or with notice of the defect in the title, I think myself there was absolutely no evidence to support the finding of the jury upon the third question put to them. The matter stands thus. The defendant was invited to lend not a trifling sum of money, but £875, upon the security of a certain pearl necklace. Why should he part with £875 upon a security which by hypothesis he knew was a bad one? I cannot see any motive for it. If he had reason to believe that Bruford was a thief or a dishonest person who had obtained the necklace by deceit, why should he take a title under him and advance £875 upon the necklace? I do not see why that should be. Any inference that I ought to draw from the facts ought to be drawn from that view only, and not from any view that he probably would be dishonest. But, looking at the evidence, I can come to no further conclusion than this, that some circumstances were shown from which it would be possible that one might be entitled to say that the transaction was very suspicious and that there were facts which would lead one to look rather closely into the matter in order to see whether the proceeding was honest and straightforward or not. That, however, is merely evidence of suspicion, and in circumstances such as these I think the inference is the other way and, to my mind, falls very far short of the discharge by the plaintiffs of the onus that rests upon them of proving that another man is, in point of fact, a dishonest person, and a person who has taken this necklace otherwise than in good faith, or has taken it with notice of a defect in the title, when such notice would be to his own injury and would not induce him to make an advance of £875 upon the security of the article. Beyond some evidence which would lead me to look into the matter, I cannot find any affirmative evidence that the defendant was guilty of bad faith. In these circumstances it seems to me that the judgment below ought to be discharged, and that judgment ought to be entered for the defendant.

KENNEDY, L.J.—In this case I agree that the judgment which has been given below cannot stand, though I am unable to come to the conclusion, upon the whole, that we ought to enter judgment for the defendant. I will endeavour to state my reasons as shortly as the importance and interest of the question allows. In my opinion I think there ought to be a new trial; I cannot go further than that, though my brothers think otherwise, and therefore the judgment will be entered for the defendant. But there have been very many interesting and important questions raised which, supposing for a moment there had been a new trial, would have been very important as a guide to the judge in the future. I desire to state my own view, specially as I have the misfortune of being unable to go the full length of my brothers in ordering judgment to be entered for the defendant.

I need not recapitulate the general circumstances of the case. Nobody disputes that this man Bruford acted fraudulently and intended to act fraudulently, and I will proceed to deal with the questions which seem to me to arise in the order in which they have been treated in the summing-up. The first question is: What was the nature of the transaction in point of law and fact into which Bruford entered with these plaintiffs when the first transaction took place on July 31? The views of the plaintiffs and of the defendant, contrasting them in the clearest and most lucid way, as I take them, were these. The plaintiffs say that they never did enter into a contract of sale in respect of this necklace. We all know, and there is legislation on the subject, what the ordinary transaction of sending goods on "approbation" or "sale or return" is. What the plaintiffs say that the transaction

amounted to was that there was at the most a contract of bailment when they delivered this necklace to Bruford with an opportunity of his making a contract, but only a contract in which it should be a condition precedent to the passing of the property that cash should be paid to them for the necklace. That is the plaintiffs' contention. The defendant's contention is this. There was a contract of bailment with the opportunity of making a contract for sale of the necklace, and, therefore, passing the property in it, with a term that the buyer should pay net cash—a term upon which he could be sued if he did not comply with it—but a term the fulfilment of which was not a condition precedent to the passing of the property in the necklace. As to which of these two positions was the true one, I agree that the jury had to judge to a very large extent, subject to proper direction by the judge. It is rather a startling thing to say that without any specific words in the contract or memorandum or oral statement there should be introduced so important a term as that the property in the goods should not pass except the buyer makes with the seller, and fulfils accordingly, an engagement to pay cash; but it was said at the trial that by the use of the words "net cash" in this trade there was a recognised engagement entered into by the buyer that the property in the article sold should not pass unless on a contract fulfilled by the actual payment of cash as a condition precedent to the passing of the property. I do not say that there was no evidence upon which the plaintiffs' view of the matter could properly be left to the jury; but, if it had been necessary to decide the case on this point, I should not, on a point which was so important in reference to the alleged larceny by a trick, have been satisfied to leave the case as it stands upon the finding of the jury; because, with all respect to the learned judge, I think when he put to one or two of the principal witnesses for the plaintiffs the question:

"Upon the terms upon which you parted with this necklace to Bruford would the property pass to Bruford without your receiving the cash?"

that was not a proper question to put to any witness, because it is asking that which is a consequence of law, and it is especially dangerous as it was repeated a little later. The learned judge said:

"I will put it in another way to the witness: Was it your intention that the property should pass to Bruford without receiving cash?"

and the witness said, "Not without receiving the money." I think both these questions were questions which ought not to have been put. The first one was simply asking whether the terms of the contract included a legal consequence, and the other was asking the witness's own intention in making the contract.

With regard to the special terms of a contract, they are to be inferred by the tribunal from the terms of the written contract, if there is a written document, having regard to the circumstances of the case, the provisions of the Sale of Goods Act, and the conduct of the parties. It is quite true, as we should naturally expect, that BRAY, J., when summing-up did explain to the jury that they must be careful not to take the witness's statement of his intention to be at all conclusive; but I must say that on so important a point it would be very difficult for the jury to forget those two answers, one of which stated what in the opinion of the witness would be the effect of the contract in point of law, and the other of which stated the intention of the witness as to what contract he was entering into. I think that those matters as they stand are serious with regard to the question whether there ought to be a new trial or not.

But then comes this further question. Assuming for this purpose that the plaintiffs' contention is right, and that according to the terms of the contract, as the jury understood them, this was a bailment or handing over of the necklace to Bruford upon the terms that he must return it, and that the only contract the plaintiffs made with him was one in which it was a condition precedent to the property passing that he paid cash, nevertheless as it is quite clear that Bruford was buying no doubt under a false representation that it was for the purpose of

re-selling, and that that purpose was the basis upon which the plaintiffs themselves sold the article, it seems to me that even on the plaintiffs' own view of the matter the transaction was one which could not rightly be described as amounting to larceny by a trick. I will not go into the details of the arguments, interesting though they are, as to what is "larceny by a trick," and as to what is obtaining a contract by fraud, whether by false pretences or other fraud, as I would not limit it to false pretences. But I hold the opinion which CHANNELL, J., elaborated in his judgment in *Oppenheimer v. Frazer and Wyatt* (4). I will not read, as it is not necessary for this purpose to read, the whole of his judgment in that case, but if it were necessary to pronounce an opinion upon it, I concur in the view which he expressed, especially at pp. 526, 527 of [1907] 1 K.B. I think for the purpose of testing the rights of third parties honestly acquired between the time of the transaction and the time of the avoidance of the transaction by the party who has been defrauded, that it is not right to treat this transaction, even on the plaintiffs' own view of the matter, as a case in which there was larceny by a trick. With regard to larceny by a trick I do not wish to add, and should not venture to add, anything more to the statement of the law than what is very fully discussed in the passage in POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW, pp. 218, 219, a passage to which I had occasion to refer when *Oppenheimer v. Frazer and Wyatt* (4) was before the Court of Appeal ([1907] 2 K.B. at p. 77). In that passage the matter is fully dealt with and the legal principles discussed, and there I agree is to be found what I think is, and what I am willing to adopt as, the accurate expression of the law as to what constitutes larceny by a trick. But in this case, where, even on the plaintiffs' own version of the matter, there is a bailment and delivery, and not merely that, but a bailment or delivery for the purpose of the person to whom the property is delivered himself exercising a disposing power over the property, I do not think that the transaction can be described properly, for the purposes of such an action as the present, as "larceny by a trick," resulting in a void and not in a voidable contract. The plaintiffs' intention was that Bruford should himself sell the article, as we see from many passages in the evidence. Therefore, it seems to me impossible to say that this is a case in which there was no contract at all intended to be acted upon and no contract of any kind except a mere bailment. It was not a bailment; it was a parting with possession and a right to confer property on a third person given to a bailee, to be exercised by him in such a way as would pass the property, or some rights of property, to a third person. I think, as CHANNELL, J., seems to have thought, that where we have a case such as *Hardman v. Booth* (5), or such as *Cundy v. Lindsay* (2), in which, though there may be an apparent contract, there is no real contract, because there is no person with whom there is a contract really made by the seller at all, as was the case in *Cundy v. Lindsay* (2) and in *Hardman v. Booth* (5), where you get no contract as the result of the transaction, then in such cases the mere bailment of the goods made with the consent of the owner does not prevent the transaction from being larceny by a trick. But where the facts are such as I have described them, then, according to the plaintiffs' own version of them, it seems to me that there was no evidence to support the finding of the jury that in this case there was larceny by a trick.

That, however, becomes immaterial in the view I take of the subsequent circumstances. I agree that the fraud of Bruford continued, and continued to the extent that the subsequent transaction of sale might still be considered as induced by that fraud, because the plaintiffs were still told that there was a customer of his who was going to pay for the necklace and that it was for the customer's convenience only that the money was not paid to him, and, therefore, the plaintiffs could avoid that transaction on the ground of fraud. But that second transaction was unquestionably a sale. The document in which it is recorded in the plaintiffs' books is the sale ledger, and the transaction is entered in the plaintiffs' own books as a sale to Bruford and is stated to be a sale by bills at five and six months. In the ledger we find "copy entry of plaintiffs' sale book relating to sale to Bruford, price

£1,410," and so on, and in the sale book there is another similar entry describing the transaction as a sale of the pearl necklace to Bruford, price £1,410 by five and six months' bills. It is true that at the bottom of these entries is written "net cash," which must refer to the inception of the case because it can no longer have any reference to the matter, when, as is not disputed, it was to be a sale by bills at five and six months. That is the plaintiffs' own record of the second transaction and it is impossible to say that that transaction was anything short of a sale, though I agree, and I do not think it could be disputed, that it was a sale which any tribunal might truly say was induced by fraud on the part of Bruford, and was therefore voidable as against him. Even if it was a transaction which might have been set aside, for the reasons given I think it was voidable only and not void. The plaintiffs entered into this transaction which, subject to their right to avoid it by reason of its being induced by fraud, was a sale to Bruford, giving him all the rights of a purchaser, and the benefit of that would enure to any innocent purchaser to whom Bruford at any time before the plaintiffs finally elected to avoid the transaction might transfer the necklace. I cannot find in the summing-up any reference to the effect upon the rights of the parties of this very important transaction by which the plaintiffs sold the necklace to Bruford and took bills for the price of the same, and, that being so, I do not feel satisfied that the jury came to a right conclusion on the case, or that the questions put to them were sufficient upon that part of the case.

There remains the question as to the onus of proof and the effect of s. 23 of the Sale of Goods Act, 1893. It has been assumed, and I think it was rather assumed in the last judgment, that s. 23 applies to this case. I am by no means sure that s. 23 of the Sale of Goods Act does apply; so much the worse for the plaintiffs' case, because they are then thrown back on the common law, and any difficulty that might arise from the language of the proviso in the section as to buying the goods in good faith and without notice of the seller's defect of title would no longer be a difficulty as it would not exist. What the section deals with is the case of a "buyer" acquiring a good title to the goods, and it may be that the question of pledge is different. It is not necessary to decide that point, but my own inclination would be to say that we must refer to the common law on this question, and the common law has no proviso. The true rule of common law as regards burden of proof is, that in a case of this kind where the transaction out of which the dealing with the property has arisen could be avoided, the plaintiff, who comes forward to take away from another property that has been acquired by that other person before the transaction has been avoided by the plaintiff, is bound to show not only that he was himself originally deceived into parting with the property that has gone to the ultimate purchaser whom he is suing, but also that he has a right to recover it from such purchaser upon proof that he took it otherwise than in good faith and with notice of the defect in the title. No authority directly bearing on that point has been cited one way or the other. It seems to me that a plaintiff, who seeks to avoid a transaction, must be dealt with upon the basis that, *prima facie*, the act of a third party is the act of an innocent party, and that he cannot take away that which the third party has acquired, and will be assumed, in the absence of evidence, to have innocently acquired, without showing that there were circumstances which put the third party out of the category of an innocent buyer into the category of one who at least, if he had acted honestly and with reasonable care, could not have fallen into the mistake of buying the goods which the plaintiff is seeking to recover from him. I agree with the other members of the court that the summing-up of the learned judge was materially wrong in that respect. Reference has been made to the cases and the law on the subject of bills of exchange. It is sufficient for me to say that the question on whom the burden of proof lay, even with regard to negotiable instruments, was the subject, not of agreement, but of disagreement, among judges before the Bills of Exchange Act, 1882, as was pointed out by LORD BLACKBURN in *Jones v. Gordon* (3). The law as regards that point has now been settled by s. 30 (2) of the Bills of Exchange Act, 1882. It was thought advisable

to codify the law upon the class of cases coming under that subsection in the way there dealt with. It seems to me in principle, and in point of equity and justice, there being no authority at all to the contrary, that the different view as to the onus of proof which was taken by BRAY, J., in this case is one, with respect, in which I cannot concur. If the onus of proof was on the plaintiffs, it is quite clear that the finding of the jury on this question cannot stand, because that was the chief difficulty, as the learned judge seems to point out, under which the defendant laboured. According to the judge's view the defendant had got to make out affirmatively that he had acted in good faith and without notice. Even if that were the true position, I should not quite agree with some language used in putting it, because I think with a jury there might be a possible danger when the question as to good faith was put in the way in which it was here put:

"You are at liberty to get at what was in the defendant's mind by what you think a reasonable man would have in his mind."

If that was meant to apply, as apparently it was, both to notice and to good faith, I do not think it was quite as clear or quite as suggestive of the right view as one could wish, because, although as regards notice, no doubt a man must be taken to act as a reasonable man does in noticing facts, yet, as regards good faith, nothing short of gross negligence, which may be evidence to the jury of bad faith, ought either in regard to bills of exchange or in regard to a transaction of this kind to be taken into consideration against a man. A man may, to a certain extent, be negligent, and yet ought not to be held by a jury to have acted without good faith, or to have acted with notice of a fraud.

The one thing upon which I cannot go the full length of my brothers in this court is this. I must put myself in the position that the jury were right; but I am very far from saying, upon the evidence as it stands, I should have come to the conclusion that, if the onus of proof had been on the plaintiffs, the defendant's servant had been shown to have been guilty of bad faith or of want of attention to facts which he must have noticed, or which ought to have put him on inquiry. But, as I conceive, it is not for me to put myself in the position of the jury. I cannot say that there were no facts for their consideration, and, therefore, even if I thought that with a proper direction the verdict as it now stands would be against the weight of evidence, I am not at liberty, in my view, to enter judgment for the defendant, unless I think there was no evidence upon which, under a proper direction, the jury upon the facts before them could only so find in fact. Upon the whole, without going into details, I think there were circumstances in the case, putting it generally, which under a proper direction it would not have been justifiable for a judge to withdraw from the jury. I therefore come to the conclusion that, as far as I can see, my judgment is in perfect accord with the judgment of the other members of the court on the other points, but, upon the whole, I do not myself think that the application ought to result in anything more than a new trial. The judgment of the court, however, is to the contrary.

Appeal allowed.

Solicitors: *Julius A. White; Stanley J. Attenborough.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

COPE AND OTHERS v. CROSSINGHAM AND OTHERS

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Buckley and Kennedy, L.J.J.), April 29, 30, May 21, 1909]

[Reported [1909] 2 Ch. 148; 78 L.J.Ch. 615; 100 L.T. 945;
25 T.L.R. 593; 53 Sol. Jo. 559]

Trade Union—Funds—Branch funds—Right of union trustees to restrict application—Action by union trustees against branch trustees—Competency—Injunction—Claim for administration of branch funds by court—Trade Union Act, 1871 (34 & 35 Vict., c. 31), s. 4 (3) (a).

A branch of a trade union seceded from the union and passed a resolution for the distribution of the funds of the branch among its members. The rules of the union provided for persons becoming members of the union by becoming members of a branch, for the collection by the branch of contributions from its members, and for the remittance by the branch to the head office of the union of the bulk of those contributions. In an action by the head trustees of the union against the trustees of the branch for a declaration that the resolution of the branch was ultra vires and void, and an injunction restraining the defendants from dealing with the branch funds otherwise than in accordance with the rules,

Held: while, under s. 8 of the Trade Union Act, 1871, the funds of the branch were vested in the trustees of the branch, the head trustees had sufficient interest in the branch funds, which must be regarded as part of, and not as distinct from, the funds of the union, to entitle them to the declaration and injunction sought; the claims for the declaration and injunction were not instituted with the object of enforcing an agreement for the application of the funds of the union to provide benefits to members within s. 4 (3) (a) of the Trade Union Act, 1871, and so was maintainable; and, therefore, the plaintiffs were entitled to succeed.

Per KENNEDY, L.J.: A claim for an order for the administration of the branch funds by the court would bring the case within s. 4 (3) (a) of the Act of 1871.

Notes. As to the duties and powers of trustees of trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 497 et seq., and cases there cited. For Trade Union Act, 1871, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244.

Cases referred to:

- (1) *Wolfe v. Matthews* (1882), 21 Ch.D. 194; 51 L.J.Ch. 833; 47 L.T. 158; 30 W.R. 838; 43 Digest 107, 1123.
- (2) *Yorkshire Miners' Association v. Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431, H.L.; 43 Digest 107, 1127.
- (3) *M'Laren v. Miller (or Amalgamated Society of Railway Servants for Scotland v. Motherwell Branch of the Society)* (1880), 7 R. (Ct. of Sess.) 867; 43 Digest 107, 1123ii.

Also referred to in argument:

- Rigby v. Connol* (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 28 W.R. 650; 43 Digest 98, 1035.
- Re Barrett, Whitaker v. Barrett* (1889), 43 Ch.D. 70; 59 L.J.Ch. 218; 38 W.R. 59; 23 Digest (Repl.) 333, 4542.
- Madden v. Rhodes*, [1906] 1 K.B. 534; 75 L.J.K.B. 329; 94 L.T. 741; 70 J.P. 230; 54 W.R. 373; 22 T.L.R. 356; 50 Sol. Jo. 326; 21 Cox, C.C. 180, D.C.; 43 Digest 110, 1157.
- Duke v. Littleboy* (1880), 49 L.J.Ch. 802; 43 L.T. 216; 28 W.R. 977; 43 Digest 105, 1095.

Chamberlain's Wharf, Ltd. v. Smith, [1900] 2 Ch. 605; 69 L.J.Ch. 783; 83 L.T. 238; 49 W.R. 91; 16 T.L.R. 514; 44 Sol. Jo. 643, C.A.; 43 Digest 99, 1036.

Barracough v. Brown, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249, H.L.; 16 Digest (Repl.) 132, 160.

Appeal by the plaintiffs, the head trustees of the Municipal Employees' Association, a registered trade union, against a decision of EVE, J., reported [1908] 2 Ch. 624.

The Municipal Employees' Association was a registered trade union. The rules were badly framed, but SIR HERBERT COZENS-HARDY, M.R., found that (i) it was a trade union, with branches; (ii) a man was admitted a member of a particular branch, and not of the union as a whole, and elected a member by the branch; (iii) there were branch trustees, elected by the branch members, and head trustees, appointed by the National Executive Council; (iv) the general management of the association was vested in the National Executive Council, with large powers to suspend from all benefits or privileges any branch or any member; (v) the contributions of members were paid to the officers of the branches to which they belonged; (vi) the head office funds were produced by payments made by the branches in respect of (a) entrance fees, (b) a sum of 1s. 6d. per quarter for each member, and (c) an annual sum for each member for legal expenses and for Parliamentary representation; (vii) the branch funds were produced by payments made by members—out of those funds the administration expenses of the branch were paid, and also sick pay; should there be a sum in hand beyond a certain limit the excess was to go to a reserve sick fund at the head office, and in case of deficiency the branch could claim assistance out of this reserve sick fund; (viii) funeral claims and accident claims were paid out of the head office funds, but through the branch secretary; (ix) accounts were audited quarterly, the branch accounts by auditors appointed by the branch, and the head office accounts by auditors otherwise appointed; (x) there was no provision for the secession of a branch. In February, 1907, a duly convened meeting of the Woolwich branch was held, when it was resolved that the branch "seceded their membership" from the union and that the branch funds be drawn from the Post Office Savings Bank and distributed among the members. Other branches took the same course, and the National Executive Council resolved to take proceedings to recover all money and other properties of the association held by seceding branches. In the present action in which the plaintiffs were the head trustees, and the defendants were the trustees of the Woolwich branch, the plaintiffs claimed (i) a declaration that the resolution of February, 1907, was ultra vires; (ii) an injunction; (iii) the removal of the defendant trustees and the appointment of new trustees; and (iv) administration by the court of the funds and property of the branch. The defence denied that the branch still existed and alleged that the defendants held the branch funds for the persons who had been members of the branch, who were their cestuis que trust; and they pleaded the Trade Union Act, 1871.

EVE, J., held that the head trustees had sufficient interest in the funds to maintain the action, and that the action was instituted, not to enforce an agreement for the application of the funds to provide benefits to members within s. 4 (3) (a) of the Trade Union Act, 1871, but to restrain a misapplication of the funds, and, therefore, that the action could be maintained. He made a declaration to the effect that a distribution of the funds among the members of the branch would be ultra vires and not in accordance with the rules of the society, but he refused to grant an injunction, giving the plaintiffs liberty to apply in case of any threatened misapplication of the funds. The plaintiffs appealed against so much of the judgment as refused an order on the three first named defendants to pay over the funds in their hands to the plaintiffs, and the defendants gave notice of a cross-appeal claiming a decision that the action could not be maintained.

The Trade Union Act, 1871, s. 4 (3) (a), provides :

"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely . . . (3) Any agreement for the application of the funds of a trade union (a) to provide benefits for members."

H. S. Preston for the plaintiffs.

J. D. A. Johnson for the defendants.

Cur. adv. vult.

May 21, 1909. The following judgments were read.

SIR HERBERT COZENS-HARDY, M.R., after stating the facts and the effect of the rules, continued: It is conceded by the plaintiffs that the action could not have been maintained before the Trade Union Act, 1871, but they assert that there is nothing in s. 4 of that Act which deprives them of their right to recover from the defendants money and property which is legally vested in the plaintiffs as trustees of the association. By s. 8 of the Act of 1871 the real and personal estate "of any branch of a trade union shall be vested in the trustees of such branch," and not in the trustees of the union. It is true that, by s. 3 of the Act of 1876, s. 8 is amended by inserting after the words "trustees of such branch" the words "or of the trustees of the trade union if the rules of the trade union so provide," but I am clearly of opinion that there is nothing to be found in the rules of this trade union to prevent the application of s. 8. Indeed, it is plain that the rules contemplate and expressly provide that the branch funds shall be vested in the branch trustees. This seems to strike at the root of the plaintiffs' title to require payment of the money in the hands of the defendants. It is no doubt true that the rules contain numerous provisions for payment of various sums out of branch funds to the head office and to other persons (such as branch secretary and branch auditors and members for sick pay), and on the other hand for payment by the head office of various sums to or for the benefit of the members of the branch. This, however, involves the administration of the funds according to the rules, and to order payment would be a direct enforcement of an agreement for the application of funds to provide benefits to members, and would, therefore, fall within s. 4. I do not intend to indicate an opinion that new trustees of the union could not maintain an action to recover union funds from former trustees, and the same would apply to new trustees of the branch as against former trustees of the branch. That would not involve any administration. But I am unable to apply that principle to the present case. I think the branch trustees never were trustees of the union and were never accountable as such. *EVE, J.*, has held, and the lords justices agree, that the plaintiffs, although not entitled to require payment of the money, have a sufficient interest in the branch funds to entitle them to a declaration that the defendants are not entitled to deal with the branch funds otherwise than in accordance with the rules. This court is also of opinion that they are entitled to an injunction restraining the defendants from dealing with the funds in any other way. I feel some doubt on this point—a doubt based upon the hopeless obscurity of the rules; but I am not prepared formally to dissent from the view which is taken by my colleagues. It follows that the judgment of *EVE, J.*, must be affirmed and an injunction granted, and the cross-notice must be dismissed. There should be no costs of the appeal.

BUCKLEY, L.J.—There are two questions in this case, the one a question of law of general importance arising under s. 4 of the Trade Union Act, 1871, and the other a question arising under the construction of the rules of this particular union.

The first question is whether this action is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the union to provide benefits to members. Those are the only words in s. 4 of the Act of 1871 relevant to this case. I do not address myself particularly to the word "directly." It may well be that that word means (by way of contrast) enforcing by direct order as distinguished from enforcing by the recovery of damages for breach. This action is not, I think (within any meaning of the word "directly"), such a legal proceeding as is excluded by s. 4. The nature of the action is as follows. There are funds in the hands of the defendants. The trustees of the union say: We are entitled to prevent the misapplication of those funds, we desire to preserve the fund, we do not ask the court in any way to administer the fund. In this action the court has nothing to do with the right of any member to a distributive share of the fund. All the court is asked to do is to see that the fund is preserved, leaving its proper destination as between the members entitled to share in the fund wholly unaffected by any judgment which the court is asked to pronounce. By the decision in *Wolfe v. Matthews* (1) and the opinions of the learned Lords in *Yorkshire Miners' Association v. Howden* (2) it is, I think, decided that such an action can be maintained. In the last-mentioned case LORD DAVEY dissented. But, in my judgment, his opinion is not contrary to, but is in favour of, the view which I have expressed. The majority of the learned Lords were of opinion that where the question was whether moneys were being rightly paid to members an action brought to restrain their misapplication was not a direct enforcement. In other words, they held that to enforce negatively by preventing misapplication was not to enforce directly. In this view LORD DAVEY did not agree, but he did agree that if the question was not of payment to members at all but of preservation for the benefit of such members as might be entitled, the action could be maintained. He said ([1905] A.C. 270):

"I am disposed to think that the trustees might have maintained this action against the original defendants under the powers given to them by s. 9 of the Act."

In the present action the relief asked consists of a declaration that a resolution to divide branch funds among the members of the branch was ultra vires, an injunction to restrain such division, and an order for the appointment of new trustees and the vesting of the funds in them. There is added, it is true, in para. (iv) of the claim, a prayer for administration so far as may be necessary. No such judgment, however, has been pronounced by EVE, J., and no such judgment is asked from this court. In my opinion, the action is one which can be maintained for the purposes of the prayer.

The second question depends upon the proper construction of the rules, and upon these it is not strange if opinions should differ. The rules are full of difficulties. Provision is made by r. 1 for the formation of the society, and there is a definition of membership. Members are members of the society, and may become such by becoming members of a branch. They are not members of a branch or distinguished from the society. On joining the society, members make contributions as stated in r. 2 and again in r. 15. The member receives a certificate of membership which certifies that he is admitted a member of the ——— branch of the society. There does not seem to be any machinery for becoming a member except by joining a branch, but it is difficult to say that a man could not become a member by joining at the head office and paying under the provision in r. 2. When a man joins a branch he becomes a member of the society, not a member of the branch as distinguished from the society. The society, as it seems to me, might exist when there was no branch. As I read the rules, the branches are not separate unions. There is no rule that the society shall or may consist of branches. The society consists only of members who are natural persons, and who become members by joining a branch. On joining, the member pays 1s. entrance fee, 3d. for rules, and 1d. for his card. He subsequently pays 2½d. a week and also

1½d. at the end of the year for labour representation purposes. These contributions are disposed as follows: All entrance fees are paid to the head office at the end of the quarter (r. 17); the 1½d. for labour representation purposes is paid at once to the head office (rr. 2 and 15); the 3d. and the 1d. are retained by the branch. Out of the 2½d. a week (which is equal to 2s. 8½d. a quarter) the branch sends to the head office at the end of the quarter 1s. 6d. for each financial member, a financial member being one who is not more than a quarter in arrear (r. 17). The substance of this is that all entrance fees and 1s. 6d. out of the 2s. 8½d. a quarter go to the head office, and that the branch keeps 1s. 2½d. per member per quarter. The sick fund exists as a separate fund; the member pays 4d. per week (r. 22); the branch pays the sick fund moneys to the head office subject to retaining sums of £5, £10 or £15 as the case may be (r. 22). All the rest is handed over to the head office. This is all I need say about contributions. As regards benefits, funeral claims are made through the branch secretary, but are paid by the head office (r. 3). Proceedings for compensation in respect of accident are taken by the head office, seemingly at the expense of the society, if the head office so determine (r. 3). Payments for dismissals are made by the head office (r. 3). Permanent accident gratuities are paid by the head office (r. 3). Sick allowance is paid by the branch (r. 22); but, if the branch has not sufficient funds, it applies to the head office, which has power to grant the branch a sum from the sick reserve fund to tide it over its difficulties (r. 22). The outcome of the above is that in substance the head office pays all benefits, except that the branch keeps the sick fund in hand to a limited amount which presumably is sufficient to answer current demands, and calls upon the head office for any deficiency. The branch has a good many salaries to pay (r. 24). The sum of 1s. 2½d. a quarter per member which it retains is presumably to meet these expenses and some other trivial expenses, such as payments to banner carriers (r. 15). I cannot find that any other destination is indicated for so much of the fund as the branch retains, except that it is subject to levies to be made by the head office. The head office can make levies on the branch funds for head office purposes (r. 6), and the branch cannot deal with any of its funds for any purpose other than as specified by the rules except by sanction of the executive council (r. 15). The executive council are the final authority to vote any of the funds of the association away for any purpose not stated in the rules (r. 6). The executive council can open or close any branch, and can suspend from all benefits any branch member or members (r. 6). A branch has no power to secede. When a member has once joined he need not continue to pay, but, if he does not, he will after six months' arrears be erased from the books and will forfeit all he has paid (r. 15).

The outcome of these provisions, I think, is that the branch does not exist as a separate trade union—that the provisions as to branches, branch officers, and branch trustees and the aggregation of branches into districts are all mere matter of subdivision of the affairs of the body, and that, although a branch has under the rules separate trustees, it has not separate funds in the sense of being entitled as regards such sums as under the rules are from time to time left in its hands to a right to those funds in the branch as distinguished from a right to them in the society. Supposing there were fifty members in the branch and that forty of them ceased to pay, it is quite plain that after six months those forty would have no further right in respect of the funds. When all fifty cease to pay every member of the branch ceases to have any interest in the funds. To divide the funds among the fifty members would, it seems to me, be in breach of plain provisions of the rules. The funds are not funds of the branch as distinguished from the union, but funds of the branch as a constituent part of the union. The plaintiff Hatchell claims to be still a member of the branch. Whether he is or not the closing of the branch is an act which, under the rules, could only be done by the National Executive Council. They have not closed it. They have only resolved not to pay the seceding members anything more. If they had closed the branch they could open it again. The existence and continued vitality of the branch is dependent

not upon acts to be done by the branch or its members adversely to the union, but by the National Executive Council, as controlling, amongst other things, the existence of the branch. The language of the rules is that the National Executive Council may open a branch—this must be by inviting persons to join the society by becoming members of the new branch which theretofore did not exist. They can so invite persons, I think, now, and the machinery may thus be set in motion by which further members of the branch can come into existence and the continued existence of trustees of the branch ensured. The order which the learned judge pronounced is, I think, quite right, except that I think he should have gone on to grant an injunction. He has declared the resolution of Feb. 18, 1907, to be *ultra vires*, has declared that the branch trustees hold the branch funds upon the trusts declared by the rules, and has given liberty to apply. Under that liberty effect can be given to the rights of preservation of the fund, as, for instance, by an order to hand over the funds to new branch trustees if and when such shall be appointed. His order should, I think, be affirmed, but there should be added to it an order for an injunction restraining the defendants, the branch trustees, from distributing the branch funds amongst the members of the branch, or dealing with the same otherwise than in accordance with the rules. The cross-appeal, which affirmed that the action could not be maintained, and asked for an order declaring that the funds belonged to the branch, should, I think, be dismissed. The plaintiffs not having succeeded in obtaining an order for payment there should be no costs of the appeal. The dismissal of the cross-appeal will be with costs if there are costs of the cross-appeal.

KENNEDY, L.J.—This is a case of some difficulty, due in part to the disputable effect of the language of the Trade Union Act, 1871, s. 4, which has led to the remarkable divergence of judicial interpretation in *Yorkshire Miners' Association v. Howden* (2), and in greater part to the looseness and imperfection of the 1905 code of rules of the Municipal Employees' Association, whose affairs form the subject of the consideration of this court. The dispute in the present case has sprung from a resolution of the Woolwich branch to secede from the central organisation. There is no provision in the rules for such an event. They contain no agreement for the solution of the questions which almost continuously must arise whenever such a secession takes place, both in regard to funds then in the possession of the branch and also in regard to funds on which, though in the possession of the central organisation, the branch, as representing its members, has a right of call for the purpose of paying to members of the association the benefits to which the rules entitle them. It is in reference to the first of these two questions only that we have in this action to decide.

The material points may be stated very shortly. The association, which, according to r. 1 (2), consists of persons employed by any municipal authority in Great Britain and Ireland, is constituted by a central body, called the National Executive Council, and by local branches, which may or may not be grouped into districts, and from which elected representatives are sent to form the National Executive Council. The branches, in their inception, are created, and during their existence are controlled, by the authority of the National Executive Council. The branch collects contributions due from its members, but is bound quarterly to render accounts to the head office and to remit to it the bulk of those contributions, retaining only, I think, sums sufficient for the administration expenses of the branch (including payments to officers and banner carriers), and for its sick fund. It is the head office which, out of the contributions from the branches, as I understand the rules, generally allots and distributes the benefits to members, and makes good other payments in the name of the association as the National Executive Council directs. By r. 6 (c) the National Executive Council is empowered to make levies on branch funds for head office purposes. So far a branch would seem to be merely one of several subordinate parts of one centrally controlled association, possessing certain powers of local administration, but, except that it can retain

in its own hands enough to cover the cost of local management and the needs of its sick fund, acting financially as a mere vehicle for receiving and passing on to the head office the contributions of the members of that branch, and for distributing the amounts allotted as benefits by the head office. Under r. 22 (8) a branch is not entitled to retain surplus funds beyond £15 (as a maximum), the amounts below £15 being regulated according to a scale which depends upon the size of the branch. If the surplus in its hands exceeds the maximum, the excess must be remitted to the head office of the association to form part of a reserve sick fund, from which subventions may be made by the National Executive Council to any branch whose sick fund happens to be exhausted. By r. 15 (8) no branch can part with any of its funds for any purpose other than as specified by the rules, except by the sanction of the National Executive Council. By r. 6 (a) it is provided that the National Executive Council is the final authority to vote any funds of the association owing for any purpose not stated in the rules. A branch may make byelaws for its own guidance, but they must be approved by the National Executive Council (r. 15 (8)). At the same time (and the respondents to this appeal much rely on this), the real and personal estate of the branch by law (see the Trade Union Act, 1871, s. 8, and the Trade Union Act Amendment Act, 1876, s. 3) and the rules of this association vested, not in the trustees (called in the rules the "head trustees") of the association, but in the trustees of the branch. They are appointed by the vote of the members of the branch. The banking accounts of the branch stand in their name. They are responsible for paying in and drawing out money. The accounts are audited quarterly by auditors appointed by the branch.

The present action has been brought in consequence of the secession, as I have already said, of the Woolwich branch of this association on Feb. 18, 1907, according to a resolution carried at a duly convened meeting of the branch, which also provided that the existing funds should be drawn from the Post Office Savings Bank and distributed among the members of the branch. The National Executive Council has refused to recognise the claim of the Woolwich branch to sever itself in this way from the association, and has brought this action for the purpose, in substance, of preventing the funds of the branch being distributed among its members in accordance with the resolution of Feb. 18, 1907. In the names of the head trustees of the association and one George Hatchell, who was a member of the Woolwich branch, and who, as I understand, has at some time asserted that he disapproves of the resolution to secede, the National Executive Council have sued the trustees of the branch and the branch secretary claiming (i) a declaration that the resolution of the Woolwich branch to divide its funds among its members was ultra vires; (ii) an injunction to restrain the defendants from making such a division and from dealing with the funds otherwise than in accordance with the rules of the society; (iii) the removal of the defendants from the office of trustees, the appointing new trustees, and an order that the defendants do transfer to such new trustees the funds and property of the Woolwich branch; (iv) so far as may be necessary, the administration by the court of such funds and property. It is common ground in the present case, that at the time of the secession in February, 1907, the defendant trustees had under their control a sum of money—some £40, I think—which, if the relations between this branch and the association had remained normal, would, in accordance with the rules, have been payable by them to the head office at the end of the current quarter, and this is the sum which the plaintiffs on behalf of the association seek to affect by their claims in the present action.

The defence put forward by the defendants is twofold. In the first place, they contend that, upon the true construction of the rules, there is no legal right given to the representatives of the central body, or any other person suing on its behalf, to interfere, as the plaintiffs seek to do in this action, with the disposal of funds vested in the trustees of that branch. Secondly, they say that s. 4 of the Trade Union Act, 1871, prevents the successful maintenance of legal proceedings to

obtain any part of the relief claimed by the plaintiffs. Taking this second line of defence first, I am of opinion that it cannot be made effective so far as regards the first two claims for relief. It appears to me that to make the declaration and to grant the injunction asked for cannot, after the decision of the House of Lords in *Yorkshire Miners' Association v. Howden* (2), be held to be wrong as constituting a violation of the statutory enactment against a legal proceeding "instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members." The defendant trustees of the Woolwich branch had threatened to obey the resolution of the branch meeting of Feb. 18, 1907, by distributing the funds in question among members of the branch, not as "benefits" under the rules at all, or for any purpose named or contemplated in the rules, but substantially as gifts to those members. In my view, this would be a dealing with the trust funds entirely ultra vires; and the present action—so far as the prayer for a declaration and the prayer for an injunction are concerned—is a legal proceeding to declare that such a dissipation of the funds collected from the group of members forming this branch, and held by the defendant trustees for the objects of the association as stated in the rules, is ultra vires, and to prevent it by an injunction of the High Court of Justice. Neither form of relief touches the application of these funds in the provision of benefits to members.

The Scottish case of *M'Laren v. Miller* (3), which was cited in *Yorkshire Miners' Association v. Howden* (2), appears to me to be very much in point, as the facts were like those of the present case. The Motherwell branch of the Amalgamated Society of Railway Servants had seceded from the central organisation just as the Woolwich branch has done, and had passed a resolution to "uplift" moneys in the bank, and to retain them in the hands of certain members of the branch until the secretary of the branch should propose a scheme of division of the amount among the members of the branch, and that the funds should be thereafter divided. The trustees of the association sued for an interdict, and the defendants, the trustees of the branch, set up the defence of s. 4 of the Trade Union Act, 1871. The court held that it was untenable, and granted an interdict that "the defenders are not to part with the funds until the rights of the members of the branch society and of the central body be determined."

As to the defendants' first contention, which is independent of s. 4 of the Trade Union Act, 1871, and depends upon the effect of the rules of 1905, I have felt that the question is not free from difficulty owing to the imperfection of the rules of 1905. The property of the branch is undoubtedly vested (see the Trade Union Act, 1871, s. 8, and the Trade Union Act Amendment Act, 1876, s. 3) in the trustees of the branch. But upon the whole, having regard to the rules, and especially to those to which I have adverted in the earlier part of this judgment, I am of opinion that those funds ought to be treated, as between the association and the branch, as funds also of the association; or, in other words, that they ought to be treated as funds of the branch as a part of, and not as distinct from, the association. So far as regards the particular moneys to which this action relates, they were under the rules allotted by the officers of the branch, and have come into the control of the trustees of the branch upon trust to be remitted (subject to deduction for administration expenses and the sick fund, and, I think, also for some small payment to banner bearers) to the head office of the association, to be distributed from the head office through the proper officials in the form of benefits to members according to the rules, and also used in part for such other purposes of the association as the National Executive Council may direct.

Having regard to the constitution of this society, I hold that the present plaintiffs, and indeed any members of the association, are so far interested in the funds in the hands of the Woolwich branch, and in the proper use of them by the trustees of the Woolwich branch, that the present action is well founded. In my judgment, the plaintiffs are entitled to the declaration and the injunction for which they have sued in this action. The further relief sought under heads (iii) and (iv) of the plaintiffs' claim should not, I think, be granted. As the branch no longer exists,

and, so far as I can gather from the facts before us, there are no members of the association who have formed or who have asked the association to form a new Woolwich branch, I do not see how new trustees of that branch, to whom a transfer of the funds in question would be made, can be appointed; and I am inclined to think that an order to administer the fund would infringe the provisions of the Trade Union Act, 1871, s. 4. In regard to this appeal, I concur in the order which has been stated by the MASTER OF THE ROLLS.

Solicitors: *F. A. Stern; E. C. Kilsby & Son.*

[Reported by W. C. Biss, Esq., Barrister-at-Law.]

WILLMOTT v. LONDON ROAD CAR CO., LTD.

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), October 13, 1910]

[Reported [1910] 2 Ch. 525; 80 L.J.Ch. 1; 103 L.T. 447;
27 T.L.R. 4; 54 Sol. Jo. 873]

Landlord and Tenant—Lease—Assignment—Covenant not to assign without consent—Consent not to be withheld in respect of a “respectable and responsible person”—Assignment to corporation without consent.

A lease contained a covenant by the lessee not to assign or underlet the premises without the previous written consent of the lessor, but such consent was not to be withheld in respect of a respectable and responsible person. The lessee assigned the premises to a limited company.

Held: a limited company was a “person” within the meaning of the proviso in the lease and was capable of being “a respectable and responsible person.”

Decision of NEVILLE, J., [1910] 1 Ch. 754, reversed.

Harrison, Ainslie & Co. v. Barrow-in-Furness Corpn. (1) (1891), 63 L.T. 834, questioned.

Notes. By s. 19 (1) (a) of the Landlord and Tenant Act, 1927 (13 HALSBURY'S STATUTES (2nd Edn.) 904), where a lease, whether made before or after the commencement of the Act, contains a covenant against assigning, underletting, charging, or parting with the possession of the demised premises or any part thereof without licence or consent, such covenant notwithstanding any express provision to the contrary, shall be deemed to be subject to the proviso that such licence or consent is not to be unreasonably withheld.

Applied: *Re Greater London Properties, Ltd.'s Lease, Taylor Bros. (Grocers), Ltd. v. Covent Garden Properties Co., Ltd.*, [1959] 1 All E.R. 728. Referred to: *Curtis Moffat, Ltd. v. Wheeler*, [1929] 2 Ch. 224.

As to covenants against assignment or underletting, see 23 HALSBURY'S LAWS (3rd Edn.) 629-637; and for cases see 81 DIGEST (Repl.) 420-433.

Cases referred to:

- (1) *Harrison, Ainslie & Co. v. Barrow-in-Furness Corpn.* (1891), 63 L.T. 834; 39 W.R. 250; 31 Digest (Repl.) 423, 5507.
- (2) *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857; 49 L.J.Q.B. 736; 43 L.T. 389; 45 J.P. 20; 28 W.R. 957, H.L.; 13 Digest (Repl.) 264, 908.

- (3) *Re Jeffcock's Trusts* (1882), 51 L.J.Ch. 507; 13 Digest (Repl.) 267, 932.
- (4) *South Hetton Coal Co. v. North-Eastern News Association*, [1894] 1 Q.B. 133; 63 L.J.Q.B. 293; 69 L.T. 844; 58 J.P. 196; 42 W.R. 322; 10 T.L.R. 110; 9 R. 240, C.A.; 13 Digest (Repl.) 327, 1332.
- (5) *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 87; 28 L.J.Ex. 201; 32 L.T.O.S. 283; 5 Jur.N.S. 226; 7 W.R. 265; 157 E.R. 769; 13 Digest (Repl.) 327, 1330.

Also referred to in argument :

- Hirst v. West Riding Union Banking Co.*, [1901] 2 K.B. 560; 70 L.J.K.B. 828; 85 L.T. 3; 49 W.R. 715; 17 T.L.R. 629; 45 Sol. Jo. 614, C.A.; 13 Digest (Repl.) 265, 914.
- Hereford Corpn. v. Morton* (1866), 15 L.T. 187; 31 J.P. 56; 15 W.R. 110; 13 Digest (Repl.) 267, 929.
- Newcastle-upon-Tyne Corpn. v. A.-G.* (1845), 12 Cl. & Fin. 402; 8 E.R. 1464, H.L.; 8 Digest (Repl.) 502, 2226.
- Re Thompson's Settlement Trusts, Thompson v. Alexander*, [1905] 1 Ch. 229; 74 L.J.Ch. 133; 91 L.T. 835; 21 T.L.R. 86; 13 Digest (Repl.) 269, 945.
- Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 52 W.R. 273; 48 Sol. Jo. 178, C.A.; 44 Digest 705, 5484.

Appeal against a decision of NEVILLE, J.

The plaintiff Willmott, by an indenture dated May 31, 1900, leased certain premises at Putney to H. E. Porter for sixty-two and a half years from Sept. 29, 1899. The lease contained the usual covenants, and, in particular, a covenant by the lessee to "use the premises for the business of a jobmaster and livery-stable keeper," and

"not without the previous written consent of the lessor, his heirs, and assigns, to assign or underlet or part with the possession of the said hereditaments or any part thereof or these presents, but such consent shall not be withheld in respect of a respectable or responsible person."

The lease also contained a provision for re-entry by the landlord in case of breach of any of the covenants by the lessee. In February, 1901, the lease and premises were assigned to the defendants for the remainder of the term, with the written consent of the plaintiff, by W. J. Heath as executor of the will of H. E. Porter. On Dec. 1, 1908, the defendants applied to the plaintiff for permission to assign the lease and premises to the London General Omnibus Co., Ltd., but the plaintiff refused such permission. The defendants, however, subsequently sold and conveyed their undertaking to the London General Omnibus Co., Ltd., and the latter had been in occupation of the premises since July, 1909. The plaintiff thereupon brought this action claiming a declaration that he was entitled to re-enter the premises and determine the tenancy by reason of the defendants having assigned without his consent. There was also a claim for damages. NEVILLE, J., following a decision of ROMER, J., in *Harrison, Ainslie & Co. v. Barrow-in-Furness Corpn.* (1), held that a limited company was not a "respectable and responsible person" within the covenant and gave judgment for the plaintiff with 30s. damages. The defendants appealed.

Butcher, K.C., and *Richards* for the defendants.

Peterson, K.C., and *W. H. Draper* for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This is an appeal from a decision of NEVILLE, J., by which he has declared that the London General Omnibus Co., being a corporation, are not a "respectable and responsible person" within the meaning of the covenant contained in a lease, and has declared that the plaintiff, the lessor, is entitled to recover possession of the demised premises; and he is also awarded 30s. damages. Two learned judges, ROMER, J., and NEVILLE, J., have taken a view which I am unable to follow or to adopt. The lease in this case was

granted in 1900 to a Mr. Porter of some premises at Putney. The rent was £95 a year. The premises were insured for £5,000, so it was apparently a valuable property. The lease contained a covenant that the lessee would use the premises "as and for the business of a job-master and livery stable keeper"; and

"not without the previous written consent of the lessor, his heirs and assigns to assign or underlet or part with the possession of the hereby demised hereditaments or any part thereof or these presents but such consent shall not be withheld in respect of as respectable or responsible person."

Mr. Porter did assign the lease to the present defendants, the London Road Car Co., in 1901, and the plaintiff gave his assent thereto. The defendants were minded to assign to the London General Omnibus Co. The real question, which has been decided by NEVILLE, J., is that a corporation is not a "person," and cannot be a "responsible and respectable person" within the meaning of this covenant.

It is necessary to consider with some care what is the true *prima facie* meaning of the word "person," what is its meaning at common law, and, apart from any statutory enactment, I go back to LORD COKE upon those words and his exposition of the Hospitals for the Poor Act, 1597, which was made perpetual by the Statute 21, Jac. 1, c. 1. The language of the statute was quite positive. It authorised all and every person and persons seized of an estate in fee simple to found hospitals and alms-houses, and LORD COKE upon those words "all and every person and persons" says this (COKE'S INSTITUTE'S (1797 Edn.), part 2, vol. 2, p. 722):

"These words regularly doe extend to any body politick or corporate, but not to such as are restrained by any Act of Parliament to alien, &c., but doth extend to such bodies politick and corporate as may alien."

He does not put that on any context in the Act; on the contrary, there is no context, but he puts it as a general proposition: "These words regularly do extend to any body politic or corporate such as may alien." Of course a corporation which had no power of alienation could not be a person within the meaning of this Act, which says that any person might alienate. It did not authorise an Act which was otherwise *ultra vires*. Then we come to BLACKSTONE, who is quite explicit. He said (COMMENTARIES, vol. 1, p. 123): "Persons also are divided by law into either natural persons or artificial." Then in the very important case of the *Pharmaceutical Society v. London and Provincial Supply Association* (2) in the House of Lords, LORD SELBORNE (2) said that in a statute the word "person" *prima facie* included an artificial person or a corporation. LORD BLACKBURN indicated the same view, although he said he was not so clear about it. It is said that may be so as to statutes, but it has no application to instruments even of the most formal character under seal such as this lease is. As far as I am aware, there is no authority for that. Is there any authority to the contrary? I think there is, for the decision of CHITTY, J., in *Re Jeffcock's Trusts* (3), which was a case of a will, shows that where trustees of a will have power given to them to grant lease to any "person or persons" as they may think fit, a limited company—that is to say, a corporation—is within the meaning of that power, and is a person to whom the trustees may lawfully and properly grant a lease. I am not aware that the precise point has arisen with reference to a lease, but I should be most unwilling to draw a distinction which I think would be contrary to the whole trend of modern dealings, and to say that a corporation in a lease of this kind was not to be regarded as a "person."

The real stress of the able arguments of counsel for the plaintiff rested upon the subsequent words. Let me take them one by one. It is plain that under this lease and apart from this covenant a company could be an assign of the lease. There is no dispute about that; it was competent to become an assign. It was not *ultra vires* of the company to accept the lease, and it was perfectly

competent to become an assign. Suppose the words had simply been that consent should not be withheld in the case of a responsible person, I cannot bring myself to doubt that in that case a company which was admitted to be responsible in the sense of being able to discharge all obligations in respect of rent and covenants under the lease would be a "responsible person" within the meaning of that covenant, and therefore, a person with respect to whom consent could not be refused. But then it is said, "Can it be said a corporation can be 'respectable'?" Does not the addition of that word 'respectable' compel one to say that in this case the word 'person' must be limited to an individual, a human personality, a person who is capable of acts moral or immoral?" In my opinion that is not so. I think that the ordinary use of language justifies one in saying that a company is a respectable company. We all use that language, habitually. We talk of a "respectable insurance company," "a respectable bank," and a "highly respectable business," and we have no reference at all to the fact that the insurance company is or is not an incorporated body, in which case the word "respectable" is used with reference to the mode and their conduct of carrying on business.

But we are not without assistance from authority which is absolutely binding upon us. A company, whether limited or not limited, can maintain an action in respect of libel calculated to injure its reputation in respect of its business, without proving any special damage. *South Hetton Coal Co. v. North-Eastern News Association* (4), which is a decision of this court, is a clear authority on that point. I am content to rely on a passage there quoted from the judgment of POLLOCK, C.B., in the *Metropolitan Saloon Omnibus Co. v. Hawkins* (5) (4 H. & N. at p. 90), where he says that in order to carry on business it is necessary that the reputation of a corporation should be protected, and therefore, in a case of libel or slander it must have a remedy by action. A company can have a reputation which is not the reputation of the individual directors, but the reputation of the company, of the corporation, the reputation which the corporation itself, the company itself, and itself alone can protect by means of an action of libel. Are we to draw a distinction and say, "True, that may be so if the word had been 'reputable,' but it is not 'reputable,' it is 'respectable.'" I decline to draw that fine distinction. It seems that the better view (and I think it is in accordance really with modern policy, and the trend of all mercantile dealings), and I think the true view is that a company in a document of this kind, and a clause of this kind, is a person which may be both responsible and respectable, and that, therefore, there can be no right to refuse permission to assign. In other words, taking the whole context of this clause, it really amounts to a provision that the lessee shall not without the previous written consent of the lessor, assign or underlet or part with the possession of the premises, but such consent shall not be withheld in respect of the contemplated assignee who is an incorporated company, or of the under-lessee, and that is put in a short phrase of a "person," a phrase, which is in law applicable equally to an artificial as to a natural person.

Now I am aware that the view I am taking in this case is contrary to that expressed by ROMER, J., in *Harrison, Ainslie & Co. v. Barrow-in-Furness Corpn.* (1). That decision may have been right on other grounds, but the learned judge says this:

"No doubt, for many purposes, the word 'person' includes corporation, as, for example, for the purposes of the Conveyancing Act, 1881. The question I have to decide is, whether, looking at this particular lease, I can hold that a corporation such as that of Barrow-in-Furness falls within the definition of 'a person of responsibility and respectability.' I think not. Although the word 'person' may, under many circumstances and for many purposes, include a corporation, I do not think that is *primâ facie* the natural meaning of the word; but whether that be so or not, I have here to deal with a clause about

a person of responsibility and respectability. Looking at the phrase as a whole, and considering the terms of the lease, I do not hold that the corporation can be said to come within the fair meaning of these words."

With that decision before him, I think NEVILLE, J., was perfectly right in giving the decision which he did, following the decision of a judge of co-ordinate jurisdiction, leaving the parties to come to the Court of Appeal, but having, after the full and excellent argument we have had, arrived at a clear opinion that both those decisions are wrong, this appeal must be allowed and the action dismissed with costs here and below.

FLETCHER MOULTON, L.J.—I am of the same opinion. The question before us is the construction of the provision in this lease, and in construing it we must take all the words that we find there, but as the argument of the counsel before us has indicated, this naturally falls into two parts. We have first to consider whether the word "person" used in a provision of a lease of this type can include a corporation or whether it is restricted to individuals. Then, if we come to the conclusion that it can include a corporation, we have to consider whether the indications afforded by the two epithets which are applied to the word "person" are such as to lead us to the conclusion that it bears a narrower sense.

In my opinion, there can be no question that the word "person" may include corporation. The quotation from BLACKSTONE'S COMMENTARIES (vol. 1, p. 123) is decisive, and I have never known any doubt thrown upon that; but as LORD BLACKBURN points out in the *Pharmaceutical Society v. London and Provincial Supply Association* (2), the fact that a word has an extended meaning in law does not bring with it as a matter of necessity that wherever that word is used we must attribute that extended meaning to it. He points out that in ordinary parlance "person" would probably be used in many contexts in a much narrower manner. Then he points out that in legal documents the probability would be that it was used in its more complete legal sense, and in these remarks the learned Lord does not, in my opinion, intend to draw any hard and fast line saying that we must attribute a particular meaning to it when used in one class of document, and we must not attribute that meaning to it when used in some other class, but he wishes to indicate that as we proceed from common parlance towards the strictest legal expression there will be a gradually increasing probability that the full legal sense is to be attached to the word. Now, under those circumstances, I ask myself in a lease dealing with the holding of a property, and the performance of the covenants of that lease, a document of a legal profession, is the meaning of the word "person" the full, extended, legal meaning, or are we to attribute to it the narrower meaning which it bears so frequently in ordinary conversation?

Here we have a very valuable guide in the decision of CHITTY, J., in *Re Jeffcock's Trusts* (3). There, some trustees under the will had a power to let property to such person or persons as they might think fit, and they came to the court to know whether that authorised them to let to a limited company. That raised in the clearest way the question whether in a document of that type the proper interpretation, apart from indications to the contrary, of "person" was that the word was used in its extended sense, and the decision of CHITTY, J., that it was to be interpreted in the extended sense was in the clearest language. I cannot help thinking that it would have been a most disastrous thing if it had been otherwise, because why should trustees be prevented from accepting eligible tenants merely because they were corporate bodies when they might be equally capable of performing the covenants and equally liable as any individual tenant they might get. I may say also that I think that the gradual change in the organisation of societies which has been going on for the last century whereby more and more of the business of the country is done by corporations

and less and less by private individuals, has brought with it an increased tendency to use the word "person" as including all those who can perform the duties of persons with regard to property. The possibility that a tenant would be a corporate body was very much smaller 200 years ago than it is at the present time. I should in any legal document dealing with property, the holding of it, and the performance of the obligations connected with it, be inclined to hold "person" as being necessarily used in its extended sense unless there was something in the context or in the object of the provision which led me to a different conclusion. In the present case there is nothing. A power to object to a person on reasonable grounds as an assignee of a lease when there would be otherwise clearly power in a corporation to become the assignee of the lease, is, in my opinion, a provision for the protection of the lessor with regard to the proper user of the property and the performance of the covenants, as to rent and otherwise, and I can see no reason whatever why that should exclude any important branch of the wide word "person" that was capable of performing the obligations under the lease. For these reasons the first part of the argument breaks down, and that if there were no epithets the words of the lease, that such consent should not be withheld in respect of a person against whom there was no objection, would certainly include corporations.

Now, do the two epithets indicate that the narrower sense is to be used, in other words, are they so personal, so individual, that they preclude our including the artificial persons recognised by the law whom we call corporations. The word "responsible" is just as applicable to a company or any incorporated body as it is to a person, and that has not been contested at the Bar. The whole argument on this part of the case has been based on the word "respectable." In my opinion the word "respectable" points to the behaviour of the person primarily in carrying out his business, but probably in the whole of his external relations, and I cannot see why the word "respectable" is not just as applicable in this sense to a corporation as it is to a person. It is perpetually used with regard to corporations, and the instance given by FARWELL, L.J., is probably as good as any, where we talk of "respectable" insurance companies. You might say, "No respectable insurance company adopts such and such a policy." Everybody would understand that to mean an insurance company that carried on its business in accordance with high principles and which had acquired a corresponding reputation. Now, considering that the object of this provision was, that the property should only go into hands that would treat it so that the locality would not lose reputation, and that the performance of the covenants of the lease would be secured, I cannot see why the words "respectable" and "responsible" should not have been put in as excluding corporations that did not carry on business in a reputable manner or were not equal to the burdens of the covenants and therefore not responsible. For these reasons I come to the conclusion that the London General Omnibus Co. was a proper tenant as to whom consent to assign could not be refused, and I agree with the conclusion of the MASTER OF THE ROLLS that the action must be dismissed and the appeal allowed.

FARWELL, L.J.—I am of the same opinion. We are considering the true construction of a clause in a lease of the year 1900. One has to remember that in 1900 the development of the one-man company principle had gone very far, and the limited companies were very numerous indeed. The parties to the lease put in this clause, that the lessee is not to assign except to a respectable and responsible person. Now, *primâ facie*, in my opinion in a legal document such as a lease in the year 1900 dealing with land, as in the case of a will creating a power to grant leases of land, *primâ facie* the word "person" bears that stated by BLACKSTONE to be its meaning. Persons are divided by law into either natural persons or artificial; that is to say, that when you find the word "persons," *primâ facie* it includes both natural and artificial persons, unless there is something

to the contrary in the context. I do not think I could call "person" a technical word so as to bring the case within the rule which says that technical words are to have a technical meaning; but when one talks of the ordinary meaning of words one must necessarily have regard to the subject-matter to which those words are applied, and it is perfectly true, as LORD BLACKBURN points out in *Pharmaceutical Society v. London and Provincial Supply Association* (2), that when you are talking about who is the richest person in London, you have not present to your mind a corporation, and "person" does not naturally include a corporation. If I say I saw a crowd of persons in Trafalgar Square, I necessarily mean the natural persons and not the corporate individualities; but when, as I say, in the year 1900 you are dealing with a lease, and you bear in mind that a very large proportion of the owners of property, as lessees or grantees, are corporations, are companies, the inference is that the parties in that document did mean "person" to include "corporation." I think it is involved in the decision of CHITTY, J., in *Re Jeffcock's Trusts* (3), because he had necessarily no evidence before him; the case came on on a petition for advice by trustees and there was no context in the will, and he had to decide a simple question whether a power to grant leases to any "person or persons" the trustees should think fit authorised them to grant a lease to a limited company, and he held that it would. He must have held that *prima facie* that is the meaning of those words in a will containing such a power.

That being so, the only question which remains is whether the generality of the rule, or whether the *prima facie* meaning, is got rid of by the use of the two epithets "responsible" and "respectable." I cannot see that they have really any limiting power at all. "Responsible" relates to financial capacity, and that has hardly been argued, and I think is not arguable, that word is not as applicable to a corporation or a limited company as to an individual. The lessor desires to have a responsible tenant, whether the tenant be an individual or whether it be a corporation. He also desires to have a respectable tenant. "Respectable" means there something which is worthy of respect. Why it should be said that the words "respectable" or "not respectable" are inapplicable to a limited company I fail to see. The company has a reputation for respectability, and if its character is impugned by a written statement that it is not a respectable company, an action for damages would lie at its instance without giving any particulars showing any special damage. It appears, therefore, if it were not for the decision of ROMER, J., in *Harrison, Ainslie & Co. v. Barrow-in-Furness Corpn.* (1), the case would have been plain, and I think probably NEVILLE, J., would have decided this case the other way. I confess I am unable to follow the reasoning of ROMER, J. I am not prepared to say that the decision might not be supported on the ground stated by LORD SELBORNE in *Pharmaceutical Society v. London and Provincial Supply Association* (2) because, although it may very well be that a "person" includes a corporation which is capable of accepting a lease and undertaking the responsibilities of it, it would be a wrong construction to say that it includes a corporation not a limited company with powers to do these things, but a corporation which had no power either to accept the lease or to perform the obligations without spending money which it had no business to spend. It might have been put on that ground or it might have been put on the ground, possibly, that a corporation ready and willing so to act was not respectable. However that may be, we are not bound by the decision. If it is not distinguishable upon those grounds, I cannot agree with it. I think, myself, it is distinguishable—at any rate, I agree that the decision in this particular case cannot stand, and that the appeal should be allowed. I only desire to add this word as to costs, that I think it is plain that the 30s. was thrown in as a matter of concession to save further time and expense on the footing that the learned judge had decided the first point against the present appellants, and that it was not worth while going on for a matter of 20s. or 30s., it was

so trivial. The result is that I think that those damages follow and go with the general point, and that the appeal should be allowed and the action dismissed with costs here and below.

Solicitors; Joynson-Hicks, Hunt, Moore & Cardew; Nicol, Son & Jones.

[Reported by W. C. BISS, Esq., Barrister-at-Law.]

R. v. CLARKE. Ex parte CRIPPEN

[KING'S BENCH DIVISION (Darling, Pickford and Lord Coleridge, JJ.), October 25, 1910]

[Reported 103 L.T. 636; 27 T.L.R. 32]

Contempt of Court—Prejudicing fair trial of legal proceedings—Statement that accused has confessed—Publication before charge made in court—Warrant issued on sworn information and accused arrested.

Where after an information on oath has been laid against a person charging him with an offence which may ultimately be tried in the High Court, and after a warrant has been issued by a magistrate and the accused has been arrested and is in custody under such warrant, statements are published which tend to prejudice the fair trial of the charge, as, e.g., that he has confessed his guilt of the charge against him, the King's Bench Division of the High Court has jurisdiction to punish by attachment for contempt of court the person who has published such statements, notwithstanding that at the date of the publication of such statements the accused had not been brought before a magistrate and charged with the offence.

Coroner—Contempt of coroner's court—Possible committal of person for homicide—Statements prejudicing fair trial—Punishment by High Court for publication.

Where a person may be charged by a coroner's inquisition for the offence of, e.g., murder, statements which are published and may prejudice the fair trial of that person may constitute a contempt of the coroner's court, and may be punished by the King's Bench Division of the High Court of Justice in exercise of its jurisdiction to protect inferior courts and punish those who commit contempts of those courts where they have no jurisdiction themselves to punish for such contempts: per PICKFORD and LORD COLERIDGE, JJ.

Notes. As to contempt of court by statements calculated to defeat the ends of justice and contempt of a coroner's court, see 8 HALSBURY'S LAWS (3rd Edn.) 6-12, 508-506; and for cases see 16 DIGEST (Repl.) 12, 13, 21 et seq.
Cases referred to:

- (1) *R. v. Davies*, [1906] 1 K.B. 32; 75 L.J.K.B. 104; 54 W.R. 107; 50 Sol Jo. 77; sub nom. *R. v. Davies, Ex parte Hunter*, 93 L.T. 772; 22 T.L.R. 97, D.C.; 16 Digest (Repl.) 12, 44.
- (2) *R. v. Lefroy* (1873), L.R. 8 Q.B. 134; 37 J.P. 566; sub nom. *Ex parte Joliffe*, 42 L.J.Q.B. 121; sub nom. *Re County Court Judge, Ex parte Joliffe*, 28 L.T. 132; sub nom. *Re Lefroy, Ex parte Joliffe*, 21 W.R. 332; 16 Digest (Repl.) 15, 82.
- (3) *R. v. Parke*, [1903] 2 K.B. 432; 89 L.T. 439; 67 J.P. 421; 52 W.R. 215; 19 T.L.R. 627; sub nom. *R. v. Parke, Ex parte Dougal*, 72 L.J.K.B. 839; 47 Sol. Jo. 692, D.C.; 16 Digest (Repl.) 25, 192.

Also referred to in argument :

Thorpe v. Priestnall, [1897] 1 Q.B. 159; 66 L.J.Q.B. 248; 60 J.P. 821; 45 W.R. 223; 13 T.L.R. 95, D.C.; 14 Digest (Repl.) 169, 1321.

R. v. Thompson, ante p. 526; [1909] 2 K.B. 614; 78 L.J.K.B. 1085; 25 T.L.R. 651; 7 L.G.R. 979; sub nom. *R. v. Thompson, Ex parte Martin*, 100 L.T. 970; 73 J.P. 403; 22 Cox, C.C. 129, D.C.; 33 Digest 386, 472.

Rule Nisi for a writ of attachment for contempt of court.

The rule called upon Mr. Clarke, the secretary of Edward Lloyd, Ltd., the registered proprietors of the newspaper called the "Daily Chronicle," and upon Mr. Robert Donald, the editor of that paper, to show cause why they should not be committed for contempt of court in respect of certain statements published in the "Daily Chronicle" newspaper tending to prejudice the fair trial of a criminal charge against one H. H. Crippen.

On July 13, 1910, human remains were found at Crippen's house in London. It was suspected that a murder had been committed and an information on oath had been laid before one of the metropolitan police magistrates. Upon this information a warrant was issued on July 16, 1910, for the arrest of Crippen and another person on the charge of murder, and another warrant was issued charging Crippen with murder and the other person with being an accessory after the fact. These warrants commanded the arrest of Crippen upon a charge of wilful murder. Crippen disappeared, and, as it afterwards transpired that he was proceeding to Canada, these warrants were sent out to Canada in charge of a police officer, who arrived at Quebec before Crippen, and upon these warrants Crippen was arrested on July 31, 1910, on board the ship near Quebec in the Dominion of Canada. On Aug. 1 the accused was brought before the judge in Quebec under the Fugitive Offenders Act, 1881, in order that proceedings might be taken to have him returned to England. On Aug. 20 he started on his return to England in custody of the police officer, and on Aug. 27 he was brought up at Bow Street Police Court and was formally charged with murder. Proceedings were also begun on July 18 in the coroner's court in London to inquire into the cause of the death of the person, the subject of the charge against Crippen, and those proceedings were pending in the coroner's court when the statements complained of were published.

Those statements appeared in the issue of the "Daily Chronicle" of Aug. 5, 1910, when there appeared on the front page in large letters the headlines :

"Was Mrs. Crippen poisoned? Mysterious purchase of subtle drug before the tragedy. Sensational discovery."

Then followed in the usual type the statements :

"A sensational discovery of the purchase of deadly poison some time before the tragic death of Mrs. Crippen was reported to us late last night. The police are investigating the purchase and the identity of the purchaser. Meanwhile Crippen, acting presumably on the advice of his counsel, has become more taciturn."

Lower down in the same column, under the heading in large letters: "Crippen's life in gaol," appeared the following :

"From Our Special Correspondent.—Quebec, Thursday.—It is generally considered here that the formal official denials that Crippen has made a confession hinge upon a distinction between the words "admission" and "confession." It is quite possible that what Crippen said may not be regarded officially as a confession, especially as he declared that he was not a "murderer," but that the prisoner made a statement to Inspector Dew last Monday I have reason to feel certain. I have confidence in the authority on which I cabled you the information sent last night, and I am assured to-day from the same source that Crippen admitted in the presence of witnesses that he had killed his wife, but denied that the act was murder. He reserved any

further statement until his arrival in London, and now, since he has received and accepted Mr. Arthur Newton's offer of conducting his defence, it is considered useless to question him further. No longer quoting my authority, but giving an impression which finds credence in official circles, it is now stated that Crippen's defence will be that his wife died under an operation."

In the issue of the paper of the previous day (Aug. 4), under the heading "The confession," there appeared the following:

"From our special correspondent. Quebec. Wednesday. There is no longer any doubt that Crippen has made a confession to Inspector Dew regarding the crime of which he is charged, and the news which I sent you as a rumour last night can now be stated as a fact."

Other statements of a similar kind followed.

Shearman, K.C., and *Fustace Hills* showed cause against the rule.

Tobin, K.C., *Huntly Jenkins*, and *H. D. Roome*, in support of the rule, were not called on to argue.

DARLING, J.—In this case cause has been shown against a rule granted by this court calling upon the secretary of the "Daily Chronicle" newspaper and another to show cause why they should not be committed to prison for contempt of court, but the assistant editor, who was in charge of the editorial work, has come before us and takes the place of those against whom the rule was moved, as the person really responsible for printing in the paper the matter complained of.

It is well, first of all, to deal with the point of law which has been raised by the learned counsel. It is necessary, before dealing with it, to cite the facts which make it possible to raise the point. It was suspected that a murder had been committed. Information on oath had been laid before one of the magistrates of the metropolis. Thereupon the magistrate issued warrants which commanded the arrest of Harvey Crippen upon a charge of murder. Crippen had fled the country, and had become, no doubt, a fugitive offender. The warrants were sent out in charge of a police officer, who arrived in Quebec before Crippen himself arrived there, and somewhere outside Quebec he effected the arrest of Crippen. He brought him before the judge in Quebec, as is prescribed by the Fugitive Offenders Act, 1881, in order that the proper proceedings might be taken to have Crippen remitted to London, to be brought up at Bow Street Magistrates' Court on the charge of wilful murder, for which he had been arrested under the warrant. While he was detained in Quebec and while his case was still not disposed of by the judge, who would have to act by virtue of the Fugitive Offenders Act, on Aug. 5 the newspaper published the paragraphs complained of.

The point which has been taken is that, whereas it is admitted that if proceedings are pending in a court and something is done to interfere with the due course of justice by means of a publication, even although that court be an inferior court, this court will deal with the matter by punishing the culpable person for contempt of court, yet it is said that that only applies where the case is pending in the court. It is enough to say that that has been done of late years in many cases, and the jurisdiction is not to be founded altogether upon modern authorities, or upon specially decided cases. It is an old jurisdiction. It was recognised in *R. v. Davies* (1) that it is a jurisdiction of a very wide character for the protection of inferior courts. *WILLS, J.*, in *R. v. Davies* (1) refers to the matter in these words ([1906] 1 K.B. at pp. 37, 38):

"From the most ancient times, [the King's Bench Court] exercised functions which belonged to no other court in the kingdom. The high nature of those functions is described in emphatic language by *LORD COKE* in the *FOURTH INSTITUTE*, c. 7, on 'The Court of King's Bench,' and in *HAWKINS' PLEAS OF THE CROWN* under the same title, bk. 2, c. 3, to which we refer only to show the supreme place in the judicature assigned to that court. There is no

doubt that the great functions of this court as of all others must be exercised, as pointed out by LORD COKE, 'according to due course of law.' His general attribution to it of the power to 'correct . . . errors and misdemeanours extrajudicial tending to the breach of the peace or oppression of the subjects . . . or any other manner of misgovernment,' as well as HAWKINS' wider and more elaborate description of the like powers, refers to every kind of misdemeanour, including those which are properly the subject of indictment or criminal information as well as those which are punishable summarily by attachment, and therefore throw no light upon the question whether a particular offence falls under the one head or the other, or both. They do serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior courts, and that it is in a special manner the guardian and protector of public justice throughout the kingdom."

No words could be wider than those; they were used as recently as 1905 for declaring that this court is in a special manner the guardian and protector of public justice throughout the kingdom.

Counsel showing cause on behalf of the newspaper has argued that, although the court has power to interfere where there are proceedings pending against anyone at the suit of the Crown or even proceedings pending as between two persons, particular individuals, yet that no proceeding is pending, if it be a criminal matter, until after the person charged has not only been arrested, but has been put in the dock and a criminal charge preferred against him, to which it is then his place to say "Guilty" or "Not Guilty." That is the rule counsel has asked us to lay down. There is no authority for it unless it can be said to be an authority that the court has never been called upon to interfere before in such a case as this, and counsel has said that we ought not to enlarge the jurisdiction of the court. I do not think it is to enlarge the jurisdiction of the court to hold that contempt has been committed here of which the court can take cognisance. I think that to assent to the contention of counsel showing cause would be to narrow the jurisdiction of the court, and no case has been called to our attention where it has ever been held that the issue of a warrant is not the commencement of proceedings. There are cases which have been cited where the contrary has been held, and it has been said in so many words that the issue of the warrant is of itself the commencement of proceedings. No case has been cited to us which says that where the person has been arrested and is in custody upon a warrant proceedings are not pending against him. The warrant has been declared by my brother A. T. LAWRENCE in a case before the Divisional Court, which has been mentioned by my brother PICKFORD, to be of itself a judicial act; and yet we are asked to say that after the magistrate has performed a judicial act upon sworn information laid before him there are no proceedings against the accused person, and that where the person has been arrested upon a warrant and is in custody, there are no proceedings against him in the sense that anybody is at liberty to say whatever he pleases concerning the case, which has got as far as an information on oath, has got as far as the issue of a warrant after judicial consideration by a magistrate, and has got as far as the execution of that warrant by the arrest of the accused person. In my opinion, it would be gravely to narrow the jurisdiction of this court to lay down any such rule as that. It is hardly necessary to consider what would be the consequence. I will put a simple case. Suppose a man to have been accused by information, to have been arrested upon warrant and to be about to be tried before the magistrate, then if counsel is right, anyone, without the slightest danger, in any newspaper or elsewhere, might say what he pleased about that matter in the way of comment and give any kind of opinion as to what the evidence was which was likely to be brought against the man. If that were so, it is perfectly obvious that the prisoner or his friends might easily take steps, not by conspiracy with the person giving the information, but in consequence of

the information so given, to bring the whole prosecution to a futile end. We see no authority nor do we see any reason which can be deduced from any authority which obliges us to hold that there are no pending proceedings until the person has actually been put in the dock and charged with the offence.

In the present case the warrant had been executed and the man was in custody. The warrant that was executed in Canada was the warrant issued from Bow Street for his arrest on a charge of murder. It is very probable that there was something more than that in order to satisfy the judge in Canada, but Crippen was in custody on this charge. I do not mean to say that the laying of the information alone, coupled with the granting of the warrant, would not have been quite sufficient without any arrest at all. I am not going to say a word to prejudice that case; it has not arisen, but it may some day arise. Seeing that in this case there was an information on oath, that there was the issue of a warrant against the accused, that the accused was actually in custody upon the warrant, and actually in course of being brought before the court in Canada that he might by virtue of the Fugitive Offenders Act be remitted to this country for trial, I, for my own part, think that there was pending a proceeding which gives this court jurisdiction to deal with any act which may prejudice the fair trial or consideration of the allegation which is contained in the information and recited in the warrant and which has led to the arrest of the accused.

I have disposed of the point of law, and I will now proceed to deal with the facts. This man was in custody. Nothing could be done by a newspaper by way of comment upon his case, whether he had confessed or whether he had not confessed, to assist those who were attempting to unravel the crime. There is no pretence that there was any such motive, or that it was anything except to administer to the idle and vulgar curiosity of people who desired to know, before it could in the ordinary course come out in a court of justice, what was passing behind the prison doors in Quebec. A news agency was asked to furnish news, and a person named Moore procured various information by telegrams from Quebec. When he did not get enough he telegraphed for 1,000 words more of information, and apparently he was informed that a detective out in Canada had supplied information as to what Crippen was supposed to have said to those who had him in charge. Thereupon the newspaper published what has been complained of. That was really saying that Crippen had confessed to the crime in respect of which he was charged. The effect upon the prisoner would be precisely the same whether that was called an admission or a confession. It was that he had admitted himself guilty of the crime with which he was charged. Anything more calculated than that to prejudice the defence of a man can hardly be conceived. This statement is circulated among those who will be jurors at the trial, if the accused were committed for trial, because the jurors are drawn from the whole body of the county of Middlesex, in which this paper is widely circulated. No one can suppose that the jurymen entered the jury box in this case without ever having heard of it; but the less they hear of a case before they come to listen to the evidence the better, and newspapers do not help in the administration of justice by publishing what I can only describe as idle gossip, which at the best may have been wormed out of those who had the man in custody or who were engaged in investigating the case when he was being charged before the judge in Quebec.

[The learned judge then dealt further with the particular facts, and proceeded:] The court, therefore, come to the conclusion that a contempt of court was committed here, as was admitted, once the point of law was got rid of, in the publication of this matter; and we are of opinion that it was a very grave contempt of court. It is most important that the administration of justice in this country should not be hampered as it is hampered in some other countries, and it is not enlarging the jurisdiction of this court—it is refusing to narrow the jurisdiction of this court—when we say that we are determined while we are here to do nothing to substitute in this country trial by newspaper for trial by

jury, and those who attempt to introduce that system in this country, even in its first beginnings, must be prepared to suffer for it. Probably the proper punishment—and it is one which this court may yet have to award if the punishment we are about to award proves insufficient—will be imprisonment in cases of this kind. There is no question about that, because we cannot shut our eyes to the fact that newspapers are owned by wealthy people, and it may even happen that they will take the chances of the fine and pay it cheerfully and not feel that they have then paid too much for the advertisement. Therefore, it may well be that if this process is not stopped, if this is not a sufficient warning, the court may have to resort to a more peremptory method—that is, the imprisonment of the guilty person. We do not do so in this case. We have been told that the assistant editor, who is the person responsible for this act of contempt of court, sees how wrong he was, acknowledges his fault, and regrets it and apologises to the court. It is not to the court that any apology can do any good. Apology is due to the person whose trial might have been prejudiced, and to the public whose interest it is to see that justice is fairly administered in this case, and not to the court, which has no feeling in the matter. When one does repent of a wrong we will not punish him as though he still persisted in his wrongdoing. To that extent the court takes notice of what has been said by counsel speaking on behalf of the assistant editor. Notwithstanding that, this remains a very grave offence against the administration of justice. In the hope that what has been said in this court will be the means of stopping it and enforcing our opinion, as we must do, the order of the court is that the assistant editor, who has made himself responsible for this contempt of court, do pay to the court the sum of £200, and also the costs of bringing this matter before the court, and that he be imprisoned until that sum is paid. The costs will have to be taxed, and, therefore, the order as to imprisonment will not apply to the costs. As to the coroner's court, I guard myself by saying that the fact that I do not mention anything about the coroner's court does not mean that I should not have been prepared to hold that we had jurisdiction. I have not heard the argument upon that point, and I will not say what my decision might have been. I merely say that I do not profess to give any decision upon that point.

PICKFORD, J.—I agree. I assume that it is necessary that there should be a prosecution pending which may eventually come before this court, but I have not been able to decide that it is necessary; and I am not to be taken to be deciding that the proceedings in the coroner's court, which might also lead to a verdict upon which the prisoner might be indicted, would not have been sufficient by themselves to give the court jurisdiction to stop any comment upon the case while those proceedings were going on. But assuming in favour of the respondents that it is necessary that there should be a prosecution pending, I am of opinion that in this case there was a prosecution sufficiently pending to give this court jurisdiction. It has been quite clearly decided that it is not necessary that there should be a committal, and that proceedings for contempt of court may be taken while the prosecution is going on before the magistrates, and while it is yet undecided whether they will commit the prisoner for trial or not. But it is said that such proceedings for contempt of court cannot be taken until the prisoner has been brought before the justices or the magistrate's court and evidence has there been given against him. I can see no ground for this contention, and I am of opinion that there is no authority for such a proposition. There is ample authority for holding that the prosecution has begun at the time, at any rate, when the warrant is issued. In this case an information had been laid; the magistrate in the exercise of his judicial discretion had issued a warrant, and the man had actually been arrested upon that warrant. It does not seem to me to matter in the least that that arrest was in Canada, and that the accused was at that time in prison in Canada. Certain proceedings might be necessary in Canada for the purpose of sending him back to England;

but he was in custody in another part of His Majesty's Dominions upon a warrant which was issued in England, and upon which, if it went to its end, would be founded a prosecution which would take place in England. In those circumstances it seems to me perfectly hopeless to argue that there was not then a proceeding pending which justifies this court in interfering to prevent that man from being prejudiced by statements—whether well-founded or ill-founded I do not think it matters—made about his case and about his conduct with regard to that case, which might affect him upon his trial. In my opinion, therefore, there is ample jurisdiction in this case to interfere by way of process of contempt of court; and with regard to the facts of the particular case, I do not propose to add to what has been said by my learned brother.

LORD COLERIDGE, J.—I do not propose to add anything to the statements which have been made, but I do desire to say a few words on the question of the law. No one can doubt that if the accused were in fact on trial the effect of these publications would be to prejudice the case, and that would be an unlawful interference with the administration of justice. Has the court power to punish for contempt in respect of observations made publicly and tending to interfere with the due administration of justice where a warrant and an arrest are the only proceedings that have been taken at the time of the observations being made? I do not desire to express any opinion whether such proceedings could be taken when the sole thing that had been done was the swearing of an information upon which no further steps had been taken. But after an information has been laid before the magistrate and he has issued a warrant, in my opinion, at any rate, all comments after that, tending to prejudice the administration of justice, are in the nature of contempt. The issue of the warrant is an act of a magistrate not merely ministerial, but involving the exercise of a judicial discretion. It is, therefore, the first step in the criminal proceeding. It is true that this court has refused to interfere in the matter of contempt with proceedings before the Central Criminal Court. Those decisions were founded upon a misapprehension to the effect that that court was a separate and independent court and not a branch of the High Court, which it really is.

Further, in my opinion, the observations in this case constituted a part of the proceedings before the coroner's court. Those proceedings began on July 18; they involved an investigation as to who was the author of the death of the deceased woman and they were calculated to result in an accusation against some person, possibly this man, Crippen. On the coroner's inquisition some person might have been tried and condemned or acquitted. The coroner's court is a court of record, but it is an inferior court. It has no power to commit for any other contempt than that committed in face of the court: see the observations in *R. v. Lefroy* (2) (L.R. 8 Q.B. at p. 137). That the coroner's court is an inferior court of record is shown by the fact that certiorari lies to it from this court to bring up inquests for the purpose of having them inquired into. True, the Court of King's Bench never interferes with contempt of inferior courts where the inferior courts have jurisdiction over the particular contempt, a jurisdiction confined, as I have said, to contempt in face of the court, but still as the High Court watches over inferior courts of record to see that they do not exceed their jurisdiction, so they protect the inferior courts and punish those who commit contempts of those courts in matters where they have not jurisdiction to punish for such contempts. In illustration of what I say, I would refer to the remarks of the court in a passage from the judgment in *R. v. Davies* (1) where the court said this ([1906] 1 K.B. at pp. 47, 48):

“The mischief to be stopped is in the case of the inferior courts identical with that which exists when the due administration of justice in the superior courts is improperly interfered with. The reason why the Court of King's Bench did not concern itself with contempts of the other superior courts was

that they possessed ample means and occasions for protecting themselves. Inferior courts have not such powers, although some of them, quarter sessions for example, try many more cases than are tried at assizes, and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the superior courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings."

Following upon that, in *R. v. Parke* (3) the court said this [1903] 2 K.B. at p. 442):

"This court exercises a vigilant watch over the proceedings of inferior courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interferences with their independence on the part of others."

Therefore, on both these grounds, I consider that this court has jurisdiction to act as it has done.

Rule absolute.

Solicitors: *Arthur Newton; Hopwood & Sons.*

[Reported by W. W. ORR, Esq., Barrister-at-Law.]

JONES v. LLANRWST URBAN DISTRICT COUNCIL

[CHANCERY DIVISION (Parker, J.), November 3, 4, 9, 10, 11, 14, 15, 16, 17, 18, December 6, 1910]

[Reported [1911] 1 Ch. 393; 80 L.J.Ch. 145; 103 L.T. 751;
75 J.P. 68; 27 T.L.R. 133; 55 Sol. Jo. 125; 9 L.G.R. 222]

Waters and Watercourses—Pollution of river—Action by riparian owner—Sewerage system constructed by council's predecessors—Transfer of property and "liabilities" to defendant council—Contamination of river—Liability of council—Local Government Act, 1894 (56 & 57 Vict., c. 73), ss. 25, 27.

Trespass—Trespass to land—Discharge of sewage into river—Deposit on bed and bank of river—Rights of riparian owners.

Local Authority—Transfer of functions—Property and "liabilities"—Liability of transferee council for predecessor's acts—Sewage disposal system—Contamination of river by sewage—Local Government Act, 1894 (56 & 57 Vict., c. 73), ss. 25, 27.

A board of guardians, as the rural sanitary authority for their area under the Public Health Acts, in 1874-75 began to lay down a system of sewerage for a town in the area. Under arrangements with the tenant for life of land adjoining a river, and in return for an annual payment, they constructed a sewer across the land, discharging crude sewage into the river. By s. 67 of the Local Government Act, 1894, the powers, duties and liabilities of the guardians as sanitary authority were transferred to a rural district council. In 1897 by an order of the county council made under the Local Government Act, 1888, and the Local Government Act, 1894, the rural district was divided into two parts, that part containing the sewerage system becoming an urban district with an urban district council to whom the property and liabilities of

the rural district council in respect of the part were transferred. The urban district council themselves subsequently relaid and enlarged many of the sewers and connected additional sewers to the system. In 1910 the plaintiff as owner of the land across which the sewer had been laid brought an action for an injunction to restrain the urban district council from so using the sewers as to pollute the water of the river and deposit faecal matter on the river bed and bank. The plaintiff had let the fields adjoining the river to a yearly tenant, and the whole bed of the river, which was influenced at the point adjoining the land by exceptional, but not by ordinary, tides, was claimed by the opposite riparian owner, who licensed people to fish from both sides although the plaintiff also licensed people to fish on his side and his tenant's cattle watered in the river.

Held: the plaintiff was entitled to an injunction against the urban district council, because: (i) if the ownership of the half of the bed of the river was important (*sed dubitante*), the evidence was not sufficient to rebut the presumption that the bed of the river usque ad medium filum belonged to the plaintiff as riparian owner, and this presumption was unaffected by the tidal effects since the river was not tidal in the ordinary sense: *Reece v. Miller* (1) (1882), 8 Q.B.D. 626, and *West Riding of Yorkshire Rivers Board v. Tadcaster Rural District Council* (2) (1907), 97 L.T. 436, applied; (ii) the plaintiff as riparian owner was entitled to the flow of the river past his land in its natural state of purity and undeteriorated by noxious matter discharged into it by others and could maintain an action in respect of such discharge without proof of damage: *Lyon v. Fishmongers' Co.* (3) (1876), 1 App. Cas. 662, and *North Shore Rail. Co. v. Pion* (4) (1889), 11 App. Cas. 612, applied; and the deposit on his land by the river of faecal matter under the control of another was a trespass: *Fletcher v. Rylands* (6) (1866), L.R. 1 Ex. 265, and *Foster v. Warblington Urban District Council* (7), [1906] 1 K.B. 648, applied; (iii) the plaintiff was not debarred from bringing the action by the letting of the fields adjoining the river to a tenant, since the infringement of natural rights was physically of a permanent nature in that it must continue until the sewage was diverted elsewhere, and it therefore injured the plaintiff's reversion; (iv) the plaintiff was genuinely seeking to remedy a private wrong and not to compel the council to carry out their statutory duty: *Glossop v. Heston and Isleworth Local Board* (8) (1879), 12 Ch.D. 102, distinguished; (v) the liabilities of the guardians as sanitary authority having been expressly transferred to the rural district council and that council's liabilities to the urban district council, the urban district council was liable in respect of the nuisance and common law liabilities in the same way as the guardians would have been, and the urban district council in any event had left things as they found them: *Glossop v. Heston and Isleworth Local Board* (8) (1879), 12 Ch.D. 102, distinguished; (vi) the plaintiff's right to bring an action was not affected by the statutory right of persons with houses within a certain distance of any sewer to connect their drains with the sewerage system: *A.-G. v. Dorking Union Guardians* (11) (1882), 20 Ch.D. 595, distinguished; (vii) the agreement of the plaintiff's predecessors for the laying of the sewer on his land coupled with the plaintiff's receipt of rent under it did not constitute a licence to turn crude sewage into the river, the sanitary authority having statutory power to lay the sewer there in any event and the agreement therefore in effect determining the compensation; (viii) in the absence of prescription by virtue of the Rivers Pollution Act, 1876 [repealed], the plaintiff's delay was only material for the purpose of the statutes of limitation which did not apply to a continuing nuisance or trespass except in respect of damages and the action was for an injunction.

Notes. Followed: *Haigh v. Deudraeth R.D.C.*, [1945] 2 All E.R. 661. Considered: *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.*, [1953] 1 All E.R. 179. Referred to: *White v. London General*

Omnibus Co. (1914), 58 Sol. Jo. 339; *Smeaton v. Ilford Corpn.*, [1954] 1 All E.R. 923; *Esso Petroleum Co. v. Southport Corpn.*, [1955] 3 All E.R. 864.

As to the duty not to allow poisonous or offensive matter to escape and contaminate waters and watercourses, see 33 HALSBURY'S LAWS (2nd Edn.) 606 et seq., and as to the remedy of the person injured, see *ibid.*, p. 609; as to pollution of rivers in sanitary districts, see *ibid.* 620 et seq.; and for cases see 44 DIGEST 37 et seq., 49 et seq. and 45 et seq. respectively. As to a local authority's interference with private rights in the exercise of its powers, see 30 HALSBURY'S LAWS (3rd Edn.) 693 et seq.; as to negligence in exercising powers, see *ibid.* 669 et seq. As to what constitutes trespass to land, see 33 HALSBURY'S LAWS (2nd Edn.) 6 et seq., and as to the powers of a reversioner to sue in such cases, see *ibid.* 13, 14; and for cases see 43 DIGEST 377 et seq. and 391 et seq.

Cases referred to:

- (1) *Reece v. Miller* (1882), 8 Q.B.D. 626; 51 L.J.M.C. 64; 47 J.P. 37, D.C.; 44 Digest 85, 669.
- (2) *West Riding of Yorkshire Rivers Board v. Tadcaster Rural District Council* (1907), 97 L.T. 486; 71 J.P. 429; 5 L.G.R. 1208, D.C.; 44 Digest 86, 671.
- (3) *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; 46 L.J.Ch. 68; 35 L.T. 569; 42 J.P. 163; 25 W.R. 165, H.L.; 44 Digest 107, 856.
- (4) *North Shore Rail. Co. v. Pion* (1889), 14 App. Cas. 612; 59 L.J.P.C. 25; 61 L.T. 525, P.C.; 44 Digest 86, 673.
- (5) *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; 36 L.J.Ch. 584; 16 L.T. 438; 15 W.R. 801, L.C.; 44 Digest 56, 401.
- (6) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (7) *Foster v. Warblington Urban District Council*, [1906] 1 K.B. 648; 75 L.J.K.B. 514; 94 L.T. 876; 70 J.P. 233; 54 W.R. 575; 22 T.L.R. 421; 4 L.G.R. 735, C.A.; 44 Digest 75, 561.
- (8) *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 44 Digest 51, 365.
- (9) *Simpson v. Savage* (1856), 1 C.B.N.S. 347; 26 L.J.C.P. 50; 28 L.T.O.S. 204; 21 J.P. 279; 3 Jur.N.S. 161; 5 W.R. 147; 140 E.R. 143; 36 Digest (Repl.) 306, 531.
- (10) *Firth v. Bowling Iron Co.* (1878), 3 C.P.D. 254; 47 L.J.Q.B. 358; 38 L.T. 568; 42 J.P. 470; 26 W.R. 558; 2 Digest (Repl.) 303, 104.
- (11) *A.-G. v. Dorking Union Guardians* (1882), 20 Ch.D. 595; 51 L.J.Ch. 585; 46 L.T. 573; 30 W.R. 579, C.A.; 41 Digest 42, 308.
- (12) *Earl of Harrington v. Derby Corpn.*, [1905] 1 Ch. 205; 74 L.J.Ch. 219; 92 L.T. 153; 69 J.P. 62; 21 T.L.R. 98; 3 L.G.R. 321; 44 Digest 58, 418.

Also referred to in argument:

- Jones v. Chappell* (1875), L.R. 20 Eq. 539; 44 L.J.Ch. 658; 36 Digest (Repl.) 307, 534.
- Benjamin v. Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 36 Digest 312, 598.
- Lillywhite v. Trimmer* (1867), 36 L.J.Ch. 525; 16 L.T. 318; 15 W.R. 763; 44 Digest 54, 383.
- A.-G. v. Gee* (1870), L.R. 10 Eq. 131; 23 L.T. 299; 34 J.P. 596; 44 Digest 48, 343.
- Brown v. Dunstable Corpn.*, [1899] 2 Ch. 378; 68 L.J.Ch. 498; 80 L.T. 650; 63 J.P. 519; 47 W.R. 538; 15 T.L.R. 386; 43 Sol. Jo. 508; 41 Digest 42, 306.
- R. v. Staines Local Board* (1888), 60 L.T. 261; 53 J.P. 358; 5 T.L.R. 25, D.C.; 44 Digest 44, 315.
- A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1911-13] All E.R. Rep. 926; [1910] 1 Ch. 48; 79 L.J.Ch. 137; 74 J.P. 57; 26 T.L.R.

93; 54 Sol. Jo. 198; 8 L.G.R. 110, C.A.; on appeal, [1912] A.C. 788; 82 L.J.Ch. 45; 107 L.T. 353; 76 J.P. 481; 11 L.G.R. 194, H.L.; 44 Digest 54, 387.

A.-G. v. Cockermouth Local Board (1874), L.R. 18 Eq. 172; 30 L.T. 590; 38 J.P. 660; 22 W.R. 619; sub nom. *Workington Local Board v. Cockermouth Local Board*, *A.-G. v. Cockermouth Local Board*, 44 L.J.Ch. 118; 44 Digest 46, 323.

Action for an injunction to restrain the defendants from continuing so to use sewers as to contaminate a river which the plaintiff's land adjoined.

The plaintiff, Mr. Isgoed Jones, was the owner of the estate of Penisardre, in Denbighshire, which was bounded on one side by the River Conway. In 1873 the rural sanitary authority of Llanrwst Union, which included the neighbouring town of Llanrwst, resolved to redrain the town, and a sewer was constructed, running for some distance under the Penisardre land, and discharging into the river at a point on the Penisardre property. The then owner of Penisardre apparently gave a verbal agreement to the work being carried out, but in 1879 a formal agreement was entered into between him and the authority, by which he was to receive £3 10s. per annum for the easement. About 1891 this agreement was terminated, the use of the old sewer was discontinued, and a new sewer was laid. This second sewer traversed a part of the river bed adjoining the Penisardre land, and discharged into the river at a spot somewhat higher than the outfall of the former one. The plaintiff became the tenant of Penisardre in 1898, and in 1909 he acquired the freehold, by a conveyance which bore the reservation :

"Subject to the easement granted for the purpose of a public sewer along the site marked on the annexed plan so far as such easement is now subsisting and also subject to all other easements (if any) affecting the said hereditaments."

By the Local Government Act, 1894, the rural sanitary authority of the Llanrwst Union was superseded in that year by the rural district council; and in 1897, by an order of Denbighshire County Council, Llanrwst Urban District Council, the defendants, were constituted. Since 1897 the defendants had effected considerable alterations and enlargements in the sewers of Llanrwst; a number of houses, which had formerly been without water drainage altogether, were compulsory connected with the main drainage system, while numerous streets and roads were paved and channelled. The plaintiff alleged that the user of the defendants' sewers conveyed crude sewage and filthy water into the River Conway, that the river was thereby contaminated, and that excrementitious and noxious matter was deposited on the banks of the Penisardre property. He brought an action for an injunction to restrain the defendants from continuing to use the sewers in such a manner.

Romer, K.C., and *E. P. Hewitt* for the plaintiff.

Macmorran, K.C., and *T. J. C. Tomlin* for the defendants.

PARKER, J.—The plaintiff in this action is the owner of property known as Penisardre, situated at Llanrwst, in the county of Denbigh, and bounded on the west by the River Conway, which flows from south to north. The land immediately adjoining the river on the plaintiff's side consists of low-lying fields which are subject to floods in time of high water. These fields are in the possession of a yearly tenant. In the bed of the river for a distance of about two hundred yards along the plaintiff's river frontage, commencing at the southerly end thereof, is a shoal of stones and gravel which is uncovered in times of low water. There appears to be some doubt as to the ownership of the bed of the river, including this shoal. The presumption, of course, is that the bed of a river which is not tidal belongs usque ad medium filum to the riparian owners on either side; but it is said that the Conway is a tidal river at the point in question, and further, whether it is tidal or not, the Earl of Ancaster claims to be, and is, the owner of the entirety of the river bed. On the facts as proved before me I find that the river, so far as it adjoins the plaintiff's property, though influenced by exceptional tides, is not influenced by ordinary tides, and therefore is not tidal in the proper

sense of the word: see *Reece v. Miller* (1) and *West Riding of Yorkshire Rivers Board v. Tadcaster Rural District Council* (2). Further, I do not think that the evidence before me in support of the earl's claim to the whole bed of the river is sufficient to rebut the usual presumption. It is true that persons holding licences to fish the earl's waters do, as a fact, fish both sides of the river, and that the earl's agents insist on his licence being obtained to fish on either side, but a several fishery is not necessarily conclusive as to the ownership of the bed of a natural stream; and it appears that the plaintiff, since he bought the Penisardre property, has himself licensed people to fish on his side of the river, and his tenants' cattle are habitually watered in the river, crossing the shoal for the purpose when the river is low. I doubt, however, whether the fact, if it be a fact, that the plaintiff does not own half the bed of the river is really very important for the purposes of this action.

Llanrwst is a town of some 2,000 or 3,000 inhabitants, and has a good water supply and a system of water drainage through which the sewage of at least 2,000 people is taken in a crude state, without treatment of any sort, into the River Conway opposite the plaintiff's property. The plaintiff complains, first, that this sewage seriously pollutes the water of the river opposite his property, his rights as riparian owner being thus infringed; and, secondly, that faecal matter from the sewer outfall is deposited on the river bed, including the shoal I have mentioned, and along his banks in such quantities as to occasion a serious nuisance, and that such deposit is a trespass on his land. With regard to the first complaint, I am of opinion that a riparian owner on the banks of a natural stream is, whether he is the owner of any part of the river bed or otherwise, entitled to the flow of the stream past his land in its natural state of purity or undeteriorated by noxious matter discharged into it by others. Anyone who fouls this water infringes his right of property, and therefore he can maintain an action without proving that he has been actually damaged: see *Lyon v. Fishmongers' Co.* (3), *North Shore Rail. Co. v. Pion* (4) and *Crossley & Sons v. Lightowler* (5). With regard to the second complaint, I am of opinion that anyone who turns faecal matter or allows faecal matter collected by him or under his control to escape into a river in such manner or under such conditions that it is carried, whether by the current or the wind, on to his neighbour's land is guilty of a trespass: see *Fletcher v. Rylands* (6) and *Foster v. Warblington Urban District Council* (7).

There is in the present case a singular conflict of evidence as to whether the purity of the river is or is not seriously affected by the sewage in question; and as to whether such sewage is or is not, to any considerable extent or at all, deposited in the river bed, including the shoal, or on the plaintiff's banks. The plaintiff's witnesses for the most part described what they had seen and experienced. The defendants' witnesses for the most part deposed that, though they had been on the spot at all states of the water, they had never seen or experienced anything of the kind described by the plaintiff's witnesses. I see no reason to think that the plaintiff's witnesses were not telling the truth; and I find it impossible to reject their positive evidence on the strength of the negative evidence of the defendants' witnesses. I think the apparent conflict of evidence may be reasonably explained by the varying conditions of the River Conway, which rises and falls with great rapidity and is subject to sudden spates and floods. Taking the evidence as a whole, I find (i) that the sewage in question does sensibly diminish the purity of the river opposite the plaintiff's land and render it less sensibly fit for watering cattle and for the other purposes for which a riparian owner would be entitled to use it; and (ii) that at times, by reason chiefly of back-washes and undercurrents in the river, faecal and other sewage matter is deposited on the bed of the river in close proximity to the plaintiff's land, particularly on the shoal I have mentioned, and also, though to a less degree, on the plaintiff's banks contiguous to and below the shoal, and that such faecal or sewage matter is, at any rate at times of low water, sufficient to constitute a nuisance. It would not in my opinion serve any useful purpose to analyse the evidence of the various

witnesses in detail. I have carefully considered the shorthand notes and find the facts as stated. On these findings of fact, I do not think that if the defendants were private individuals, and if the plaintiff were in actual occupation of the fields adjoining the river, there could be any defence to this action.

But it is said that the plaintiff cannot maintain this action, first, because the fields adjoining the river are in the occupation of a tenant who is not a co-plaintiff, and, secondly, because the defendants are the local sanitary authority, with statutory obligations, and having only a qualified property in the sewers in question. With regard to the first point, it is reasonably certain that a reversioner cannot maintain actions in the nature of trespass, including, I think, actions for infringement of natural rights arising out of his ownership of land, without alleging and proving injury to the reversion. If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question for the jury: *Simpson v. Savage* (9). I take "permanent," in this connection, to mean such as will continue indefinitely unless something is done to remove it. Thus, a building which infringes ancient lights is permanent within the rule, for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, or the exercise of an alleged right of way, are not in their nature permanent within the rule, for they cease of themselves, unless there is someone to continue them. In my opinion, what is complained of in the present case is of a permanent nature within the rule. The sewage of Llanrwst will continue to be turned into the Conway unless and until something is done to divert it elsewhere. It is not a case only of the present intention of the defendants, but of the necessary consequences of the physical conditions, if nothing is done to alter them. Further, I am satisfied that the plaintiff's reversion is, in fact, injured and depreciated in value by reason of what is happening at the present time.

The second point is one of greater difficulty. The defendants say that they are within the principle of *Glossop v. Heston and Isleworth Local Board* (8) and are not liable at all. Of course, I am bound by the decision of the Court of Appeal in that case, though it is, in my opinion, by no means easy to arrive at the principle on which it was decided. According to the judgment of VAUGHAN WILLIAMS, L.J., in *Foster v. Warblington Urban District Council* (7), the ratio decidendi was that the action was in substance not an action based on a private wrong, but an action for a mandatory injunction to compel the defendant board to carry out their statutory duty to provide a proper system of sewerage relief which could only be obtained by prerogative writ of mandamus. This would appear at any rate to be the ratio decidendi so far as JAMES, L.J., was concerned, for, after referring to the transfer of the sewers in question to the local board by virtue of s. 13 of the Public Health Act, 1875, he says (12 Ch.D. at p. 110):

"The sewers, qua sewers, are under their control or vested in them, and by that section alone, as it appears to me, they are under the same liabilities and have the same defence in respect of any alleged liability as any private owner of a sewer would have. If the sewer, being in the same state in which it was transferred to them, would, independently of the Act of Parliament, give to any landowner or proprietor a right to an injunction to restrain the use of that sewer, it appears to me that they would be in the same position as any other owner of a sewer would be. But the case here is not based on any common law nuisance, or on any nuisance existing, or any damage existing irrespective of the neglect of the Act, but upon the alleged neglect to comply with the Act of Parliament."

I think it clear that the principle of *Fletcher v. Rylands* (6) would apply to the owner of a sewer, whether he himself made the sewer or not: *Firth v. Bowling Iron Co.* (10). His duty at common law would be to see that the sewage in his sewer did not escape to the injury of others; and mere neglect of this duty would give any person injured a good cause of action. JAMES, L.J., evidently thought

there was no common law nuisance, or, at any rate, that the action was not a bona fide action to remedy a private wrong. On the other hand, BRETT and COTTON, L.JJ., while holding that the plaintiff would have had a cause of action for what was being done if the sewers in question had belonged to a private person, held that the defendants were not liable, because they were a statutory body, with only a limited property in, and with only limited powers, and therefore limited duties with respect to the sewers transferred to them by the Act. They would be liable for nuisance caused by the exercise of any power vested in them; but not liable, except on prerogative writ of mandamus, for neglect to perform their statutory duty. In other words, supposing the case put by JAMES, L.J., of an existing nuisance at the time of the transfer, the plaintiff's remedy had, in their opinion, gone altogether; and, so far as I can see, without compensation. In *Foster v. Warblington Urban District Council* (7) STIRLING, L.J., seems to have thought that the ratio decidendi of *Glossop v. Heston and Isleworth Local Board* (8) was to be found in the judgments of BRETT and COTTON, L.JJ., and certainly those lords justices constituted the majority of the court. If VAUGHAN WILLIAMS, L.J.'s explanation is to prevail, I am of opinion that *Glossop v. Heston and Isleworth Local Board* (8) has no application to the present case. I am satisfied that the plaintiff is bona fide complaining of a private wrong, and that he is not, under colour of such a wrong, merely attempting to compel the defendants to fulfil their statutory duty. If, on the other hand, STIRLING, L.J.'s explanation is to prevail, it is impossible to say whether the case applies without tracing the history of the sewerage system of Llanrwst.

Before the passing of the Public Health Act, 1875, the guardians of the poor of the Llanrwst Union, under earlier statutes, were the sanitary authority for the district now comprising the sewers in question; and they continued to be such sanitary authority under the Public Health Act, 1875; and, by s. 12 of that Act, any property vested in them as the sanitary authority under the earlier statutes remained vested in them as the sanitary authority under the Public Health Act, 1875. We have therefore nothing to do with a transfer of sewers under s. 13 of the last-mentioned Act, such as had occurred in *Glossop v. Heston and Isleworth Local Board* (8). In the year 1874-5 (the precise date does not appear in evidence) the guardians commenced to lay down a system of sewage for the town of Llanrwst. For this purpose, having come to some arrangement, the precise nature of which is uncertain, with the then owners of the plaintiff's property, they laid along the river bank thereof a sewer, which I will call sewer No. 1, having an outfall into the river at a point considerably lower down the stream than the outfalls at present existing. Until 1882 all the sewage which was turned into the sewers of the guardians found its way through this outfall into the river. In 1882 the guardians, having entered into an arrangement, dated Oct. 10, 1882, with the then tenant for life of the plaintiff's property, laid another sewer, which I will call sewer No. 2, across the plaintiff's property, with the intention of connecting it with sewer No. 1 at a point considerably above its outfall. As a matter of fact, however, sewer No. 2 was either never connected with sewer No. 1 at all, but taken straight into the river, or, if originally connected with sewer No. 1, was shortly afterwards disconnected therefrom and taken straight into the river. There is no evidence that this was done under any further agreement with any person then interested in the plaintiff's property. In 1891 No. 1 sewer, so far as it was situated on the plaintiff's property, was discontinued, parts being taken up, and a new outfall, for such sewage as had theretofore passed through it, was made by laying a short sewer from the south-west corner of the plaintiff's land straight into the river bed, such sewer for some yards at any rate traversing the river bed adjoining the plaintiff's land and on his side of the river. From this date all the sewage which found its way into the sewers of the guardians was discharged into the river through the new outfall and the outfall of sewer No. 2, and is still so discharged.

It is, in my opinion, reasonably clear that, up to this point, the guardians, as the sanitary authority, having themselves constructed the whole sewerage system,

would be responsible in the same way as any private person for the escape of their sewage to the injury of others, whether the injury consisted in fouling the water of the river to the infringement of the rights of riparian owners, or in the deposit of offensive matter on their land. Up to this point there is no room, therefore, for the application of *Glossop v. Heston and Isleworth Local Board* (8), on any view of that case. The guardians, however, ceased to be the sanitary authority for the district under the provisions of the Local Government Act, 1894, being succeeded in that capacity by Llanrwst Rural District Council, to whom, under s. 25 of the Act, were transferred all the powers, duties, and liabilities of the guardians as sanitary authority, and under s. 67 of the Act all property held by the guardians by virtue of such powers and duties. The "respective duties and liabilities," as used in s. 22, have, by virtue of another section of the Act, the same meanings as the meanings respectively assigned to them in the Local Government Act, 1888, and therefore, by s. 100 of the last-mentioned Act, "duties" include all responsibilities and obligations; and "liabilities" include any liability to any proceeding for enforcing any duty. In my opinion, the duties and liabilities thus transferred included the duty of the guardians to dispose of their sewage so as not to interfere with private rights, although this may be a common law and not a statutory duty arising out of the principle of *Fletcher v. Rylands* (6). In this respect the Local Government Act, 1894, differs from the Public Health Act, 1875, which, in vesting all sewers in their district in a local sanitary authority, says nothing as to the transfer of duties and liabilities. I am of opinion that the rural district council, on their constitution under the Act of 1894, became liable for proceedings for breach of this duty to the same extent as the guardians would have been liable had they remained the sanitary authority, and that, so far, *Glossop v. Heston and Isleworth Local Board* (8) has no application.

In 1897, by virtue of an order of Denbighshire County Council, made under the Local Government Acts, 1888 and 1894, and duly confirmed by the order of the Local Government Board, the district of Llanrwst Rural District Council was divided into two parts, and that part in which the sewerage system in question is situate became an urban district of which the defendants became the sanitary authority as successors of the rural district council. This order contained provisions whereby the property and liabilities vested in or attaching to the rural district council, so far as the same related to the area comprised in the new urban district, passed to and vested in the defendants. In my opinion, the liabilities transferred again included those attaching to the rural district council in respect of the sewerage system in question, including in particular the common law liability, which, on the principle of *Fletcher v. Rylands* (6), attached to such last-mentioned council and their predecessors, the guardians of the poor of the Llanrwst Union, in respect of the disposal of the sewage in their sewers. It follows, I think, that *Glossop v. Heston and Isleworth Local Board* (8) has no application to the defendants any more than it had to the rural district council or the guardians. Further, the defendants themselves have not, with regard to the sewerage system vested in them, confined themselves, as the local authority had done in *Glossop v. Heston and Isleworth Local Board* (8), to leaving things as they found them. They have themselves laid new sewers connected with such sewerage system, and they have relaid and enlarged a very considerable part of the sewers constructed by the guardians, and this alone seems to me to take this case out of *Glossop v. Heston and Isleworth Local Board* (8): see *Foster v. Warblington Urban District Council* (7).

The case of *A.-G. v. Dorking Union Guardians* (11) was also relied on by the defendants as an answer to the claim for an injunction. It is true they contended that no questions of prescriptive rights arise in the present case, because of the Rivers Pollution Act, 1876 [repealed], but the difficulty which would have arisen, had there been prescriptive rights, arises equally because of the statutory right of persons, with houses within a certain distance of any sewer belonging to the

sanitary authority, to connect their drains with such sewer. In this connection they also referred to *Earl of Harrington v. Derby Corpn.* (12). It appears to me that, if the statutory rights in question afford a defence to an action for an injunction restraining a nuisance from sewage, no such injunction can ever be granted against a sanitary authority. Yet there have been numerous cases in which such injunctions have been granted, and some of them at the suit of private persons, and not, as the defendants suggested, of the Attorney-General only. Further, I am unable on principle to see why, if the existence of some right in third parties which would be interfered with by an injunction is a bar to relief by way of injunction at all, it should be any less a bar because the Attorney-General is the plaintiff who asks for it. But it seems to me that the statutory rights in question are not analogous to the prescriptive rights referred to in *A.-G. v. Dorking Union Guardians* (11). Those prescriptive rights must have been rights to convey sewage into the river by means of sewers belonging to others, rights which had been acquired against the riparian owners. The statutory rights are only rights to turn sewage from private drains into the sewers of the authority, leaving the authority to dispose of it in any manner they choose. If A, the owner of a cess-pit, grant to B, or B acquires by prescription, a right to turn B's sewage into A's pit, I cannot myself see how A can escape liability for letting the sewage out on his neighbour's land merely because of the rights of B. It would be different if B's prescription had been to turn his sewage through A's pipe on to his neighbour's land. I come to the conclusion that the existence of the statutory rights affords no defence to the claim for an injunction.

Lastly, the defendants endeavoured to defend the action partly on the ground of the agreement made in 1882, under which the guardians obtained leave to lay sewer No. 2 through the plaintiff's property (the plaintiff having received rent under such agreement), and partly on the plaintiff's knowledge of everything which has been done, and his delay in instituting these proceedings. I cannot construe the agreement of 1882 as a licence to turn crude sewage into the river to the injury of the owners of the Penisar dre estate. The guardians had, under s. 16 of the Public Health Act, 1875, statutory authority to lay sewer No. 2, and through Penisar dre, without any consent on the part of the owners, although, of course, they would be bound to compensate such owners. I look on the agreement as settling the compensation payable and not as granting to the guardians any right which they did not already possess. With regard to the plaintiff's delay, it does not appear to me to be material except so far as the defendants can rely on prescription or the Statutes of Limitation. That they cannot rely on prescription is admitted, and I do not think that, in the case of a continuing nuisance or trespass, the Statutes of Limitation have any application except as to the amount of damage which can be recovered. The plaintiff does not ask for damages if I grant an injunction; and, in my opinion, an injunction is, under all the circumstances, the appropriate relief, though no doubt the operation of the injunction will have to be suspended for a reasonable time, and its precise terms require some little consideration, more especially as s. 17 of the Public Health Act, 1875, may be read as conferring a power to turn the sewage into the river, provided it is freed from excrementitious or other foul or noxious matter such as would deteriorate the quality of the river water. Under these circumstances possibly the best form of order will be an injunction restraining the defendants from causing or permitting the sewage of the town of Llanrwst, or any part thereof, to flow or pass into the River Conway by means of the existing outfalls or any outfall unless or until the same shall have been sufficiently purified by the removal of excrementitious or other foul matter so as not to pollute the water of the river opposite the plaintiff's land, and from allowing any solid or excrementitious matter to escape through any such outfall so as to accumulate in the river bed or on the plaintiff's banks to such an extent or in such manner as to be a nuisance to the plaintiff or his tenants, the occupiers of the Penisar dre estate or any part thereof. I think that if the operation

of the injunction be suspended for eighteen months it will meet the justice of the case.

Judgment for the plaintiff.

Solicitors: *Johnson & Stokes*, for *Chamberlain & Johnson*, Llandudno; *Sharpe, Pritchard & Co.*, for *Porter, Amphlett & Jones*, Llanrwst.

[Reported by WHITFIELD HAYES, Esq., Barrister-at-Law.]

BOW, McLACHLAN & CO., LTD. v. THE CAMOSUN (Owners) AND ANOTHER

[PRIVY COUNCIL (Lord Loreburn, L.C., Lord Ashbourne, Lord James of Hereford, Lord Gorell and Lord Shaw), May 3, July 23, 1909]

[Reported [1909] A.C. 597; 79 L.J.P.C. 17; 101 L.T. 167;
25 T.L.R. 833]

Canada—Exchequer Court of Canada—Admiralty—Common law jurisdiction—Action to enforce mortgage of ship—Counterclaim to set off damages for breach of contract.

The Exchequer Court of Canada was constituted by the Exchequer Court Act, 1887, a Dominion statute, for the purpose of dealing with matters in which the Crown was concerned (s. 15 and s. 16), and had no general common law jurisdiction. Its jurisdiction as a Court of Admiralty derived under the Colonial Courts of Admiralty Act, 1890, and the Dominion statute the Admiralty Act, 1891, is no greater than the Admiralty jurisdiction of the High Court of England, which has not been altered by the Supreme Court of Judicature Acts, 1873 and 1875.

The appellants, the builders of a ship, brought an action in rem in the Exchequer Court of Canada, British Columbia Admiralty District, to enforce payment of the balance due from the respondents, the shipowners, on a mortgage of the ship. The respondents claimed the right to deduct an amount in respect of expenses lost, and demurrage, which they alleged they had suffered because the ship was not properly built in accordance with the contract, and they pleaded by way of equitable defence that they were entitled to deduct this amount from the sums payable by them to the appellants.

Held: the respondents' plea of set-off was in reality a counterclaim for damages for breach of contract, and, therefore, the Exchequer Court had no jurisdiction to entertain it.

Notes. Considered: *Fern v. The Ingleby*, [1923] Ex.C.R. 208; *United Africa Co. v. The Tolten*, [1946] 1 All E.R. 79. Referred to: *Harris, Son & Co. v. Vallarman & Co.*, [1940] 1 All E.R. 185; *Re Nanaimo Community Hotel*, [1945] 3 D.L.R. 225; *Re Taxation Agreement*, [1946] 1 W.W.R. 257; *Sparrow Point v. Vancouver*, [1951] 2 D.L.R. 785.

As to colonial courts of Admiralty, see 1 HALSBURY'S LAWS (3rd Edn.) 139, 140; and for cases see 1 Digest (Repl.) 295 *et seq.*

Cases referred to:

(1) *The Cheapside*, [1904] P. 339; 73 L.J.P. 117; 91 L.T. 83; 53 W.R. 120; 20 T.L.R. 655; 9 Asp.M.L.C. 595, C.A.; 1 Digest (Repl.) 185, 711.

- (2) *Mondel v. Steel* (1841), 8 M. & W. 858; 1 Dowl.N.S. 1; 10 L.J.Ex. 426; 151 E.R. 1288; 7 Digest (Repl.) 413, 294.
- (3) *Broom v. Davis* (1794), 7 East, 480, n; 103 E.R. 186, N.P.; 44 Digest 1298, 39.
- (4) *Basten v. Butler* (1806), 7 East, 479; 3 Smith, K.B. 486; 103 E.R. 185; 44 Digest 1297, 29.
- (5) *King v. Boston* (1794), 7 East, 481, n.; 103 E.R. 186; 2 Digest (Repl.) 357, 402.
- (6) *Davis v. Hedges* (1871), L.R. 6 Q.B. 687; 40 L.J.Q.B. 276; 25 L.T. 155; 20 W.R. 60; 7 Digest (Repl.) 414, 295.
- (7) *Warwick v. Nairn* (1855), 10 Exch. 762; 156 E.R. 648; 6 Digest (Repl.) 154, 1103.

Also referred to in argument :

- Newfoundland Government v. Newfoundland Rail. Co.* (1888), 13 App. Cas. 199; 57 L.J.P.C. 35; sub nom. *A.-G. for Newfoundland v. Newfoundland Rail. Co.*, 58 L.T. 285; 4 T.L.R. 292, P.C.; 7 Digest (Repl.) 436, 386.
- The Cathcart* (1867), L.R. 1 A. & E. 314; 16 L.T. 211; 2 Mar.L.C. 500; 1 Digest (Repl.) 140, 274.
- The Innisfallen* (1866), L.R. 1 A. & E. 72; 35 L.J.Adm. 110; 16 L.T. 71; 12 Jur.N.S. 653; 2 Mar.L.C. 470; 1 Digest (Repl.) 140, 273.
- The Benwell Tower* (1895), 72 L.T. 664; 8 Asp.M.L.C. 13; 41 Digest 191, 308.

Appeal from a judgment of the Supreme Court of Canada (DAVIES, IDINGTON and DUFF, JJ., FITZPATRICK, C.J., dissenting) (reported 40 S.C.R. 418), affirming a judgment of the Exchequer Court of Canada at Ottawa (BURBIDGE, J.) (10 Ex.C.R. 403), giving the respondents leave to plead an equitable defence.

The facts are set out in the judgment of the Board.

Sir R. Finlay, K.C., and *C. Robertson Dunlop* for the appellants.

Butler Aspinall, K.C., and *M. Macnaghten* for the respondents.

July 23, 1909. **LORD GORELL.**—This appeal raises a question of considerable interest and importance as to the jurisdiction in Admiralty of the Exchequer Court of Canada. The facts giving rise to the case are these. The appellants are a shipbuilding company, having their office at Paisley, and in 1904 agreed with the respondent company (hereinafter called the respondents), whose office is at Vancouver, British Columbia, to build a steamship, afterwards called the *Camosun*, for £28,000, of which £5,000 was to be paid in cash on delivery, and the balance was to be treated as lent by the appellants and secured by mortgage. The *Camosun* was accordingly built by the appellants at Paisley, and delivered to Mr. Gordon Legg, the managing director of the respondents, on Feb. 9, 1905. On the same day, he was temporarily registered as owner, paid the appellants £5,000, and mortgaged the vessel in the statutory form to them to secure the sum of £23,248 and interest. The £248 was for interest to the date of settlement. The consideration was stated in the mortgage to be £23,248 "this day lent to me by Bow, McLachlan & Co., Ltd.," and the mortgage contained a covenant by Mr. Legg to pay to them the said sum with interest at 6 per cent. per annum on May 9 then next, and that, if the said sum was not paid on that day, he would, during such time as the same or any part thereof remained unpaid, pay to them interest on the amount unpaid at 6 per cent. per annum by equal half-yearly payments on Feb. 9 and Aug. 9 in every year, and was expressed to be to secure the repayment in manner aforesaid of the said principal sum and interest. The mortgage was duly registered. An agreement was subsequently entered into between the appellants and the respondents, signed by the former at Paisley on Feb. 25, 1905, and by the latter at Vancouver on May 13, 1905. This agreement recited that the *Camosun* had been built to the order of the respondents for the sum of £28,000, and was completed and made ready for sea, and that £5,000 had been paid, and provided for the payment of the balance with interest on the cost during construction, viz., £23,248, by yearly instalments commencing with a payment of £5,248

on or before Feb. 9, 1906, and £5,000 on or before each subsequent Feb. 9 until the whole was paid off, with interest at 6 per cent. per annum from Feb. 9, 1905, on the balance of price remaining unpaid from time to time. The first payment of interest was to be made on Feb. 9, 1906, for the year previous to that date, and afterwards the interest was to be paid half-yearly on Feb. 9 and Aug. 9 in each year. In addition to the security of the said mortgage, the respondents agreed to give the appellants certain further security, and to keep the vessel insured, and they also agreed that, if they failed to pay any of the instalments or half-yearly balance of interest when due, or failed to carry out any of the obligations undertaken by them under the agreement, the appellants should be entitled forthwith to enforce the mortgages or any of them, accounting to the respondents for the net proceeds of the vessel if sold. The vessel proceeded to Vancouver and was transferred by Legg to the respondents, who were then registered as her owners.

On Feb. 9, 1906, there were due to the appellants £5,248 and £1,380 for one year's interest. The respondents tendered to the appellants £2,990, being £1,610 on account of the £5,248, and £1,380 in respect of the interest, but claimed a right to deduct from the £5,248 the sum of £3,638 in respect of expenses, loss, and demurrage which they alleged they had incurred because, as they alleged, the vessel was not properly built in accordance with the contract, and was built negligently and defectively. The amount tendered was received under protest, and an action in rem was at once commenced by the appellants in the Exchequer Court of Canada, British Columbia Admiralty District, to enforce the said mortgage for the sum of £21,638, which was, according to the statement of claim, the sum then alleged to be due in the circumstances on the mortgage, after giving credit for the payments received, unless the respondents were entitled to deduct the amount of their cross-claim. The vessel was arrested, but afterwards released on bail. The appellants' statement of claim was in the usual form to enforce payment of the said sum of £21,638 and interest. The respondents delivered a defence and counterclaim, in which they did not dispute the validity of the mortgage and admitted the payments aforesaid, but they alleged there was no default. This allegation appears to have been based on their claim to reduce the amount payable by their cross-claim, and accordingly, they put forward their claim by way of counterclaim in the action.

This counterclaim was on July 7, 1906, struck out on motion by MORRISON, J., the deputy local judge in Admiralty, on the ground that the Exchequer Court of Canada in Admiralty had no jurisdiction to entertain it. An appeal to the judge of the Exchequer Court at Ottawa was dismissed with costs on Sept. 13, 1906. The learned judge, BURBIDGE, J., after referring to the statutes on which the point turned, said

"It is not contended that the Admiralty jurisdiction of the High Court in England includes jurisdiction to hear a claim for the breach of a contract to build a ship in accordance with certain specifications, but it is argued that, because a judge of the High Court in England has otherwise authority to hear and decide such a claim, and might, if he saw fit, dispose of it as a counterclaim in an action in Admiralty (*The Cheapside* (1)), this court has a like jurisdiction and authority. That, it seems to me, is not the effect of the statutes referred to. The jurisdiction which this court may exercise under the statutes mentioned is the Admiralty jurisdiction, and not the general or common law jurisdiction of the High Court in England."

From this decision no appeal was brought, but an application was made by the respondents to MARTIN, J., the local judge of the Exchequer Court, for leave to deliver an amended statement of defence. The proposed amendment was contained in para. 7 of the amended defence, and from this it appears that the respondents pleaded by way of equitable defence the same allegations as they had previously pleaded by way of counter-claim, and claimed to be entitled to set off and deduct from the sums payable by them to the appellants the aforesaid sum of £3,638

alleged to have been expended by them. Leave to file and serve the amended defence was given by the learned judge. He seems from his judgment to have considered that he would not be justified in excluding the proposed plea, and to have allowed it under r. 63 of the Practice Rules of the Exchequer Court. That rule provides that the defendant may, in his statement of defence, plead set-off and counterclaim, but that if, in the opinion of the judge, such set-off or counterclaim cannot be conveniently disposed of in the action, the judge may order it to be struck out. With regard to the discretion conferred by the rule, he considered it would not be more inconvenient to try the question in British Columbia than in Scotland, though it would doubtless be a difficult matter to dispose of anywhere satisfactorily. This decision was affirmed on appeal by BURBIDGE, J., on April 22, 1907, on the ground that, to the extent that the facts stated in the amendment entitled the respondents to an abatement in the price of the ship, such facts might be pleaded in defence to the appellants' action. He pointed out that the respondents had no right to set off special or consequential damages, and that some of the damages sought to be set off might only be the subject of a cross-action, but that would not be ground for striking out the whole paragraph pleading the amended defence. It may be here noticed that, in any view of this case, the amended plea read with the particulars delivered under it, so far as it is possible to ascertain by a perusal of the particulars, would show no answer to the whole claim, but only to part thereof, as the particulars appear to include matters which would not go only to an abatement of the price, but to special or consequential damages.

After the amended defence had been put in, there were further pleadings and objections in law. These raised formally the right of the respondents to plead para. 7 of the amended defence, which set forth the claim on which the respondents relied. The points of law were argued before MARTIN, J., who, while considering that the appellants could raise their objection in law to the plea, notwithstanding that leave had been given to plead it, held that the previous judgment had substantially decided the point, and his order, which was made on Sept. 25, 1907, was that the said para. 7 constituted a good defence in law *pro tanto* to the appellants' action, and that the respondents were at liberty to plead the same, and that the court had jurisdiction to entertain the questions thereby raised. An appeal from this order came before BURBIDGE, J., at Ottawa on Jan. 7, 1908, and was dismissed by him for the reasons which he had given on the previous application. The appellants appealed to the Supreme Court of Canada, and, on June 16, 1908, that court, consisting of FITZPATRICK, C.J., and DAVIES, IDINGTON and DUFF, JJ., dismissed the appeal. The Chief Justice dissented, but, owing to his absence on the day when the judgment was delivered, his judgment was announced by DAVIES, J., without stating the reasons for dissent. DAVIES, J., agreed, though entertaining many doubts, that the appeal should be dismissed.

Leave to appeal having been granted by the Supreme Court, this appeal was brought. It was not contended before this Board that the respondents had any right to deduct from the amount claimed by the appellants to be due on Feb. 9, 1906, any sum for special or consequential damages arising from the alleged breach by the appellants of the building contract, but only that the respondents were entitled, if they proved the alleged breach, to deduct such a sum as represents the difference at the time of delivery owing to the alleged breach between the vessel as she was and as she ought to have been according to the contract.

In order to determine the question, it is in the first place necessary to consider the nature and extent of the jurisdiction of the Exchequer Court of Canada. That court was constituted by the Exchequer Court Act, 1887 (50 & 51 Vict., c. 16) (Dominion), for the purpose of dealing with matters in which the Crown was concerned (s. 15 and s. 16), and has no general common law jurisdiction. Its Admiralty jurisdiction is derived under the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., c. 27) (Imperial), and the Admiralty Act, 1891 (54 & 55 Vict., c. 29)

(Dominion). The Act of 1890, so far as material, is as follows :

“Section 2 (1). Every court of law in a British possession which is for the time being declared in pursuance of this Act to be a court of Admiralty . . . shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may, for the purposes of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction. . . . (2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England. . . .

“Section 3. The legislature of a British possession may by any colonial law (a) declare any court of unlimited civil jurisdiction [by s. 15 unlimited civil jurisdiction means civil jurisdiction unlimited as to the value of the subject-matter at issue or as to the amount that may be claimed or recovered], whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act and limit territorially or otherwise the extent of such jurisdiction, and (b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal, if any, as may seem fit, provided that any such colonial law shall not confer any jurisdiction which is not, by this Act, conferred upon a Colonial Court of Admiralty.”

The Canada Admiralty Act, 1891 (Dominion), enacts :

“Section 3. In pursuance of the powers given by ‘the Colonial Courts of Admiralty Act, 1890,’ aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers, and authority conferred by the said Act and by this Act. . . . (4) Such jurisdiction, powers, and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all rights and remedies in all matters (including cases of contract and tort and proceedings in rem and in personam), arising out of or connected with navigation, shipping, trade, or commerce, which may be had or enforced in any Colonial Court of Admiralty, under the Colonial Courts of Admiralty Act, 1890. . . . (9) Every local judge in Admiralty shall, within the Admiralty district for which he is appointed, have and exercise the jurisdiction and the powers and authority relating thereto of the judge of the Exchequer Court in respect of the Admiralty jurisdiction of such court. . . . (25) Any rules or orders of court made by the Exchequer Court for regulating the procedure and practice therein, including fees and costs, in the exercise of the jurisdiction conferred by the Colonial Courts of Admiralty Act, 1890, and this Act, which require the approval of Her Majesty in Council, shall be submitted to the Governor in Council for his approval, and, if approved by him, shall be transmitted to Her Majesty in Council for her approval.”

It is clear from these statutes that the jurisdiction of the Exchequer Court as a Court of Admiralty is no greater than the Admiralty jurisdiction of the High Court of England, and that the power to make rules for procedure and practice is confined to the making of rules for the exercise of the jurisdiction thus conferred, so that r. 63 of procedure above mentioned does not affect the case unless the defence or set-off is within the Admiralty jurisdiction.

The question thus arises—What is the Admiralty jurisdiction of the High Court in England with regard to such a matter as that in controversy? It was suggested by IDINGTON, J., that the Admiralty jurisdiction of the High Court in England had been altered by the Supreme Court of Judicature Acts, 1873 and 1875, and he referred to s. 24 of the first of those Acts. Those Acts amalgamated the English courts and transferred to the High Court all the jurisdiction which had been previously exercised by the different courts, so that every judge of the High Court can exercise every kind of jurisdiction possessed by the High Court, but these changes conferred no new Admiralty jurisdiction on the High Court, and the expression "Admiralty jurisdiction of the High Court" does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new Admiralty jurisdiction. It is true that a judge of the High Court sitting in the Admiralty Division thereof may, as judge of the High Court, exercise any jurisdiction which is now possessed by a judge thereof, but he does so by virtue of the general jurisdiction conferred on him, and not by virtue of any alteration in his Admiralty jurisdiction. In their Lordships' opinion, this case is unaffected by the Judicature Acts, and, on this point, they agree with the opinions expressed by MORRISON and BURBIDGE, JJ., who struck out the counterclaim, although the respondents might have made it, if the Judicature Acts applied so as to alter the Admiralty jurisdiction into a general jurisdiction. Proceeding, then, with the consideration of what is the Admiralty jurisdiction of the High Court in such a case, it must be pointed out that, under that jurisdiction, no claim could be made formerly by a mortgagee of a ship to enforce his mortgage nor by either party for breach of a contract for the building of a ship. The history of the long contest between the civilians of the Admiralty Court and the courts of common law is well known and need not be gone into now. It resulted in the Admiralty jurisdiction being confined within certain well-defined limits, which were, however, extended by the legislature in more modern times, but not sufficiently to include a suit to enforce such a claim as that made by the respondents. With regard to mortgages, the Admiralty Court Act, 1840, s. 3 [repealed] provided that whenever any ship or vessel should be under arrest by process issuing from the High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested should have been brought into court and be in the registry of the said court, in either such case the court should have full jurisdiction to take cognisance of all claims or causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively. The object of this was to enable the court in the cases mentioned to take cognisance of claims by mortgagees of ships to enforce their mortgages in suits and to intervene to protect their property. This remedy being found to be inadequate, it was enacted by s. 11 of the Admiralty Court Act, 1861 [repealed] that the Admiralty Court should have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854 [repealed] (now the Act of 1894), whether the ship or proceeds thereof were under arrest of the said court or not. These sections seemed to be confined to claims by mortgagees. It is under the jurisdiction conferred by the later Act that the appellants proceeded in this case. With regard to the building of a ship, s. 4 of the last-mentioned Act gave the Admiralty Court jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court.

The appellants could not have proceeded under this section for the price of the vessel unless she, or the proceeds of her, were under arrest, and the respondents could not proceed under it for damages for breach of the building contract, whether there was an arrest or not. Therefore, as the Exchequer Court had no general common law jurisdiction, and the respondents had no right under the Admiralty

jurisdiction to proceed either against the ship or the appellants, they could not enforce their counterclaim in that court. The ground on which they have been permitted to put forward their claim as a defence pro tanto, so far as it is for a difference in value resulting from an alleged breach of the building contract by the appellants, is either that it may be treated as a set-off or as justifying a reduction in the price on the principles indicated in *Mondel v. Steel* (2), and that, therefore, the amount due on the mortgage may be lessened to the extent of the aforesaid difference—that is to say, that, though they cannot put forward a counterclaim, they can put forward a defence pro tanto. Let it be assumed that any matter which affords a defence, in the ordinary sense of the term, to a mortgage claim can be set up under the Admiralty jurisdiction, it remains to be seen whether the respondents' contention in this case is sound.

In the first place it is to be observed that the claim is to enforce under the mortgage deed a debt which it was agreed should be treated as due from the respondents to the appellants as money lent, and that it is no answer by way of set-off to such a claim to seek to reduce it by unliquidated damages claimed under another contract. Cases such as *Mondel v. Steel* (2) do not proceed on any principles of set-off (which depend on the statutes of set-off), but on another and different principle, not of law, but of practice. This principle is very clearly stated in the case just mentioned. In former days, it was held that, where an article had been supplied under a contract at an agreed price, and the buyer had taken delivery and retained the article and was sued for the price, his remedy for breach of contract resulting in a diminution of value of the article was by a cross-action for damages, and that he could not set off or deduct the sum he claimed. An early case of this character is that of *Broom v. Davis* (3) (7 East, 479, in notes to *Basten v. Butler* (4)) before BULLER, J. Afterwards, LORD KENYON, C.J., in another case (*King v. Boston* (5)) seemed to be of opinion that the buyer ought to be allowed to deduct the difference in value. The following passage from the judgment of PARKE, B., in *Mondel v. Steel* (2) shows how the practice became changed (8 M. & W. at pp. 870, 871):

"Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of work done, as any consequential damage, might have been recovered; and this course was simple and consistent. . . . But after the case of *Basten v. Butter* (4) a different practice . . . began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value."

Similar views were expressed in *Davis v. Hedges* (6) by HANNEN, LUSH, and BLACKBURN, JJ., where the change of practice is referred to as being introduced to prevent circuity of action. It seems clear that the change was made, not on any principle of law, but on grounds of convenience, in order to prevent circuity of action. Before the statutes of set-off, it was necessary to bring cross-actions in respect of debts on the one side and on the other, and, except in the cases referred to by PARKE, B., no change was, as a matter of strict law, made with regard to unliquidated damages until the Judicature Acts. No instances were cited to their Lordships of any cases in which this procedure had been adopted, except such as are referred to by PARKE, B.; and, indeed, in the cases where a seller or supplier had taken a bill of exchange for the price, the buyer has been left to his cross-action, unless there has been a total failure of consideration (*Warwick v. Nairn* (7)).

The mortgage in question, though a security for the balance of price and interest, is expressed, as usual, to be in consideration of money lent, and to secure the repayment of that money and interest, and the covenant is for the payment thereof (see Form B, Merchant Shipping Act, 1894). It is not expressed to be for securing the repayment of the amount due on the building contract, and it does not refer to that contract. The builders would, no doubt, be desirous of having a security which they could assign, if necessary, so as to keep them in funds, for the contract contained no provisions for giving bills for the instalments, which bills could be discounted, as is frequently done, and they would also wish that they, or their assignees, should be in a position to enforce their mortgage against the vessel, wherever she might be, and whoever might then be her owners, so that their claim would be simply for the amount made payable by the mortgage, and, if those who became defendants in proceedings to enforce it had any claim against the holders of the mortgage which the court had jurisdiction to enforce, the latter would have to meet it as a cross-claim. The respondents' counsel argued that the position was in effect the same as if the appellants were suing on the building contract, and that, therefore, the amount which they could sue for was only the amount due under that contract after an abatement had been made. But that would be to extend the practice above referred to beyond the only cases in which it has been permitted, and to place the appellants at a disadvantage in proceeding on their mortgage. On such a document, they are in effect much in the same position as the sellers who were holders of the bills of exchange in the cases above alluded to, where the claim is on one contract and the cross-claim on another, whereas the cases relied on by the respondents are all cases in which the action was brought on the original contract, and the abatement was claimed for breach of it. Considerations which may apply to a claim and cross-claim on the same contract do not necessarily apply to a case where the claim is on one document, admitting on its face the amount of the debt due under it, and the cross-claim is in respect of damages claimed under another contract. It seems necessary to consider the matter strictly, for, if the practice referred to were extended to a statutory mortgage of a ship, such as that in question, inconveniences might readily arise. The defendant may well be left to his cross-action or, in England since the Judicature Acts, and in any courts of general jurisdiction which allow counterclaims, to his counterclaim.

BURBIDGE, J., in his judgment, puts the question: What good reason exists or can be suggested for refusing permission to set out the facts as a defence to an action on a mortgage given to secure the stipulated price? The most important reason in the present case does not appear to have been fully presented to the learned judges in Canada. The change of practice, as stated in *Mondel v. Steel* (2) was based on convenience in order to avoid circuity of action, and the courts were dealing with actions in which they had jurisdiction in the action for the price, and also jurisdiction in an action which might be brought to enforce the cross-claim in which both the damages which might be treated as an abatement and special or consequential damages could be recovered, and it was not unreasonable to permit the former to be proved to reduce the price without putting the defendant to the expense of a cross-action. But a totally different position arises when the court in which the action to recover the debt is brought has no jurisdiction to entertain a cross-action by the defendant to recover from the plaintiff damages for breach of the contract. In such a case, the matter cannot be treated as one of mere convenience. This is the position in the present case. The real contest between the parties is with regard to a matter which is not a defence proper, and over which, if put forward as a claim, the Exchequer Court had no jurisdiction, whether the claim was against the ship or the appellants. This contest should be left to be settled by a cross-action in a court having jurisdiction to entertain it. The importance to the parties of deciding this case according to their strict rights is that on the decision as to the plea under consideration depends the place of trial of the real dispute in the case. It is obvious that this is, in the circumstances,

the reason for excepting to the jurisdiction of the court to hear and determine the issue raised by the plea.

For these reasons, their Lordships will humbly advise His Majesty to allow the appeal, to set aside the judgment of the Supreme Court of Canada dated June 16, 1908, and the judgments of the Exchequer Court of Canada dated respectively Jan. 7, 1908, and Sept. 25, 1907, and to sustain the appellants' objections in law that the Exchequer Court of Canada had no jurisdiction to entertain the questions raised by para. 7 of the respondents' amended statement of defence, and to order the respondents to pay the costs of and incidental to the argument on the said objections in the courts in Canada. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors: *Lowless & Co.*, for *R. Cassidy*, Vancouver; *F. F. Macnaghten*, for *Davis, Marshall & MacNeill*, Vancouver.

[*Reported by C. E. MALDEN, Esq., Barrister-at-Law.*]

LAGOS v. GRUNWALDT

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., and Farwell, L.J.), November 2, 1909]

[*Reported* [1910] 1 K.B. 41; 79 L.J.K.B. 85; 101 L.T. 620;
26 T.L.R. 69; 54 Sol. Jo. 216]

Practice—*Specially endorsed writ*—*Affidavit verifying cause of action*—*Affidavit made on information and belief*—"Debt or liquidated demand"—*Claim on contract for quantum meruit*—*R.S.C., Ord. 3, r. 6*—*R.S.C., Ord. 14, r. 1 (a)*.

The plaintiff was an attorney in Monte Video, and had been instructed by P. & Co., solicitors in London, to represent the defendants in certain proceedings there. The plaintiff brought an action against the defendants to recover the amount of his bill of costs and disbursements in respect of the foreign action, and applied for judgment under R.S.C., Ord. 14. On this application no affidavit was filed by the plaintiff himself, but one of the firm of solicitors in London acting for him made an affidavit in which he deposed that the defendants were justly and truly indebted to the plaintiff in the sum claimed for professional charges for legal work done as attorney and money paid by the plaintiff for the defendants at their request, that it was within his own knowledge that the debt had been incurred and that it was still owing, and that his knowledge had been obtained from correspondence received from the plaintiff and from correspondence and conversations the deponent had had with the defendant's solicitors. He also stated that he had been duly authorised by the plaintiff to make the affidavit, and the particulars of the claim appeared by the endorsement on the writ in the action.

Held: this was not an affidavit by a person other than the plaintiff who could swear positively to the facts within R.S.C., Ord. 14, r. 1 (a), as it was based on information and belief only, and, therefore, there was no jurisdiction to make an order for payment upon it.

Per FARWELL, L.J.: The plaintiff's claim, being a claim on a contract for a quantum meruit, was a "debt or liquidated demand" within R.S.C., Ord. 3, r. 6.

Notes. As to summary judgment after appearance, see 22 HALSBURY'S LAWS (3rd Edn.) 759-765; and for cases see DIGEST (Practice) 277 et seq.

Case referred to :

- (1) *Vinall v. De Pass*, [1892] A.C. 90; 61 L.J.Q.B. 507; 66 L.T. 422; 8 T.L.R. 387, H.L.; 21 Digest 636, 2163.

Also referred to in argument :

- Runnacles v. Mesquita* (1876), 1 Q.B.D. 416; 45 L.J.Q.B. 407; 24 W.R. 553; 2 Char. Pr. Cas. 247; Digest (Practice) 284, 177.

- Hallett v. Andrews* (1897), 42 Sol. Jo. 68; Digest (Practice) 280, 143.

Appeal by the defendant Grunwaldt against an order made in chambers by SUTTON, J., affirming a decision of the master.

In 1896 Messrs. Liebes, Hirschel, and Grunwaldt authorised R. Castronan to make an agreement on their behalf with Messrs. Beisso, Gandos, and Avegno with reference to the purchase of sealskins in Monte Video. Castronan signed a contract which was in terms to which he was not authorised to agree and Liebes & Co. refused to comply with it, and in consequence Beisso & Co. commenced proceedings against them in Monte Video claiming damages. In 1898 Liebes & Co. gave a power of attorney to the plaintiff, A. G. Lagos, a lawyer of Monte Video, to enable him to defend this action on their behalf, and he did so. The litigation lasted some years and ended in May, 1907, when judgment was given in favour of Liebes & Co. without costs. Messrs. Pritchard, Englefield & Co. had acted as solicitors for Liebes & Co. in this matter, and were now acting for Hirschel, and, shortly after the above judgment had been given, Lagos sent them his bills of costs. Disputes having arisen with reference to it, on June 8, 1909, he issued a writ in an action against Grunwaldt and Hirschel alone, Liebes being dead. This writ was specially endorsed under R.S.C., Ord. 3, r. 6, and was for professional charges for legal work and for money paid for the defendants, the total claim amounting to £1,469. The plaintiff then applied for judgment under R.S.C., Ord. 14. No affidavit in support of the application was made by the plaintiff himself, but a member of the firm of his English solicitors made an affidavit sworn in London on June 28, 1909, which stated inter alia (a) he believed there was no defence to the action; and (b) that it was within his own knowledge that the debt was still due, such knowledge having been obtained from relevant correspondence and conversations. On July 30 the master made an order giving the defendants leave to defend on certain terms, one of which was that they should pay £400 into court within fourteen days. On Oct. 14, 1909, this order was affirmed by SUTTON, J. The defendants appealed and asked for unconditional leave to defend.

Simon, K.C., and *J. D. Crawford* for the defendants.

E. E. Wild (*Shearman, K.C.*, with him) for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—This appeal raises a question of importance, but, to my mind, not one which involves any real difficulty. It has been argued extremely well by the junior counsel for the respondent, who said everything that could be argued on his behalf. The action is brought by a gentleman living in Monte Video, who is a solicitor. He says, and with truth, that he was instructed to defend in certain proceedings pending in the Republic of Uruguay on behalf of the defendant Grunwaldt and two other defendants, Hirschel and Liebes. The action seems to have lasted a long time, and in the result the defence succeeded in the Final Court, but without costs. The plaintiff, Mr. Lagos, sends over what he calls a statement of the costs and disbursements on account of Grunwaldt in the action, bringing out a balance of 6,705 dollars. It is not disputed that Grunwaldt, with whom we are concerned, did, through Messrs. Pritchard & Co., instruct Mr. Lagos to defend this action. A considerable sum of money (£500) was paid on account, details of which have not been furnished to us, but it has been stated, and the fact is in favour of the respondent, that the whole or greater part of that £500 was in fact found by Grunwaldt, so that the liability on

contract between Grunwaldt and the plaintiff is not disputed. A writ was issued by Mr. Lagos claiming a large sum

"for professional charges, for legal work done as attorney, and money paid by the plaintiff for the defendants at their request: Particulars.—Bill of charges and disbursements forwarded to Messrs. Pritchard, Englefield & Co., the defendants' solicitors, on June 28, 1907, in an action of *Beisso, Gandos, and Avegno v. Liebes, Grunwaldt, and Hirschel*, full particulars of which have been delivered and exceed three folios."

And then he states certain amounts, bringing out £1,469 4s. 1d. as the amount claimed, and adds that the plaintiff will "claim the above amounts on accounts stated."

Having served that writ, the plaintiff was minded to proceed under Ord. 14. Order 14 provides a special form of procedure in certain cases, but it is only in certain cases, and, unless certain conditions are fulfilled, the court has no jurisdiction to make any order under Ord. 14. Under that order, first of all the writ must be specially endorsed under Ord. 3, r. 6; and all that is required by Ord. 3, r. 6, is that

"the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant."

I think this case is within the meaning of that rule. It is a liquidated demand for money which could have been claimed under the old *indebitatus* count. But that is not all. The plaintiff must not only satisfy the court that there is a specially endorsed writ under Ord. 3, r. 6, but he must do something else. The old rule of 1875 provided that the plaintiff might

"on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to show cause . . . why the plaintiff should not be at liberty to sign final judgment."

That was the original order of Ord. 14, r. 1, and that order, unless the plaintiff could make an affidavit verifying the cause of action and swearing that in his belief there was no defence to the action, Ord. 14 could not be used at all. Then it was pointed out that there were many cases in which the plaintiff might have a perfectly good claim to which there was no defence, but the plaintiff himself was not in a position to make an affidavit; and the rule was ultimately altered to its present form, which contains these words:

"Or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action."

Now, here we have no affidavit by the plaintiff, but we have an affidavit by a member of the firm of solicitors who act for the plaintiff in the action; and in that affidavit he says:

"The defendants are justly and truly indebted to the above-mentioned plaintiff in the sum of £1,469 4s. 1d. for professional charges [following the words in the writ]. The particulars of the said claim appear by the endorsement on the writ of summons in this action."

Then he states shortly the history of the action, and he refers to a bundle of correspondence which has passed between his firm and Pritchard, Englefield & Co. He says:

"I verily believe that there is no defence to this action. . . . It is within my own knowledge that the said debt was incurred and is still due and owing, such knowledge being obtained from correspondence received from the plaintiff and also from correspondence and conversations I have had with Messrs. Pritchard, Englefield & Co. I am duly authorised by the plaintiff to make this affidavit."

In my opinion it is impossible to say that this is an affidavit made by a "person who can swear positively to the facts." It is obviously nothing more than a statement made on his information and belief, that information being derived from his own client, the plaintiff, who tells him this is due—and that obviously will not be enough to enable him to make the affidavit—and further statements made by Pritchard, Englefield & Co., who beyond all doubt were not the solicitors for the defendant Grunwaldt at the time when those statements were made. To take a single item of the bill, is it possible that the deponent can "swear positively" to the fact as to the stamped paper for forty-three documents, which is the first item in the bill? Is it possible that he can swear that was paid? I might go through all the items. Is it possible that he can swear that the fees charged by Mr. Lagos and another attorney, amounting to £1,500 in all, were due? It seems to me we should be giving altogether an irrational and improper extension of Ord. 14, r. 1, if we said that such an affidavit as this was sufficient to bring in aid of the plaintiff the peculiar provisions of Ord. 14. In my opinion, on that ground there is no jurisdiction under Ord. 14 to make the order which was made. We might as well say that the plaintiff's solicitor in every case could make an affidavit to satisfy Ord. 14, and that would be dangerous beyond anything. There may be cases in which the plaintiff's solicitor or the plaintiff's solicitor's clerk may be perfectly competent to make an affidavit satisfying the conditions of Ord. 14, r. 1 (a). There are no conditions here which justify us in saying that the plaintiff's solicitor could make the necessary affidavit and "swear positively to the facts" verifying the amount claimed. In my opinion, on this short ground the learned judge and the master had no jurisdiction to make the order that was made, and therefore the appeal ought to be allowed and the money which has been paid into court paid out to the defendant.

FARWELL, L.J.—I am of the same opinion. Two preliminary objections are taken. The first is that Ord. 3, r. 6, does not apply, because this is not a debt or liquidated demand arising under a contract. It is a claim on contract for a quantum meruit. In my opinion, that is within Ord. 3, r. 6. I think the words "debt or liquidated demand" in this rule really point to the old division, which I find thus stated in *BULLEN and LEAKE'S PRECEDENTS OF PLEADING* (2nd Edn.), p. 28:

"These counts which have from time to time been rendered more concise are designated with little difference of meaning by the terms *indebitatus* counts, money counts, or common counts; the expression common counts or common *indebitatus* counts being often used to distinguish those of most frequent occurrence, viz., where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated; and the expression money counts being sometimes used to particularise those for money lent, money paid, and money received. The most appropriate name seems to be *indebitatus* counts."

Then the learned authors also go on to say:

"There were also formerly in use counts known as *quantum meruit* and *quantum valebat* counts, which were adopted where there was no fixed price for work done or goods sold, etc.: 1 *CHITTY ON PLEADING* (7th Edn.), p. 351. These counts, however, have fallen into disuse, and have been superseded by the general application of the *indebitatus* counts."

In my opinion that is the true view. Everything you could sue for under those counts comes within the description of debt or liquidated demand.

The second ground of objection is, I think, fatal to the plaintiff's case. Order 14, r. 1, provides that, in addition to the plaintiff, the affidavit may be made

"by any other person who can swear positively to the facts, verifying the cause of action and amount claimed (if any)."

It is perfectly obvious on reading affidavit of the plaintiff's solicitor that he knows nothing whatever about it personally, and all he can swear to is to the best of his information and belief. If we turn to Ord. 38, r. 3, which regulates the contents of affidavits, we find affidavits are to be

"confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions."

I find pursuant to that rule that garnishee proceedings under Ord. 45, r. 1, have been allowed to be proved by an affidavit as to information, and belief, the words of the rule being :

"Upon affidavit by himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount."

That statement, it has been held in *Vinall v. De Pass* (1), can be proved by information and belief so long as the source of information is given. But when you contrast the words in Ord. 45, r. 1, with the very special words in Ord. 14, r. 1, "swear positively to the facts," and considering the nature of the summary proceedings which are founded upon Ord. 14, it seems to me that it is most important that the practice under Ord. 14, r. 1, should not be founded on the notion that it is enough in all cases for the solicitor to make the affidavit, and that his affidavit is sufficient in the absence of personal knowledge. A solicitor may or may not be a perfectly good witness acting on his own knowledge of the facts, but the mere fact that he is the plaintiff's solicitor cannot make his information and belief any better than that of any other person. To say that the solicitor can take his client's instructions and then swear that they are true seems to me an extravagant proposition. For these reasons I think that in the present case the jurisdiction under Ord. 14 has never arisen, and that there was no jurisdiction to make this order, and it must be discharged.

Solicitors : *Cohen & Cohen; Ince, Colt & Ince.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

MASSON, TEMPLIER & CO. v. DE FRIES

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), July 16, 17, 18, 1909]

[Reported [1909] 2 K.B. 831; 79 L.J.K.B. 24; 101 L.T. 476;
25 T.L.R. 784; 53 Sol. Jo. 744]

Husband and Wife—Paraphernalia—Right given by common law solely to a widow.

Wearing apparel was purchased by a wife out of money supplied for that purpose by the husband on condition that she did not pledge his credit. The husband did not interfere with or exercise any control over the wife's purchases; the wife wore the apparel as she pleased, and did not account to the husband for money she received if she sold the clothes. Execution creditors of the wife having seized articles of wearing apparel in her possession, the husband took out an interpleader summons, which was tried in the county court, claiming, as against the wife's creditors, ownership of the apparel as part of the wife's paraphernalia. The jury were left the question whether the apparel was given to the wife as her separate property or only as paraphernalia for her use so long as the husband chose, and they found that the apparel was the husband's property. On appeal from an order of the Divisional Court refusing to interfere with that finding,

Held: the right to paraphernalia was a right given by common law solely to a widow, and was not the husband's right, and so the question left to the jury was improper; the only issue was whether the apparel was the property of the husband or the wife and on the evidence it was the wife's property; accordingly, the jury's finding was not supported by the evidence and the appeal would be allowed.

Observations on the law of paraphernalia by SIR FRANCIS JEUNE, P., in *Tasker v. Tasker* (1), [1895] P. at p. 4, disapproved.

Per FARWELL, L.J.: After the Married Women's Property Act, 1882, the common law exception of a widow's right to paraphernalia from the husband's right to his wife's chattels personal ceased to exist.

Notes. Though some doubt exists how far the doctrine of paraphernalia is now applicable (see the judgment of FARWELL, L.J., in the present case, post, p. 945), it cannot be treated as definitely obsolete (see 19 HALSBURY'S LAWS (3rd Edn.) 838, para. 1365).

Section 1 of the Married Women's Property Act, 1882, enabling a married woman to acquire, hold, etc., real or personal property, is replaced by s. 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935.

Considered: *Rondeau, Legrand v. Marks*, [1917] 2 K.B. 636.

As to paraphernalia, see 19 HALSBURY'S LAWS (3rd Edn.) 838; and for cases see 27 DIGEST (Repl.) 102.

Cases referred to:

- (1) *Tasker v. Tasker*, [1895] P. 1; 64 L.J.P. 36; 71 L.T. 779; 43 W.R. 255; 11 T.L.R. 51; 11 R. 619; 27 Digest (Repl.) 102, 750.
- (2) *Scott v. Morley* (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919; 52 J.P. 230; 36 W.R. 67; 4 T.L.R. 56; 27 Digest (Repl.) 170, 1242.
- (3) *Lord Hastings v. Douglas* (1634), Cro. Car. 343; 79 E.R. 901; 44 Digest 184, 122.
- (4) *Williams v. Mercier* (1882), 9 Q.B.D. 337; 51 L.J.Q.B. 594; 47 L.T. 140; sub nom. *Mercier v. Williams*, 30 W.P. 720, C.A.; on appeal *Williams v. Mercier* (1884), 10 App. Cas. 1; 54 L.J.Q.B. 148; 52 L.T. 662; 49 J.P. 484; 33 W.R. 373, H.L.; 27 Digest (Repl.) 167, 1230.
- (5) *Graham v. Lord Londonderry* (1746), 3 Atk. 393; 26 E.R. 1026; 27 Digest (Repl.) 154, 1119.

Also referred to in argument :

Ridout v. Earl of Plymouth (1740), 2 Atk. 104, L.C.; 27 Digest (Repl.) 161, 1173.

Burton v. Pierpont (1722), 2 P.Wms. 78.

Barrack v. M'Culloch (1856), 3 K. & J. 110; 26 L.J.Ch. 105; 28 L.T.O.S. 218; 3 Jur.N.S. 180; 5 W.R. 38; 69 E.R. 1043; 27 Digest (Repl.) 104, 768.

Appeal by the plaintiffs from a decision of the Divisional Court (PHILLIMORE and WALTON, JJ.), which raised a question as to a wife's property in her own wearing apparel purchased with money given to her for the purpose by her husband.

The plaintiffs were a firm of costumiers, who had supplied the defendant, Mrs. De Fries, with dresses and various other articles of wearing apparel. In April, 1908, the plaintiffs issued a writ against Mrs. De Fries and her husband for about £66, the balance due for goods sold to her between November, 1903, and April, 1907. Mr. De Fries thereupon informed the plaintiffs that his authority to his wife was only to buy dresses, etc., for cash, and as he provided her with sufficient money from time to time to do this, he was not liable either on the ground that they were necessities, or that his wife had express authority to pledge his credit. On May 27, judgment was obtained against Mrs. De Fries alone and execution was levied and some dresses and other articles of wearing apparel in the possession of Mrs. De Fries were seized. Mr. De Fries then claimed them on the ground that they belonged to him as paraphernalia. An interpleader summons was thereupon issued to try the question of the ownership of these articles. This interpleader was tried in the Brompton County Court, and, after hearing the evidence and a quotation from the judgment in *Tasker v. Tasker* (1), as to the law on paraphernalia, the jury found that the goods seized were the property of the husband. Leave was given to appeal to the Divisional Court, and that court came to the conclusion that there was some evidence to justify the finding of the jury and declined to interfere. The plaintiffs appealed.

Atkin, K.C., and *J. D. Crawford* for the plaintiffs.

Samuel Moses for the husband.

July 28, 1909. The following judgments were read.

Cur. adv. vult.

SIR HERBERT COZENS-HARDY, M.R.—This is an interpleader issue in which the husband is the claimant, and the question is whether certain goods seized by execution creditors, who have obtained judgment in the *Scott v. Morley* (2) form against the wife, are the property of the husband. In the particulars of his claim the husband states the grounds of his claim to be that the goods and chattels were bought out of moneys provided by him, and that he claims the goods "as being part of the paraphernalia" of his wife. The learned county court judge asked the jury whether the dresses were given to the wife so as to become her separate property, or only as paraphernalia for her use so long as the husband chose, and he read to the jury passages from the judgment of SIR FRANCIS JEUNE in *Tasker v. Tasker* (1) as to the meaning of paraphernalia. The jury found that the goods were the property of the husband. I should say that the goods seized were dresses and other articles of such a nature as, for the purposes of this judgment, I assume might, after the husband's death, have properly been the subject of a widow's claim to paraphernalia under the old law, although their total value is now small.

It seems to me that the introduction of "paraphernalia" was only calculated to puzzle the jury and to obscure the real issue. There can be no question of paraphernalia during the husband's life. The observations of SIR FRANCIS JEUNE in *Tasker v. Tasker* (1) on the subject of paraphernalia seem to me unsupported by authority, although his decision was perfectly sound. By common law a

widow acquired a title to certain goods and chattels which the husband had not disposed of in his lifetime, a right of a very limited and peculiar nature. It was not the result of any bargain between husband and wife, for such a bargain was impossible at common law. The widow could not claim goods as her paraphernalia by reason of any gift from her husband, for such a gift was, at common law, impossible. The goods were the property of the husband and at his disposal in his lifetime, and liable to be taken in execution by his creditors, or to answer the claims of his creditors after his death. The facts admitted or not in dispute are that these goods, and similar goods, were purchased by the wife for her own wearing apparel by means of money supplied from time to time by the husband for the purpose; that the husband did not interfere in the purchases or exercise any control over her in the matter; that she did what she thought proper, and that if she sold any she would not account to him for the money, but would buy other things for herself or the children, or she would alter the dresses for the children. Under these circumstances, the question left to the jury was, in my opinion, improper, and the only doubt is whether there must be a new trial, or whether the husband's claim can be negatived on the ground that there was no evidence to support the finding of the jury.

Upon the whole, I think it is not necessary to order a new trial. Since the Married Women's Property Act, 1882, the wife is capable of acquiring and holding goods as her separate property. Money was given to the wife for the very purpose of enabling her to buy these articles of apparel for her own personal wear. She bought them, and the property in them was *primâ facie* hers. No evidence was given to rebut this presumption or to limit or qualify her possessory title. The course of dealing with the articles thus purchased was inconsistent with the idea that the husband ever had, or intended to have, any interest in the goods purchased. If a father makes an allowance to an adult daughter to provide herself with clothes, the clothes when purchased will *primâ facie* be the property of the daughter, and it is irrelevant to say that the father found the money. Since the Married Women's Property Act, 1882, the same principle must apply to a wife and to an adult daughter. I desire to express no opinion upon the question whether a widow, since the Married Women's Property Act, 1882, can claim her paraphernalia. I think the decision of the Divisional Court, declining to interfere with the verdict of the jury, cannot be supported, and that the appeal must be allowed, and that judgment must be entered for the plaintiffs, with costs in all courts, except so far as the plaintiffs may be prevented from claiming costs as a term of obtaining leave to appeal.

FARWELL, L.J.—The facts in this case are very simple and of everyday occurrence. Husband and wife were living together in amity; the husband gave his wife money from time to time in order to buy necessaries and clothes suitable for her condition on the terms that she was not to pledge his credit. She did so buy without any interference from him, and used and wore the purchased articles as she pleased, and as long as she pleased, and, when she had done with them, she either cut them up and adapted them for her children, or gave them away, or sold them, treating the proceeds of sale as her own, and neither rendering nor being asked to render, any account thereof to her husband. This is the state of affairs to be found in thousands of homes in the country today, and I should have thought that one inference, and one inference only, can possibly be drawn from them—viz., that the husband gave his wife her clothes as her own property for her own use as she pleased. But in this case the husband's solicitor had met somewhere with the word "paraphernalia." It is true that the husband himself had never heard of it, and did not know what it meant; it is true that he never said anything to his wife or anyone else to show that he did not intend the wife's clothes to be her own property; but his solicitor put in a plea that these articles of ordinary use, dresses, petticoats, dressing jacket, shoes, and the like, were given by him to his wife as paraphernalia, and the county court judge left the

jury a question whether the goods were given to the wife for her separate use or as paraphernalia, instead of asking them whether he gave her the clothes as her own, giving her the privilege of wearing them as and when he chose. If the latter question had been put, I cannot doubt the answer that any twelve reasonable men would have given. But the jury, confused not merely by the form of the question, but by having read to them by the county court judge a case in the Divorce Division, found (with regret) a verdict for the husband.

The whole difficulty has arisen from a misinterpretation of the meaning of "paraphernalia." It was a right given by the common law to a widow; it was not a right of the husband at all, but was a limitation of the legal rights of his executors or administrators after his death. At common law all the wife's personal chattels were the property of the husband, the marriage made them *unica caro*,

"so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband"

(BLACKSTONE'S COMMENTARIES (1st Edn.), Vol. 2, p. 433); and the wife had no separate rights at common law to any personal chattel at all. The idea of her asserting any right to paraphernalia against her husband during his life is out of the question; and any claim by him of his wife's personal chattels as paraphernalia is equally out of the question; such chattels were his own property, and if he claimed them he claimed them as such. But in mitigation of this extreme severity the common law, borrowing, to some extent, from the civil law, gave to the widow a right to keep certain personal chattels of which she had had the use during coverture as her own property after her husband's death. It is thus put by RICHARDSON, C.J., and CROKE, J., in *Lord Hastings v. Douglas* (3) (Cro. Car. at p. 345):

"Of all chattels personal, although the wife had them before marriage, the absolute property by the marriage is vested in the husband, and he may give them in his life or dispose of them by his will; so of those goods which are termed paraphernalia, the absolute property is in the husband, and therefore he may well devise them."

So in COMYNS' DIGEST, tit. "BARON AND FEME" (F.), "What goes to the wife (F1) if she survives, (F3) Paraphernalia," it is stated

"so the wife shall have after the death of her husband, as her paraphernalia, a necessary bed and apparel, agreeable to the quality of her husband. The property of the paraphernalia is vested in the wife presently upon the death of her husband."

So, too, in BLACKSTONE'S COMMENTARIES (1st Edn.), vol. 2, p. 435:

"And as the husband may thus, generally, acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods: which shall remain to her after his death and shall not go to his executors. These are called her paraphernalia: which is a term borrowed from the civil law and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree: which she becomes entitled to at the death of her husband over and above her jointure or dower: and preferably to all other representatives. . . . Neither can the husband devise by his will such ornaments and jewels of his wife: though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away. But if she continues in the use of them until his death, she shall afterwards retain them against his executors and administrators and all other persons, except creditors, where there is a deficiency of assets."

To the same effect are GODOLPHIN'S ORPHAN'S LEGACY, p. 130, and NOY'S LEGAL MAXIMS (Blythewood's edition), p. 241, "Widow," where it states:

"The widow shall have all her apparel, her bed, her copher, her chains, borders and jewels, by the honourable custom of the realm, except her husband unkindly gave any of them away: or be so in debt that it cannot be paid without her bed, &c., yet even in that case she shall have her necessary apparel,"

for (as it is put in COMYNS' DIGEST) "she ought not to be naked or exposed to shame or cold."

The right was entirely distinct from separate estates and depended on the common law, although questions in respect of it, arising as they did only after the husband's death, were usually dealt with in Chancery in administering his estate. The right appears to have depended on the actual use of the chattels and the position and rank in the life of the widow, and it may be doubted whether any mere declaration by the husband would suffice to establish the widow's claims to more than the chattels used by her and due to her position and rank. At a time when all the wife's personal chattels, including gifts from her husband to her (not for her separate use), at once vested in the husband as his own property, and when he and his wife were incapable of contracting with one another, it is difficult to see how anything binding the husband or his estate by way of gift to the wife or contract between husband and wife could possibly be effected during his lifetime, but, however the existence and extent of paraphernalia may have been proved, it was a claim solely by a widow arising only after her husband's death. Since the Married Women's Property Act, 1882, has destroyed the husband's right to all his wife's personal chattels and has enabled her to acquire and own them as her own, whether absolutely or subject to any lawful conditions to which she may agree as if she were a feme sole, a right which was merely a limitation or an exception out of the former legal right of the husband has in my opinion no longer any existence. The widow's right arose solely by way of exception out of the generality of the husband's common law right to all her property: *Cessante ratione cessat et ipsa lex*. And it is, moreover, no longer necessary; husband and wife can now make their own arrangements and make them binding as contracts; the husband may impose what conditions he pleases on making a gift to his wife, and husband and wife may make what bargains they please not being in fraud of creditors or otherwise illegal. If a husband buys a piece of lace he may give it to his wife on the terms that she does not part with it without his permission, but this arrangement would have to be proved by evidence as matter of fact; it would have to be proved that the condition was imposed or that the bargain was in fact made just as if the parties were not husband and wife, but strangers. But, however the claim to paraphernalia was proved under the old law, I am of opinion that "paraphernalia" has nothing whatever to do with the present case; that since the Married Women's Property Act, 1882, the old common law exceptions of paraphernalia from the husband's right to his wife's chattels personal has ceased to exist; that the jury in this case were misled by the form of questions put to them; and that there is not a tittle of evidence to justify a verdict in favour of the husband.

The Divisional Court were influenced by two cases cited to them. In the first, *Williams v. Mercier* (4) the decision of the Divisional Court was reversed on appeal, and that decision was affirmed by the House of Lords, so that the observations of the two judges in the Divisional Court on paraphernalia were obiter only. If either of them intended to suggest that a husband could make a gift to his wife during coverture otherwise than for her separate use, which would bind him or his creditors, by using the word "paraphernalia," the cases cited by them do not justify it. They were all cases of administration of the deceased husband's estate, in which a "gift" by husband to wife when contrasted with gifts to separate use may well have been used as meaning giving permission to wear or to use. The real position is clearly stated by LORD HARDWICKE, L.C.,

in *Graham v. Lord Londonderry* (5). He first deals with a number of gifts to the separate use of the wife, and continues (3 Atk. at p. 394):

"I have indeed admitted a husband may make such gifts, but when he expressly gives anything to a wife to be worn as ornaments of her person only, they are to be considered merely as paraphernalia, and it would be of bad consequence to consider them as otherwise, for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention."

With regard to *Tasker v. Tasker* (1) the decision was that the pearls were given to the wife for her separate use; and the dicta of the President cannot in my opinion be supported; it is clear that the wife could never have enforced any claim against her husband in his lifetime for paraphernalia. In my opinion this appeal should be allowed.

KENNEDY, L.J.—I have had an opportunity of reading the judgments which have just been delivered by the MASTER OF THE ROLLS and FARWELL, L.J., and they have so fully dealt with the law concerning paraphernalia that I desire to add nothing in regard to it, except that I reserve my opinion as to whether, since the passing of the Married Women's Property Act, 1882, the question of "paraphernalia" can in any case arise. Whether it can or cannot, I must respectfully express my inability to concur in the statement of the law which appears in the judgment of SIR FRANCIS JEUNE, P., in *Tasker v. Tasker* (1) and which was read by the learned county court judge in his summing up to the jury in the present case. It appears to me that the only occasion on which an issue as to paraphernalia might perhaps still be raised is a dispute as to the possession of property in the nature of ornaments and the like articles between a wife and the representative of her dead husband. As between husband and wife during their lifetime, or between either of them and the execution creditor of the other, the only question as to the property in such articles can be whether they belong to the husband as his own or are the separate property of the wife.

In the present case the matter to be decided at the trial of the interpleader issue was the simple issue which was ordered to be tried—viz., whether these goods were or were not the property of the husband, who claimed them as against the wife's execution creditor. The goods in question consisted of her wearing apparel, dresses, shoes, and the like, which had been bought by her out of moneys given to her by her husband for the purpose. It appears to me that upon the evidence a jury could not reasonably come to any but one conclusion—that they were the wife's property. They gave "with regret" a verdict for the plaintiff, which can be explained only by the fact that their minds were confused by the introduction of a question as to "paraphernalia," and the reading to them of the passage which I have referred to in the judgment of the learned President of the Probate, Divorce, and Admiralty Division in *Tasker v. Tasker* (1). In my opinion the verdict cannot be allowed to stand, and this appeal succeeds, and the order must be made which the MASTER OF THE ROLLS has declared.

Order accordingly.

Solicitors: *Cohen & Cohen; John Hands.*

[*Reported by W. C. Biss, Esq., Barrister-at-Law.*]

MASSON, TEMPLIER & CO. v. DE FRIES. DE FRIES,
CLAIMANT

[COURT OF APPEAL (Vaughan Williams and Farwell, L.JJ.), February 17, 18, 1910]

[Reported [1910] 1 K.B. 535; 79 L.J.K.B. 392; 102 L.T. 155;
54 Sol. Jo. 304]

Costs—Taxation—“Costs of and incident to” an appeal—Disbursements for documents not made for purposes of appeal.

Where “the costs of and incident to” an appeal to the Court of Appeal are awarded no disbursements should be allowed on taxation in respect of documents which have not actually been made for the purposes of the appeal.

Notes. Applied: *Wright v. Bennett*, [1948] 1 All E.R. 410.

As to costs of appeal to and from the Court of Appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 479 et seq.; and for cases see DIGEST (Practice) 787 et seq. See also the Supreme Court Costs Rules, 1959 (ANNUAL PRACTICE).

Case referred to in argument:

Warner v. Mosses (1881), 19 Ch.D. 72; 45 L.T. 359; 51 L.J.Ch. 86, C.A.; Digest (Practice) 881, 4209.

Appeal by the plaintiffs, Messrs. Masson, Templier & Co., from an order made by A. T. LAWRENCE, J., in chambers.

The plaintiffs obtained a county court judgment against a Mrs. De Fries and certain goods to the value of £15 were seized in execution thereunder. Mrs. De Fries' husband, the claimant, brought interpleader proceedings in the Brompton County Court to claim the goods seized. The county court judge gave judgment for the claimant with costs, and granted the plaintiffs leave to appeal on the terms that the plaintiffs, if successful, should not ask for the costs of the appeal. The plaintiffs appealed, and the Divisional Court dismissed the appeal with costs. The plaintiffs appealed by leave of the Court of Appeal, who allowed the appeal and ordered that the claimant should pay to the plaintiffs “the costs of and incident to the said interpleader proceedings in the Brompton County Court, such costs to be taxed,” and also repay to the plaintiffs the costs of the appeal to the Divisional Court and of the interpleader proceedings, which they had paid to him. The plaintiffs then proceeded to have their costs taxed, and the taxing master taxed their costs at £82. He disallowed the charges for certain copies of documents used in the Court of Appeal, these copies having been made and used for the purpose of the appeal to the Divisional Court.

The plaintiffs objected to the taxation in so far as the charges for these copies of documents were disallowed. The reasons for the objections were stated to be that the plaintiffs had not any costs in the Divisional Court and there had been no previous taxation of their costs under which charges for any of these copies had been allowed, and that, this being the case, the whole of these copies were allowable in the appeal to the Court of Appeal, the principle being that it was immaterial whether the copies had been used before so long as there had been no previous taxation under which the plaintiffs could charge for them, and, that being so, the costs of them should be allowed in the present Bill.

The taxing master's answer to the objections was as follows:

“The reasons for disallowing the copies in question are correctly stated in the objections. The costs of the copies were properly and necessarily incurred for the purposes of the appeal to the Divisional Court, the costs of which the plaintiffs are not entitled to as against the claimant. It seems to me, therefore, that I cannot allow them as costs incurred in prosecuting the appeal to the Court of Appeal (see *Warner v. Mosses*), where it was held that copies, etc., properly and necessarily made for use of counsel and the court in interlocutory

applications should be allowed as part of the costs of such applications. I therefore overrule the objections."

The plaintiffs then applied for a review of the taxation, asking that the charges for these copies of documents might be allowed. This application was dismissed by A. T. LAWRENCE, J., at chambers. The plaintiffs appealed, with leave.

J. D. Crawford (J. B. Atkin, K.C., with him) for the plaintiffs.

S. Moses for the defendant.

VAUGHAN WILLIAMS, L.J.—We have here to construe this order of the Court of Appeal, and, having construed it, we have to give effect to it in respect of this taxation in accordance with the practice which prevails in taxation. The order of the Court of Appeal is that the claimant should pay to the plaintiffs

"the costs of and incident to the appeal to this court and of and incident to the said interpleader proceedings in the Brompton County Court, such costs to be taxed."

We have only to note with regard to the costs in the Divisional Court that no order is made in respect of them in consequence of the condition imposed by the county court judge, when he gave leave to appeal, that the plaintiffs if successful should not ask for the costs of the appeal. All that I have to say about the construction of this order of this court, so far as it is material to the question now before the court, is that there is nothing in it which affects or alters the ordinary meaning of the words used,

"the costs of and incident to the appeal to this court and of and incident to the said interpleader proceedings."

That being so, we have only to consider what, according to the ordinary practice, would be the costs of and incident to the appeal to this court. The practice is that, inasmuch as the bill of costs is one by which the successful party seeks to make his opponent pay, the claim is for recoupment of disbursements. In my opinion, although these documents in respect of which the costs now in question were claimed were used in the Court of Appeal and the proceedings in the Court of Appeal could not have been carried through without them, yet in accordance with the practice in taxation no disbursements are allowed unless they have actually been made in respect of the proceedings in respect of which the order for payment of costs has been made. These documents in fact came into existence for the purpose of the appeal to the Divisional Court. Under those circumstances we ought not to allow in this bill of costs any charges in respect of these documents in respect of which there was really no fresh disbursement for the proceedings in this court. It does not make any difference that, by reason of the order of the county court judge, the plaintiffs, even if successful, could not ask for these costs in the Divisional Court. Therefore, in the circumstances, these costs ought not to be allowed. The result is that this appeal fails and must be dismissed.

FARWELL, L.J.—I understand the settled practice in the taxing master's office is not to allow the costs of documents which have already been used in prior applications. That being so, we cannot allow these costs in this case. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: Cohen & Cohen; John Hands.

[Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.]

TILLEY v. BOWMAN, LTD.

[KING'S BENCH DIVISION (Hamilton, J.), February 11, 1910]

[Reported [1910] 1 K.B. 745; 79 L.J.K.B. 547; 102 L.T. 318;
54 Sol. Jo. 342; 17 Mans. 97]

Bankruptcy—Property available for distribution—Sale of goods—Contract induced by bankrupt's fraud—Right of defrauded party to disaffirm contract and re-take goods after receiving order—Damages for fraud.

Bankruptcy—Set-off—Mutual dealings—Sale of goods—Contract induced by bankrupt's fraud—Claim for damages against bankrupt—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 38.

Where a contract for the sale of goods is induced by fraudulent misrepresentations on the part of the buyer, the seller may disaffirm the contract and re-take possession of the property after a receiving order has been made against the buyer. A claim for damages for the fraudulent misrepresentation may be set off under s. 38 of the Bankruptcy Act, 1883 [now s. 31 of Bankruptcy Act, 1914], against a claim by the buyer to recover back the money paid under the contract of sale which has been rescinded.

Notes. Sections 38, 43 and 44 of the Bankruptcy Act, 1883, were repealed by the Bankruptcy Act, 1914, s. 168 and the Sixth Schedule. They were re-enacted by ss. 31, 37 (2) and 38 of the 1914 Act.

Referred to: *Re City Equitable Fire Insurance Co. (2)*, [1930] All E.R.Rep. 315.

As to doctrine of mutual credit and set-off in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 480 et seq.; and for cases see 4 DIGEST 423 et seq.

Cases referred to:

- (1) *Re Eastgate, Ex parte Ward*, [1905] 1 K.B. 465; 74 L.J.K.B. 324; 92 L.T. 207; 21 T.L.R. 198; 12 Mans. 11; 5 Digest (Repl.) 685, 6032.
- (2) *Jack v. Kipping* (1882), 9 Q.B.D. 113; 51 L.J.Q.B. 463; 46 L.T. 169; 30 W.R. 441, D.C.; 4 Digest (Repl.) 435, 3855.
- (3) *Re Daintrey, Ex parte Mant*, [1900] 1 Q.B. 546; 69 L.J.Q.B. 207; 82 L.T. 239; 7 Mans. 107, D.C.; affirmed, [1900] 1 Q.B. 571, C.A.; 4 Digest (Repl.) 445, 3914.
- (4) *Palmer v. Day & Sons*, [1895] 2 Q.B. 618; 64 L.J.Q.B. 807; 44 W.R. 14; 11 T.L.R. 565; 39 Sol. Jo. 708; 2 Mans. 386; 15 R. 523; 4 Digest (Repl.) 443, 3907.
- (5) *Re Mid-Kent Fruit Factory, Ltd.*, [1896] 1 Ch. 567; 65 L.J.Ch. 250; 74 L.T. 22; 44 W.R. 284; 40 Sol. Jo. 211; 3 Mans. 59; 4 Digest (Repl.) 442, 3902.

Also referred to in argument:

Eberle's Hotels and Restaurant Co., Ltd. v. Jonas (1887), 18 Q.B.D. 459; 56 L.J.Q.B. 278; 35 W.R. 467; 3 T.L.R. 421, C.A.; 4 Digest (Repl.) 442, 3903.

Lord's Trustee v. Great Eastern Rail. Co., [1908] 1 K.B. 195; 77 L.J.K.B. 140; 97 L.T. 760; 24 T.L.R. 83; 52 Sol. Jo. 96; 15 Mans. 33; on appeal, [1908] 2 K.B. 54; 77 L.J.K.B. 611; 98 L.T. 910; 24 T.L.R. 470; 52 Sol. Jo. 394; 15 Mans. 107, C.A.; on appeal sub nom. *Great Eastern Rail. Co. v. Lord's Trustee*, [1909] A.C. 109; 78 L.J.K.B. 160; 100 L.T. 130; 25 T.L.R. 176; 16 Mans. 1, H.L.; 4 Digest (Repl.) 443, 3904.

Peat v. Jones & Co. (1881), 8 Q.B.D. 147; 51 L.J.Q.B. 128; 30 W.R. 433, C.A.; 4 Digest (Repl.) 434, 3854.

Action in the commercial list.

On Nov. 14, 1907, one Octavius A. Kirkness acting on behalf of Kirkness & Sons, a firm of retail jewellers, induced the defendants, a firm of wholesale jewellers, by means of fraudulent misrepresentations to sell him jewellery to the value of £569. He then pawned the jewellery for £300. Up to April 1, 1908, payments had been

made by the buyers in accordance with the contract of sale amounting to £182 11s. 11d. On May 5, 1908, a receiving order in bankruptcy was made against the firm of Kirkness & Sons. On May 21, the defendants, having discovered the fraud, elected to rescind the contract of sale, and redeemed the property on payment of £300 to the pawnbroker.

The plaintiff, the trustee in bankruptcy of Octavius A. Kirkness and George E. Kirkness, who carried on the business of Kirkness & Sons, in his points of claim, claimed the repayment of the £182 11s. 11d. as money had and received by the defendants to the use of the plaintiffs for a consideration which had failed; alternatively he claimed (a) a declaration that upon payment to the defendants of £300 the plaintiff was entitled to the return of the jewellery; (b) the return of the jewellery or its value, and damages for its retention.

The defendants who, in their points of defence, denied the detention, claimed to set off the sum of £300 paid to redeem the jewellery as damages for the fraudulent misrepresentations; in the alternative, they counterclaimed for £300 damages.

Dobb for the plaintiff.

Attenborough for the defendants.

HAMILTON, J.—On Nov. 14, 1907, Octavius Kirkness, a member of the firm of Kirkness & Sons, of Scarborough, jewellers, called upon Samuel Bowman, managing director of Bowman, Ltd., and, by telling him lies, induced him to sell to and deliver to him on credit a diamond brooch and six ear-rings at the credit price of £569. Then Kirkness went and pawned them for £300. From time to time money was extracted from him in accordance with the terms of the sale, up to April 1, 1908, when he had paid £182 11s. 11d. At the beginning of May a receiving order was made against the firm of Kirkness & Sons, and after that, and not earlier, Bowman, Ltd., became aware that the brooch had been pawned, were led to make further inquiries, and ultimately found out the full facts. On May 21 they elected to rescind the contract of sale as having been obtained from them by fraud. They were right in so doing. I accept the evidence of Mr. Bowman, which, in conjunction with admissions of the plaintiff, shows that the whole of the contract was voidable on the part of the defendants. The defendants in order to redeem the brooch paid £300 necessarily to the pawnbroker with whom it had been pledged. In the present action the trustee in bankruptcy for Kirkness & Sons claims first of all in detinue for this jewellery, and, secondly, he claims in the alternative for the return of £182 11s. 11d. paid from time to time in reduction of the purchase price. It is said on his behalf that at the time of the receiving order the property in the jewellery was in Kirkness & Sons, and consequently is vested in the trustee, and has not been subsequently divested by any act of the defendants, but, in the words of BIGHAM, J., in *Re Eastgate, Ex parte Ward* (1) ([1905] 1 K.B. at p. 467):

“The trustee acquired the interest of the bankrupt in the property subject to the rights of third parties. One of those rights in this case was the right of the vendors of the goods to disaffirm the contract and to re-take possession of the goods.”

That case is an authority conclusive of the present case on the claim in detinue, unless it can be distinguished on the ground that there the rescission of the contract took place after the act of bankruptcy, but before the receiving order, whereas in the present case it took place after the receiving order. It seems to me that that is not an objection which makes the case distinguishable. The artificial relation back of the trustee's title does not appear to me to make the position any different to the present position, and the principle upon which the case was decided, that the trustee took subject to the right of the vendor to disaffirm the contract, appears to me to be a qualification of the trustee's rights as in the case where the rescission is prior to the receiving order. Then it is said that as soon as the contract is rescinded, the money paid under it—namely, £182 11s. 11d.—is money had and

received to the use of Kirkness and now to the trustee. That is not disputed, but it is said that the damages now liquidated at the sum of £300 for the fraud of Kirkness may under the mutual dealing section of the Bankruptcy Act be set off so as to extinguish the claim for £182 11s. 11d. On that point *Jack v. Kipping* (2) is relied on by the defendants, a case which in its facts is distinguishable from the present only upon the circumstance that in that case the contract had not been rescinded, whereas in this case it has. It has been decided since in *Re Daintry, Ex parte Mant* (3) that the right to set off as distinguished from the ascertainment of the amount to be set off must be settled once and for all by the date of the receiving order, and it appears to me that the suggested distinction between *Jack v. Kipping* (2) and the present case is not a real one. At the date of the receiving order the defendants had the right, owing to the acts of Kirkness, to rescind the contract and claim their goods, and the goods were already in such a position that they could be reclaimed only on the terms of £300 being paid. I think, therefore, that at the material time the position was that there was a contract still unrescinded on the one hand, and a right to claim damages for fraud on the other.

I think counsel for the defendants is right in substance in saying that the money claimed by the trustee is money previously paid under the contract, and therefore the defendants knew at the time when the receiving order was made that the trustee would have a claim upon the acts done under the contract in the purchase of the jewellery, which, owing to the fraud, was a claim for £182 11s. 11d. and no more; but at the same time the defendants had a claim for £300 damages for fraud, and that therefore the facts are substantially the same as in *Jack v. Kipping* (2). The reasoning in that case raises a considerable amount of difficulty, but the decision is clear, and, if the facts are the same, the decision binds me. What is said on behalf of the trustee is that the claim is for damages for fraud, and that, therefore, applying the language of LORD RUSSELL OF KILLOWEN, C.J., in *Palmer v. Day & Sons* (4), stated and followed by VAUGHAN WILLIAMS, J., in *Re Mid-Kent Fruit Factory, Ltd.* (5), the claim for damages not arising out of contract, but out of a personal tort, is one which cannot be set off under the mutual dealing section of the Bankruptcy Act for a claim in contract, and in terms that is the language used. LORD RUSSELL OF KILLOWEN says ([1895] 2 Q.B. at p. 621):

“The section in its present shape, however, has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages liquidated or unliquidated, provided they arise out of contract,”

and VAUGHAN WILLIAMS, J., pointed out ([1896] 1 Ch. at p. 571) that the words “arising out of contract” limit the operation of the section, and prevent it being extended to cover any claims which do not arise out of the contract. He goes on to say (*ibid.* at pp. 571, 572):

“Then it was suggested that a claim in respect of a tort also fell within this section; but I pointed out that it was clear from *Jack v. Kipping* (2) that a claim for damage for misrepresentation, which was in one sense a claim in respect of a tort, was only allowed to come within the mutual credit clause on the ground that the claim of the trustee being for the price of goods, the misrepresentation which led to the purchase of the goods was a mutual dealing as between the purchaser and the bankrupt vendor.”

Jack v. Kipping (2), understood in the light of that explanation, appears to me to be on all fours with the present case. I think the claim for damages for misrepresentation, which is in one sense a claim in tort, should be allowed to come within the mutual dealing section on the ground that the claim by the trustee is for the price of goods, and is therefore on the same ground as if the contract existed still, and consequently there was a mutual dealing between the bankrupt and vendor. It is contended that that leads to the unfair result of the defendants being

allowed to approbate and reprobate at the same time; that they put an end to the contract on the ground of tort shortly after the receiving order was made, and are now relying on the contract which was put an end to. I think, however, that one must consider for the purpose of s. 38 of the Bankruptcy Act the position of the parties, and their position at the date of the receiving order, and accordingly they are not setting up and repudiating one and the same contract, but are properly claiming that the fraud which was practised in November, 1907, is the mutual dealing, and is consequently a mutual dealing with all the subsequent claims that have to be made under that contract while it was in force. The result is that I think the set-off is right, and the plaintiff gets nothing, and there will be judgment for the defendants with costs on the claim, and the counterclaim is dismissed with costs.

Solicitors: *Julius A. White; S. J. Attenborough.*

[Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.]

JONES v. REW

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), June 28, 29, 1910]

[Reported 79 L.J.K.B. 1080; 103 L.T. 165; 74 J.P. 321;
8 L.G.R. 881]

*Highway—Nuisance—Liability of local authority—Carriage plate over gutter—
Defective condition—Injury to plaintiff.*

In 1873 an urban sanitary authority, acting under powers conferred on them by the Public Health Act, 1848, made a channel in a street and covered it with carriage plates to enable the frontagers to take vehicles across it to their stables. In accordance with the Act the urban authority recovered the expense of the work from the frontagers who included the defendant's predecessor in title. There was a gap opposite the defendant's house between the carriage plate relating to that house and the plate opposite the adjoining house. The gap formed a hole some six inches deep and three inches broad. The plaintiff, while crossing the street, caught her foot in the hole and fell, sustaining injuries. In an action brought by her against the defendant for damages for personal injuries,

Held: the carriage plate had vested in the urban authority who, and not the defendant, were liable for any nuisance created by its defective condition; the mere fact that from time to time the defendant had lifted the plate to clean the channel beneath it, as he was entitled to do, did not make him responsible to the plaintiff for her injuries; and, therefore, she was not entitled to succeed against the defendant.

Notes. As to the maintenance of highways maintainable at public expense, see now the Highways Act, 1959, Part IV (39 HALSBURY'S STATUTES (2nd Edn.) 453).

As to parts of the highway repairable by the highway authority, see 19 HALSBURY'S LAWS (3rd Edn.) 117. For cases on statutory works on highways, see 26 DIGEST (Repl.) 580 et seq.

Appeal from an order of the Divisional Court (DARLING and BUCKNILL, JJ.) dated April 20, 1910, setting aside a judgment in favour of the defendant entered by

His Honour JUDGE BRYN ROBERTS, at Swansea County Court, with costs, and remitting the case to the county court for the assessment of damages.

The plaintiff's claim was for damages for personal injuries caused by the defendant having wrongfully or, alternatively, negligently placed, maintained or kept two iron plates partly on the pavement and partly on the roadway of Western Street, Swansea (which was a public highway), in such manner as to render the pavement and roadway unsafe and dangerous to foot passengers. The plaintiff while crossing the street caught her foot in a hole in the gutter between the roadway and pavement and fell, sustaining injuries. The hole was caused by a gap between two iron plates placed over the gutter to enable the occupiers of the defendant's house and the adjoining house to take vehicles across the gutter into their respective stable yards. The hole was $5\frac{1}{2}$ in. long, $3\frac{1}{2}$ in. broad and 6 in. deep. The hole and the portion of the iron cover adjacent to it were opposite the defendant's house. The iron covers had been made by the urban sanitary authority under powers conferred on it by the Public Health Act, 1848. The county court judge held that by virtue of s. 149 of the Public Health Act, 1875, the street, being a highway repairable by the inhabitants at large, had vested in and come under the control of the urban authority, and that s. 35 of the Public Health Act Amendment Act, 1890, did not apply to make the defendant, as distinct from the urban authority, liable to repair the iron covers, since the covers were not "gratings . . . in the surface" of the street or otherwise within the meaning of s. 35. Accordingly the county court judge dismissed the plaintiff's claim.

Macmorran, K.C. (with him *Jellicoe*), for the defendant.

Atkin, K.C., and *Villiers Meager* for the plaintiff.

SIR HERBERT COZENS-HARDY, M.R.—In this case we must not allow our sympathy for the plaintiff in meeting with the sad accident that she did to lead us to lay down what would be bad law. The facts, so far as we know them, are these. In 1873 the Swansea Urban Sanitary Authority gave notice to William Rew, the then owner of the defendant's house, requiring him, in common with other frontagers, to do certain work. I shall read the statutory provisions under which that was done in a moment. William Rew did not do the work himself, nor, as I infer, did the other frontagers do the work themselves, but the sanitary authority did the work for all of them, and they paid the charges between them. We have in evidence the actual account rendered in October, 1873, and the receipt for the amount paid by William Rew, and it is clear from that that at that date there were charges made for (among other things)

"kerbs, channel, flagging, excavation, foundation, limestone, pavement pipe, and carriage plate."

In other words, in that year the sanitary authority—the body to whom the necessary discretion was given—thought that in this particular place it was advisable to have a channel and a carriage plate, which is nothing more or less than a covering of a channel to enable it to be crossed. That was placed so as to render it easy and convenient to get from the main part of the street up to the door of William Rew's stable. We are bound to assume that the sanitary authority when making that demand upon William Rew were doing no more than that which they were authorised by their statute to do—neither more nor less.

I will now refer to the statutory provisions. [His LORDSHIP read ss. 68, 69 and 70 of the Public Health Act, 1848, and continued:] I assume, therefore, that this work was work done within the powers conferred on the sanitary authority by that statute, and that they were the proper body to say how and in what manner it was to be done. They were the body entrusted with power to require each owner to do his own part, or (what is the common course) they were authorised to do it themselves and recover from William Rew his proportion of the expenses. That is what was done in the present case, and we have the receipt given for the payment by William Rew of his proportion, amounting to £9 8s. 10½d. Since that date

there have been two devolutions of title, and the present defendant is the leaseholder of the house of which William Rew was the owner. It appears that there is an interval between the two carriage plates, one opposite the defendant's house and the other opposite the next-door house, and the hole—for that is what it really is—is in that part which is immediately opposite the defendant's house. The present action was brought by the plaintiff against the defendant, and the learned county court judge held that the place was part of the highway; that the iron carriage plate, wrongly fixed as it was, was part of the property of the local authority; and that the defendant therefore was not liable for what had happened. The Divisional Court took a different view, for reasons which, with great respect to that court, I am unable to follow, and which have not really been relied on before us by counsel for the respondent. They put their case before us with great ingenuity in this way. They say that the iron plate was a chattel purchased by William Rew in 1873, which he might have removed if he had so chosen. They contend that it was never part of the highway, and that, although the title to it was not shown to be vested in the defendant, yet the defendant, because he lifted it up for the purpose of cleaning the channel and put it back in the same place, was a party to creating the nuisance upon the highway, and therefore a party to the happening of this sad accident to the plaintiff. I myself am entirely unable to follow that reasoning.

In my opinion the case is a plain one, and the learned county court judge was right in the view which he took that the liability for the nuisance, if any, was in the local authority. Whatever remedy may have existed against them, however, appears to be barred by the lapse of time, and I am satisfied that there is no ground for holding that the defendant was in any way liable. The appeal must be allowed and the order of the learned county court judge restored.

FARWELL, L.J.—I am of the same opinion. I think that the word “channel” in s. 69 of the Public Health Act, 1848, is not confined to an open channel, but includes a covered one or culvert as well, and the top may be of any material. That being so, this channel plate became part of the street, and when the street vested in the local authority the culvert and materials of which it was made vested also in the local authority. I really can see no ground whatever on which this appeal can be supported on the facts stated, nor for holding the defendant responsible. It is not the fact that the accident was caused by the defendant lifting the plate and putting it back in the same place as before, and in my opinion he cannot be made in any way responsible for the unfortunate accident that happened to the plaintiff.

KENNEDY, L.J.—I agree, but, as we are differing from the view taken by the Divisional Court, I will add a few words. The judgment of the Divisional Court proceeded on a view of the evidence, and the legal inference to be drawn from the evidence, with which, with great respect to the learned judges, I cannot concur.

I will assume that this hole caused by the juxtaposition of these two plates was a nuisance for which the local authority might possibly be held liable. We have not, however, to consider their liability, but the alleged liability of a householder whose property is immediately opposite the place where the alleged nuisance was said to exist. The learned judges of the Divisional Court came to the conclusion that the evidence showed the plate to be the property of the defendant. I can see no trace of any such thing. The plate was put there under the circumstances stated by the MASTER OF THE ROLLS, and how that could have the effect of vesting it in the defendant I am at a loss to understand. That is the whole history that appears, and I can find no evidence for saying that the plate was the property of the defendant. It may be said that it is of more value to the particular person inhabiting this house than to the public at large, and with that I agree. But I cannot see the bridge which connects that fact with the conclusion that it is the property of the defendant, and not what the local authority have done as part of

the work of the street. The next point taken is that the evidence shows that the defendant has at times cleaned the channel which runs underneath a portion of the channel plate, and for that purpose lifted it up and replaced it as it was before. It has not been suggested that he did not put it back properly, or that what he did could have in any way contributed to this accident, but the learned judges of the Divisional Court seem to have come to the conclusion that that alone would justify their judgment. DARLING, J., said this:

"If it was somebody else's property and it was wrongfully put back by him, or if he took it up and looked at it and put it back, I think it would make the defendant responsible whosever property it was."

With great respect for the learned judge, that is a proposition for which I am unable to see any foundation. In my opinion it is quite incorrect to say that because this plate is a thing which somebody may move and replace, therefore a person not having any duty except to replace it should be held liable merely because he has handled it, but not altering its position in any way. That would not justify a claim against him for nuisance or negligence. It appears to me that the plate at the time of the accident was vested in the road authority, whoever they were, and that, except for the purpose of cleaning the gutter, the defendant had no right to touch it. I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *Metcalf & Sharpe*, for R. T. Leyson, Swansea; J. T. Lewis, for Aeron Thomas & Co., Swansea.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

Ex parte BOTTOMLEY AND OTHERS

[KING'S BENCH DIVISION (Phillimore and Walton, JJ.), March 2, 1909]

[Reported [1909] 2 K.B. 14; 78 L.J.K.B. 547; 100 L.T. 782;
73 J.P. 246; 25 T.L.R. 371; 22 Cox, C.C. 106]

Magistrates—Committal for trial—Illness of magistrate—Hearing continued by another magistrate—Recalling of witnesses and obtaining assent to depositions—Justices' Protection Act, 1848 (11 & 12 Vict., c. 44), s. 5.

During a preliminary examination in criminal proceedings for conspiracy the magistrate who had been hearing the case fell ill and was unable to continue the hearing. One hundred and ten witnesses had then been examined and 23 days occupied in taking their evidence. Another magistrate having taken the place of the magistrate who was ill, the prosecution proposed to recall one or two of the witnesses, whose evidence had already been given, to read their depositions over to them, to obtain their assent to the correctness of the same, to allow the defence to cross-examine the witnesses so called, and then to ask for the committal of the defendants for trial. The defendants objected and claimed that all the witnesses should be examined de novo, but the magistrate decided to adopt the procedure proposed by the prosecution.

Held: there was nothing contrary to law in the procedure proposed by the prosecution, and, in any case, the court had no power to issue a mandamus to control the magistrate in his conduct of the hearing while the case was under his consideration.

Notes. The Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 19 (1) and Second Schedule, substituted a new section for s. 5 of the Justices Protection Act, 1848. For this section, see 14 HALSBURY'S STATUTES (2nd Edn.) 304.

Distinguished: *R. v. Philips*, *R. v. Quayle*, [1938] 3 All E.R. 674.

As to taking and use of depositions, see 10 HALSBURY'S LAWS (3rd Edn.) 361-362, and Magistrates' Courts Rules, 1952, S.I. 1952 No. 2190, r. 5 (13 HALSBURY'S STATUTORY INSTRUMENTS). For cases see 14 DIGEST (Repl.) 217-218, 33 DIGEST 333-334.

Cases referred to:

- (1) *R. v. Carden* (1879), 5 Q.B.D. 1; 49 L.J.M.C. 1; 41 L.T. 504; 44 J.P. 137; 28 W.R. 133; 14 Cox, C.C. 359; 14 Digest (Repl.) 225, 1879.
- (2) *Ex parte Ellissen* (1868), unreported.
- (3) *Re Guerin* (1888), 58 L.J.M.C. 42; 60 L.T. 538; 53 J.P. 468; 37 W.R. 269; 16 Cox, C.C. 596, D.C.; 33 Digest 334, 459.
- (4) *R. v. Bertrand* (1867), L.R. 1 P.C. 520; 16 L.T. 752; 31 J.P. 531; 10 Cox, C.C. 618; sub nom. *A.-G. of New South Wales v. Bertrand*, 4 Moo.P.C.C.N.S. 460; 36 L.J.P.C. 51; 16 W.R. 9; 16 E.R. 391, P.C.; 14 Digest 349, 3387.
- (5) *R. v. Smith* (1817), Holt, N.P. 614; Russ. & Ry. 339; 2 Stark. 208, C.C.A.; 14 Digest (Repl.) 313, 2994.

Also referred to in argument:

- R. v. Watts* (1863), Le. & Ca. 339; 3 New Rep. 175, 33 L.J.M.C. 63; 9 L.T. 453; 27 J.P. 821; 12 W.R. 112; 9 Cox, C.C. 395, C.C.R.; 14 Digest (Repl.) 217, 1804.

Motion for two rules, one for a writ of mandamus, directed to Sir Horatio Davies, an alderman of the City of London, to show cause why he should not properly hear and determine certain proceedings pending at the Guildhall in the city of London against the applicants, and the other for an order under s. 5 of the Justices Protection Act, 1848. The motion was made on behalf of the applicants, Messrs. Bottomley, Fewings, Stevenson, and Easum, against whom criminal proceedings were then pending before the magistrate at the Guildhall.

The facts as shown in the affidavit of the solicitor for the applicants, were shortly as follows: Upon an information sworn on Nov. 20, 1908, Mr. Horatio Bottomley and three other persons were summoned to appear on Dec. 1, 1908, at the Guildhall, in the city of London, to answer certain charges of conspiracy to cheat and of fraud and other offences mentioned in the information. The hearing of the charges was proceeded with before Sir George Smallman, an alderman and justice for the city of London, on Dec. 1. Counsel for the prosecution opened the case on behalf of the Crown, and then proceeded to call the witnesses for the prosecution. The defendants were remanded from time to time on their own recognisances. In all, 110 witnesses had been examined and documents produced by them and exhibited to their depositions, and twenty-three days had been occupied in taking their evidence. On Mar. 1, 1909, on the case coming on, the place of Alderman Sir George Smallman was taken by Alderman Sir Horatio Davies, who on taking his seat on the bench announced that owing to illness Alderman Sir George Smallman would not sit again, and that he Sir Horatio Davies would hear the case. Counsel for the prosecution then submitted that the prosecution were entitled as of right to adopt the following course of procedure; that is to say, to recall one or two of the witnesses whose evidence had already been taken on each charge "as a sample of each of the frauds alleged" (as counsel put it), to read their depositions over to them, to obtain their assent to the correctness of the contents of such depositions, and then to leave the defence to cross-examine. The defendants submitted that such a course of procedure would be illegal, and objected to the prosecution being permitted to read over to any witness the deposition made by

him before Sir George Smallman; but the alderman ruled that the procedure proposed by the prosecution was regular and decided to permit its adoption. Mr. Bottomley further took the point that if two or three witnesses on each charge were sufficient to establish a case for committal the remainder of the 110 witnesses were presumably unnecessary or redundant, but counsel for the prosecution replied that he did not propose to discard the evidence in the other depositions or regard it as redundant. From such reply it was inferred that it was the intention for the prosecution in some way to utilise and rely on the depositions taken before Sir George Smallman for the purpose of satisfying Sir Horatio Davies that there was a *prima facie* case against the defendants. Sir Horatio Davies also stated that he had read a shorthand note of the opening speech of counsel for the prosecution.

By s. 5 of the Justices Protection Act, 1848:

"And whereas it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices and give them protection in the performance of the same if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him. Be it therefore enacted that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's court of Queen's Bench upon an affidavit of the facts for a rule calling upon such justice or justices, and also the party to be affected by such act to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against it, the said court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices upon being served with such rule absolute shall obey the same and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid."

F. E. Smith, K.C. (W. A. Casson and G. W. H. Jones with him), for the applicants Bottomley, Stevenson and Fewings.

Hemmerde, K.C. (Leslie Scott with him), for the applicant Easum.

PHILLIMORE, J.—In this case counsel have moved for two rules, one under s. 5 of the Justices Protection Act, 1848, and another for a *mandamus* to be directed to the learned alderman of the city of London before whom a preliminary inquiry is pending in a criminal prosecution against their clients.

It appears that after a hundred witnesses or thereabouts had been examined and cross-examined, the learned alderman who had hitherto been presiding was taken seriously ill, and that another learned alderman has taken his place. On his taking his seat, a discussion arose which has led to this application. In substance, we gather that the suggestion or submission on behalf of the applicants is that we are to prevent the magistrate from taking the evidence, if he is so minded and thinks it right to do so, of some or all of the hundred witnesses who have been already sworn, in this form—namely, that they should be re-sworn before him; that their depositions should be read over to them with instructions that they are to correct them when they say they are wrong; and that there should then be liberty to the counsel for the Crown—and, of course, counsel for the defendants—further to examine and cross-examine these witnesses. To prevent mistake, I should say that when we use the word "deposition," we mean that which I conceive to be the proper meaning of the word "deposition," not merely the witness's evidence-in-chief, but his evidence in cross-examination and in re-examination as well.

That being so, we have to approach this case upon general principles, and those principles are well laid down by this court in the judgment of COCKBURN, C.J., in *R. v. Carden* (1) in which he says (5 Q.B.D. at p. 5):

"In cases where a magistrate has authority to hear and determine a matter, but refuses to do so to the frustration of justice, we have undeniably jurisdiction in the exercise of our mandatory authority to direct him to hear and determine. In the present case we are applied to, while the case is under consideration, to interfere and direct the magistrate as to the course he shall pursue. While we have authority to issue a mandamus to hear and determine, we have no authority, as it seems to me, to control the magistrate in the conduct of the case, or to prescribe to him the evidence which he shall receive or reject, as the case may be. We are not called upon here to exercise anything in the nature of appellate jurisdiction. That could only be done when the case was at an end, in such cases as may come within our appellate jurisdiction. We are called upon to issue a mandamus commanding the magistrate to take a certain course while the case is pending. This is, in my opinion, an application of a very anomalous character. In the case of *Ex parte Ellissen* (2) (not reported, but referred to in *FOLKARD ON SLANDER AND LIBEL* (4th Edn.), p. 592), which has been referred to, it seems to me that this court went to the utmost limits of its mandatory jurisdiction and I should be extremely unwilling to extend the doctrine of that case to any other set of circumstances."

The weight of those remarks is not made less when we remember that the question there sought to be raised was not a question of simple procedure, but was a question of the most vital importance—namely, the admission or refusal of substantive evidence. It was not the method of taking the evidence, but it was the actual admission or refusal of substantive evidence in a preliminary inquiry that was taking place before the magistrate with a view to the committal of the defendant for trial.

Approaching the present case, as we must and should, guided by those considerations, we have to see whether within those principles any case has been made for our interfering with the discretion of the magistrate in the conduct of this trial, and we see none. We can find no authority, and the learned counsel have not been able to find any authority, which shows that if the magistrate elects to take that course which the applicants seek to prevent, he will be doing anything contrary to law. The strongest passages are those of WILLS, J., in *Re Guerin* (3), and the remarks of SIR JOHN T. COLERIDGE in giving the judgment of the Privy Council in *R. v. Bertrand* (4). Neither of these decisions gives any authority for saying that the practice suggested in this case would be contrary to law; indeed, as I read the decision in *R. v. Bertrand* (4) it is aliter. The course adopted in that case was one which their Lordships thought should be discouraged; but those words must be read in connection with the subject-matter, which was a trial for murder, where the evidence had been given at very considerable length, where the first jury had disagreed, and where the mere reading of the evidence on the second occasion would, in the opinion of their Lordships, have been so long that there was great chance of the attention of the jury flagging—a subject which has been commented upon in other cases. I remember in particular one case which I had before SIR GEORGE JESSEL, M.R., relating to the same matter. There being no authority that it is contrary to law to take the evidence in this fashion, and the practice, which we are well aware of—and which, it has been said, was applied in one case, a murder case, with the consent of counsel—being well established in this sense that it is a matter for judicial discretion to be exercised according to the requirements of justice, we have now to see whether there is any authority the other way.

SIR JAMES STEPHEN, in his *DIGEST OF THE LAW OF EVIDENCE*, is almost invariably sound and correct. My brother WALTON has looked at the first edition and the

sixth edition, and they are the same. Article 128 is :

"Leading Questions.—Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in examination-in-chief, or re-examination, except with the permission of the court, but such questions may be asked in cross-examination."

The authority of TAYLOR ON EVIDENCE is, of course, not so high, and one might have desired to look at the authorities which he quotes if one were going to rest on TAYLOR alone, but he sums up a series of instances in which leading questions are, as a rule, permitted, by saying (10th Edn., p. 1012, para. 1405) :

"Indeed, the judge has a discretionary power—not controllable by the Court of Appeal—of relaxing the general rule, whenever and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require."

With these authorities before us, we see no reason in law for saying that the learned alderman is bound to deprive himself of this mode of shortening a very long case, in so far as it is stated that an objection may arise from the fact that the putting of the deposition in this form to the witness would be a long leading question. I have not forgotten counsel's observation, which must be considered, that it is not merely the question that is put, but the answer as well. But we must have regard to convenience, the interests of justice, and to what we know ourselves about the practice. There is this statement made by such very competent counsel, Sir Harry Poland and Mr. Gill, in *Re Guerin* (3). In the LAW TIMES REPORT it is stated in these terms :

"If a case is heard before two different magistrates, the witnesses who gave their evidence before the first should be re-sworn, and give their evidence de novo before the second magistrate."

In the LAW JOURNAL report it is stated a little more pointedly, thus :

"The practice in the case of re-hearing before another magistrate is to re-swear the witnesses and read over their evidence, as in *R. v. Smith* (5)."

Having regard to those statements, and our knowledge of the practice, we do not see that there is any objection in law to this mode of taking the evidence by reason of the fact that the alderman will have not only a leading question, but the witness's answer already before him.

In refusing these rules, we simply say that the matter is one for the discretion of the committing magistrate. We do not wish to encourage any captious objection to a course which will only tend to bring this matter to that which the defendants would desire, a speedy issue; but it would be for the learned alderman to consider, if necessary, whether he thinks some particular witness should be examined in another manner; whether, if the counsel for the defendants desire, the reading of his cross-examination as written down should be postponed till he has the opportunity of interrogating viva voce, in the first instance, or whether he thinks that a particular passage should be given de novo. All these are matters with which we do not interfere in any sense with the alderman's discretion, as, again, we do not interfere with the number of witnesses whom he may require to hear before he commits for trial. In all these long cases it probably happens that, if the witnesses are credible, two or three would prove a sufficient case for committing for trial and examination before a judge and jury. The other witnesses are called because they may be required in the final trial, and because it is fair that the defendants should have every witness, if possible, called against them on the first occasion, so that they may have the opportunity of examining and discussing and answering their evidence. But, that course having been already secured in this case by the depositions of these hundred witnesses having been already taken,

it may be that the presiding magistrate may only require the evidence of a few witnesses; but we impose no burden upon him with regard to that. All we say is that we are not going to interfere with his discretion, and that these rules will be refused.

WALTON, J.—I agree, and I agree also with the reasons given by my brother PHILLIMORE; but, as the matter is of some importance, I should like to add a few words. In this case, the alderman, Sir George Smallman, commenced the hearing of the case, and that hearing extended over a considerable number of days. Then, unfortunately, in consequence of illness, Sir George Smallman has become unable to conclude that hearing. Strictly speaking, that hearing has become abortive. It may not be altogether useless, but it has become abortive, and the proceedings have now commenced before Alderman Sir Horatio Davies. It is obviously true that the hearing before Sir Horatio Davies is a re-hearing or a new hearing, and upon that hearing the prosecution must call their witnesses, and must give their evidence, just as if it was the first hearing; I mean, in theory, they must give their evidence, and call such witnesses as they choose. They may call all the witnesses who were examined before Sir George Smallman, or only some of them. We have nothing to do with that. At the beginning of the hearing before Sir Horatio Davies, a question arose as to how the evidence was to be taken, and counsel for the prosecution stated that what he proposed to do was to call, at any rate, some of the witnesses who had been examined before, to read over their depositions, and to ask them whether the statements made by them in such depositions were correct, and then either ask them or not, any further questions orally, and whether that was done or not, submit them for cross-examination. Objection was taken to it, and in answer to a question, the alderman stated that as he was then advised and speaking generally, he was prepared to allow the prosecution to take their evidence in that way.

The application before us is in effect to order him to refuse to allow any of the evidence to be taken in that way. If it is a matter of law, that must be the way in which it is put—that he is bound to refuse to allow any of the evidence to be given in that way. Is that contention well founded? When the evidence is taken, when the witness is called, and it is proposed to read over his deposition to him, and it is proposed to ask him whether the deposition is true, I think that there can be no doubt that the question will be open to the objection that it is a leading question. I need not read again art. 128 of SIR JAMES STEPHEN'S book to the effect that it is a question which ought not to be allowed except by permission of the court—that means by the permission in this case of the alderman. But is he bound to refuse to allow the question to be put? We think not. I am not in the least suggesting what the alderman must do, but I think that if objection is taken, he will have to consider and will take into consideration all the circumstances of the case. I think he is not bound to disregard unnecessary waste of time. In considering any objection that is taken, the alderman must, and I am quite sure will, be very careful to see that no injustice is done to any of the defendants; but we cannot lay down that he is bound in law to refuse to allow any evidence to be taken in the way in which it is proposed to be taken. That is a matter as to which he must exercise his discretion, and it is not for us to interfere with him in the exercise of that discretion.

Rules refused.

Solicitor: *Albert Edward Dunn.*

[*Reported by W. W. ORR, ESQ., Barrister-at-Law.*]

Re HARDY'S CROWN BREWERY LTD., AND ST. PHILIP'S TAVERN, MANCHESTER

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.),
April 15, 1910]

[Reported [1910] 2 K.B. 257; 79 L.J.K.B. 806; 102 L.T. 799;
74 J.P. 393; 26 T.L.R. 404; 54 Sol. Jo. 457]

Licensing—Compensation—Non-renewal of licence—Determination by Commissioners of Inland Revenue—Appeal to High Court—Costs of appeal—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 2 (2), (4)—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 10 (1), (3).

Upon an appeal to the High Court against the determination by the Commissioners of Inland Revenue, under s. 2 (2) of the Licensing Act, 1904, which incorporated s. 10 (3) of the Finance Act, 1894, of the amount payable as compensation on the refusal to renew an on-licence, the costs of the appeal **held** to be in the discretion of the court. The court, however, did not exercise its discretion judicially by making a substantial success on the part of the appellants the measure to apply in giving costs against the commissioners.

Section 2 (4) of the Act of 1904 did not deprive the court of this discretion, as "costs incurred by the commissioners" in that subsection did not include costs which they were ordered to pay.

Notes. The Licensing Act, 1904, s. 2 (2) and (4), have been repealed. For s. 2 (2) and (4) of the 1904 Act, see now the Licensing Act, 1953, s. 17 (3) and (4) and s. 17 (6), 33 HALSBURY'S STATUTES (2nd Edn.) 164, 165. The Supreme Court of Judicature Act, 1890, s. 5, has been repealed. For s. 5 of the 1890 Act, see now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1), 18 HALSBURY'S STATUTES (2nd Edn.) 486.

For rules as to costs, see now the Supreme Court Costs Rules, 1959 (in the Second Schedule to R.S.C. (No. 3), 1959, S.I. 1959 No. 1958), as amended by S.I. Nos. 1262, 1263, 2328. By r. 2 (5) the powers and the discretion of the court under s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, are to be exercised subject to and in accordance with those rules. The provision in s. 10 (3) of the Finance Act, 1894, relating to the costs of the appeal was repealed by the Administration of Justice (Miscellaneous Provisions) Act, 1933, and replaced by s. 7 of that Act (6 HALSBURY'S STATUTES (2nd Edn.) 44).

Referred to: *Dyson v. A.-G.*, [1911] 1 K.B. 410.

As to compensation for licensed premises, see 22 HALSBURY'S LAWS (3rd Edn.) 574 et seq.; and for cases see 30 DIGEST (Repl.) 54 et seq. For the Finance Act, 1894, s. 10, see 9 HALSBURY'S STATUTES (2nd Edn.) 372.

Appeal by the Commissioners of Inland Revenue against a decision of BRAY, J., reported 102 L.T. 284, as to costs.

The petitioners were a limited company having their registered offices at the Crown Brewery, Renshaw Street, Hulme, Manchester, and were the registered owners of the licensed premises known as St. Philip's Tavern, No. 1, Gibbon Street, Bradford Road, Manchester. The licence granted in respect of the said premises was an existing on-licence, and had been continuously in existence from a date prior to May 1, 1869. At an adjourned general annual licensing meeting held in Manchester on Feb. 20, 1908, the renewal authority for the district renewed the licence provisionally, and referred the question of the renewal to the compensation authority. The latter refused the renewal subject to the payment of compensation under s. 2 (2) of the Licensing Act, 1904, "in the same manner and subject to the like appeal to the High Court as on the valuation of an estate for the purpose of estate duty." The Commissioners of Inland Revenue fixed the amount of the compensation at £1,500, but the petitioners, not being satisfied with the amount,

appealed to the High Court, and the commissioners appeared by counsel on the appeal in support of their determination. On Mar. 2 BRAY, J., gave judgment on the appeal, increasing the amount of compensation from £1,500 to £1,770. Counsel for the petitioners thereupon asked for an order for costs against the commissioners.

BRAY, J., after argument, held that under s. 2 (2) of the Licensing Act, 1904, he had a discretion to make such an order and as the petitioners had recovered a substantial sum above the £1,500 awarded by the commissioners, he ordered the latter to pay the petitioners' costs. The commissioners appealed.

The Licensing Act, 1904, provided :

"Section 2 (1). Where quarter sessions refuse the renewal of an existing on-licence under this Act, a sum equal to the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of this Act, and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence) and the value which those premises would bear if they were not licensed premises shall be paid as compensation to the persons interested in the licensed premises.

(2). The amount to be so paid shall, if an amount is agreed upon by the persons appearing to quarter sessions to be interested in the licensed premises and is approved by quarter sessions, be that amount, and in default of such agreement and approval shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal to the High Court as on the valuation of an estate for the purpose of estate duty, and in any event the amount shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by quarter sessions.

(4). Any costs incurred by the Commissioners of Inland Revenue on an appeal from their decision to the High Court order under this section shall, unless the High Court order those costs to be paid by some party to the appeal other than the commissioners, be paid out of the amount to be paid as compensation."

The Finance Act, 1894, provided :

"Section 10 (1). Any person aggrieved by the decision of the commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the commissioners, whether on the ground of the value of any property or the rate charged or otherwise, may, on payment of, or giving security as hereinafter mentioned for, the duty claimed by the commissioners or such portion of it as is then payable by him, appeal to the High Court within the time and in the manner and on the conditions directed by Rules of Court, and the amount of duty shall be determined by the High Court, and if the duty as determined is less than that paid to the commissioners the excess shall be repaid.

(3). The costs of the appeal shall be in the discretion of the court, and the court, where it appears to the court just, may order the commissioners to pay on any excess of duty repaid by them interest at the rate of 3 per cent. per annum for such period as appears to the court just."

The Supreme Court of Judicature Act, 1890, provided :

"Section 5. Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

The Solicitor-General (Sir Rufus Isaacs, K.C.) and Lowenthal for the commissioners.

Danckwerts, K.C. (T. C. P. Gibbons with him) for the petitioners.

YAUGHAN WILLIAMS, L.J.—I think we should have to do considerable violence to the word "incurred" in s. 2 (4) of the Licensing Act, 1904, if we adopted the construction suggested on behalf of the Commissioners of Inland Revenue. Our view in this case is that BRAY, J., did not exercise a judicial discretion in dealing with the costs, because the learned judge gives as his reason for allowing these costs the fact that the petitioners succeeded to a substantial extent. We have no right to say affirmatively what constitutes a judicial exercise of discretion, but when once the discretion has been exercised in a particular case, we have a right to say that the discretion so exercised was not a judicial discretion and, therefore, to overrule it. We must, however, not be supposed to say that we think that the rule that costs follow the event, which applies to ordinary litigation, has any application in a case where the Commissioners of Inland Revenue, who have no interest in the subject-matter of the appeal, are litigants and in which the appellants have succeeded to a substantial extent. We think that to order the commissioners to pay the costs is a thing which ought only to be done in a case in which the judge thinks that they have opposed and conducted the appeal unreasonably. The result would be, if both parties wish it, that the case should go back to BRAY, J., with an intimation of our opinion that the measure which he has applied here—namely, the substantial success by the appellants—is not the right measure to apply in cases in which the commissioners are respondents. If the commissioners are going to take this case up to the House of Lords, this appeal will be dismissed and the case will not go back to BRAY, J. The case will go to the House of Lords simply upon the question whether the learned judge had a discretion in the matter of these costs which he might exercise, and not upon the question whether he has exercised it rightly or not, because the petitioners decline to go back upon that. As regards the costs of this present appeal, we do not think the petitioners should have the costs. I am not prepared, applying what I consider to be the rule of discretion which a judge ought to exercise, to say that the commissioners have acted unreasonably or improperly in coming here, and I think that as they are public officers we ought not to order them personally to pay costs unless we think they personally have behaved unreasonably. But I am particularly anxious that we should give no decision which might debar a court in a case in which it thought that these officers had behaved very unreasonably from making them personally pay the costs. I hope we shall always be able to do so.

FLETCHER MOULTON, L.J., and FARWELL, L.J., concurred.

Solicitors: Solicitor of Inland Revenue; Godden, Son & Holme, for Rylands & Sons, Manchester.

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

BANK OF BOMBAY AND ANOTHER *v.* SULEMAN SOMJI AND OTHERS

[PRIVY COUNCIL (Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson), May 13, 14, July 27, 1908]

[Reported 99 L.T. 532; 24 T.L.R. 840; 52 Sol. Jo. 727]

Mortgage—Priority—Mortgage by executor—Claim of legatee—Legacy charged on mortgaged property.

A mortgage made by an executor who is also residuary legatee to secure his private debt will be postponed to an unsatisfied legacy charged upon the mortgaged property.

Graham v. Drummond (1), [1896] 1 Ch. 968, distinguished.

Notes. As to power to alienate and charge of the personal representative, see 16 HALSBURY'S LAWS (3rd Edn.) 358–366; and for cases see 24 DIGEST (Repl.) 618 et seq.

Case referred to :

(1) *Graham v. Drummond*, [1896] 1 Ch. 968; 65 L.J.Ch. 472; 74 L.T. 417; 44 W.R. 596; 12 T.L.R. 319; 24 Digest (Repl.) 627, 6215.

Appeal by mortgagees, defendants in the action, from an order of the High Court of Bombay, varying a decree of CHANDAVARKAR, J.

Sir R. Finlay, K.C., Levett, K.C., and F. Russell for the appellants.

Danckwerts, K.C., and P. S. Stokes for the respondents.

July 21, 1908. **SIR ANDREW SCOBLE.**—The facts relating to this appeal are not in dispute, and may be stated shortly. Somji Parpia died on Feb. 15, 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Labai, who also survived him. By his will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow Labai and his younger sons. Both courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision. After their father's death the elder sons entered upon large business transactions under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on Sept. 1, 1890, deposited certain title deeds relating to the property in suit, by way of equitable mortgage, with the bank; and on Jan. 12, 1899, the bank obtained from them a formal mortgage of the same property, to secure the repayment of Rs. 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied. The property comprised in the mortgage consisted of a house in Bhaji Pala Street and a piece of land in the Falkland Road, in the city of Bombay, to both of which the mortgagors declared themselves to be entitled, but both of them had been specified by their father Somji Parpia, in his will, as subject to the charge of Rs. 30,000 in favour of his widow and younger sons. This will was not among the documents of title deposited with the bank, but the root of the title to the house in Bhaji Pala Street, the more valuable of the two properties, was indicated in the will of Meenabai, widow of Somji Parpia's father Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the bank's legal advisers had made any investigation of title, they must have inquired how Somji's share had come to the mortgagors, and in this way obtained cognisance of his will, and of the charge on this portion of his estate. But they made no

inquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. A

It is not suggested that the mortgagors practised any concealment of the real facts of the case; and if they had been asked about their father's will, it is to be presumed that they would have given an honest answer. Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the bank. But when the bank advertised the properties for sale, they filed this suit in order to establish the priority of their charge over the mortgage to the bank. And the only question in this appeal is whether they are entitled to such priority. B

Counsel for the appellants contended that, under the will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of ROMER, J., in *Graham v. Drummond* (1) in which that learned judge says ([1896] 1 Ch. at p. 974): C

"I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator." D

But this does not dispose of the present case. Here the plaintiffs are legatees, and the distinction between creditors and legatees is well pointed out in SPENCE'S EQUITABLE JURISDICTION, vol. 2, p. 376, where it is said:

"A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any; therefore the mortgagee would be safe as against creditors." E F

Moreover, in this case, the mortgagee had constructive notice, and has only himself to thank if his position is not safe; for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the will of Somji in favour of the widow and her sons.

Their Lordships agree with the learned judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the bank and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of April 14, 1905, confirmed. The appellants must pay the costs of the appeal. G

Solicitors: Cameron, Kemm & Co.; Rawle, Johnstone & Co. H

[Reported by C. E. MALDEN, Esq., Barrister-at-Law.]

Re FOUNTAINE. Re DOWLER. FOUNTAINE v. AMHERST AND OTHERS

[COURT OF APPEAL (Sir Herbert Cozens-Hardy, M.R., Farwell and Kennedy, L.J.J.), June 23, 24, 1909]

[Reported [1909] 2 Ch. 382; 78 L.J.Ch. 648; 101 L.T. 83;
25 T.L.R. 689]

Evidence—Document—Books of account—Solicitor's books—Admissibility against client—Need to prove books kept as agent for or on instructions of client.

Limitation of Action—Trustee—Acknowledgment—Payment to tenant for life of interest on trust capital—Trustee Act, 1888 (51 & 52 Vict., c. 59), s. 8 (1) (b).

A partner in a firm of solicitors employed by trustees misappropriated, at various dates before Aug. 17, 1900, part of the funds which were held on trust for a tenant for life of the income and thereafter for a remainderman absolutely. The misappropriation was discovered after the death of the partner in May, 1906. On Aug. 17, 1906, this action was brought by the tenant for life and the remainderman against the trustees to make good the misappropriated funds, and to pay or account to the tenant for life for the interest thereon. The trustees pleaded that the action was out of time, invoking s. 8 (1) (b) of the Trustee Act, 1888, and the tenant for life pleaded the payment within the six years before action brought of interest on the misappropriated sums as constituting acknowledgments by the trustees. The only evidence of such payments were entries in the accounts with the trustees kept by the solicitors in their books crediting such interest to the trustees. There was no evidence of any express authority by the trustees to the solicitors, or that the accounts were kept on the instructions of the trustees, or personally by the deceased partner or a clerk on his direction.

Held: (i) on the evidence the books of the solicitors were not kept on the instructions of the trustees or by the solicitors as agents of the trustees so that they were to be regarded as the books of the trustees, but they were kept by the solicitors for their own purposes, and, therefore, they were not admissible in evidence against the trustees; (ii) nor were they admissible on the ground that they contained admissions against the interest of the deceased partner because (a) they were the books of the firm and not personal books of the partner, and (b) there was no evidence that the entries in the books were made by the partner, or on his instructions.

Held, further: the payment of interest within the six years could not constitute an acknowledgment by the trustees of the continued existence of the trust capital so as to take the case out of s. 8 (1) (b) of the Act of 1888 on the claim of a tenant for life.

Notes. In applying this case it must be borne in mind that whereas before 1940 acknowledgment or part payment merely revived a cause of action it now, by virtue of the Limitation Act, 1939, ss. 23–25, causes a fresh cause of action to accrue: see 24 HALSBURY'S LAWS (3rd Edn.) 209, note (p). The Trustee Act, 1888, has been repealed. A period of limitation of six years is now imposed by s. 19 (2) of the Limitation Act, 1939, in cases to which s. 8 (1) (b) of the Act of 1888 would have applied.

As to acknowledgment and part payment, see 24 HALSBURY'S LAWS (3rd Edn.) 297, 316; and as to pleading them see *ibid.*, 208, 209. As to limitation of actions in respect of trust property see *ibid.* 277–281; and for cases on these subjects see 32 DIGEST 497. For the Limitation Act, 1939, s. 19 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 1179. As to the admissibility in evidence of declarations by deceased persons against interest or in the course of duty, see 15 HALSBURY'S LAWS (3rd Edn.) 303–308; and for cases see 22 DIGEST (Repl.) 93 et seq.

Cases referred to :

- (1) *Higham v. Ridgway* (1808), 10 East, 109; 103 E.R. 717; 22 Digest (Repl.) 98, 709.
- (2) *Re Somerset, Somerset v. Earl Poulett*, [1894] 1 Ch. 231; 63 L.J.Ch. 41; 69 L.T. 744; 42 W.R. 145; 10 T.L.R. 46; 38 Sol. Jo. 39; 7 R. 34, C.A.; 32 Digest 496, 1571.
- (3) *Price v. Earl of Torrington* (1703), Holt, K.B. 300; 2 Ld. Raym. 873; 1 Salk. 285; 90 E.R. 1065; 22 Digest (Repl.) 104, 840.
- (4) *Taylor v. Witham, Witham v. Taylor* (1876), 3 Ch.D. 605; 45 L.J.Ch. 798; 24 W.R. 877; 22 Digest (Repl.) 98, 768.
- (5) *Doe d. Gallop v. Vowles* (1833), 1 Mood. & R. 261, N.P.; 22 Digest (Repl.) 101, 795.

Also referred to in argument :

- Rowe v. Brenton* (1828), 8 B. & C. 737; 2 State Tr.N.S. 251; 3 Man. & Ry.K.B. 133; Concanen's Rep. 1; 108 E.R. 1217; 22 Digest (Repl.) 93, 711.
- Williams v. Geaves* (1838), 8 C. & P. 592; 22 Digest (Repl.) 98, 762.
- Mercer v. Denne*, [1905] 2 Ch. 538; 74 L.J.Ch. 723; 93 L.T. 412; 70 J.P. 65; 54 W.R. 303; 21 T.L.R. 760; 3 L.G.R. 1293, C.A.; 22 Digest (Repl.) 374, 4038.
- Thorne v. Heard*, [1894] 1 Ch. 599; 63 L.J.Ch. 356; 70 L.T. 541; 42 W.R. 274; 10 T.L.R. 216; 7 R. 100, C.A.; affirmed sub nom. *Thorne v. Heard and Marsh*, [1895] A.C. 495; 64 L.J.Ch. 652; 73 L.T. 291; 44 W.R. 155; 11 T.L.R. 464; 11 R. 254, H.L.; 32 Digest 386, 688.
- Moore v. Knight*, [1891] 1 Ch. 547; 60 L.J.Ch. 271; 63 L.T. 831; 39 W.R. 312; 32 Digest 492, 1534.

Appeal by the plaintiff, Mary Fountaine, from a decision of WARRINGTON, J., dismissing part of her claim against the defendants, trustees of the will of Andrew Fountaine, deceased, on the ground that the defendants were protected by s. 8 (1) (b) of the Trustee Act, 1888.

The plaintiffs, as beneficiaries under the will of Andrew Fountaine, deceased, who died on Aug. 11, 1874, sought to render the defendant, Lord Amherst (one of the trustees under the said will), and the estate of a deceased trustee, Captain Francis Edward Dowler, liable to make good to the trust estate certain sums of money come to their hands as trustees, but not duly invested or otherwise dealt with. No charge of fraud or dishonesty was made against the trustees; the breach of trust alleged against them is that they allowed the moneys in question to be retained by the solicitor to the trustees, one Charles Cheston, who misappropriated them. The moneys to which the action related consisted (i) of moneys forming part of the general personal estate of the testator; and (ii) of moneys arising from the sale of chattels settled as heirlooms. The plaintiff, Mary Fountaine, was entitled for her life to the income of all such moneys. The plaintiff, Charles Andrew Fountaine, was absolutely entitled to the corpus of such moneys in remainder expectant on the death of Mary Fountaine. As from Dec. 15, 1902, the plaintiffs had been co-trustees with Lord Amherst of the will, and co-trustees with him for the purposes of the Settled Land Acts. The defendant, Lord Amherst, was one of the original trustees of the will. The other two original trustees died in 1877 and 1881 respectively. On April 5, 1883, the defendant, Lord Amherst, and Captain Dowler were appointed trustees of the settlement effected by the will for the purposes of the Settled Land Act, 1882. On April 25, 1884, Captain Dowler was by deed appointed trustee of the will jointly with Lord Amherst, in the place of one of the two deceased trustees. Captain Dowler died on April 29, 1900. The defendants Herbert Maxwell Stuart and Joseph Harris were his executors. They pleaded that they had fully administered their testator's estate, and had transferred the assets to the present trustees of his will, the defendants William Henry Munton Jackson and Edward Grant Fraser Tytler. They admitted that they did not advertise for creditors before parting with the assets. They did not admit assets.

A Charles Cheston died on May 8, 1906. The breaches of trust were then discovered, and on Aug. 17, 1906, this action was commenced. The substantial defence raised by all the defendants was that of s. 8 of the Trustee Act, 1888, which provided (see p. 973 post) when the statutes of limitation could be pleaded by a trustee [see now Limitation Act, 1939, s. 19 (2): 13 HALSBURY'S STATUTES (2nd Edn.) 1179]. This defence did not affect the position of the plaintiff, Charles Andrew Fountaine.

B The plaintiff, Mary Fountaine, met it by pleading that

"The defendant, Lord Amherst, within the period of six years before the commencement of this action acknowledged the right of the plaintiff, Mary Fountaine, in respect of the said sums of £15,000, £10,000 and £6,000, and also in respect of uninvested balances, by paying her from time to time interest on those respective sums or treating such interest as paid on account."

C The plaintiffs adduced no evidence in support of their plea of acknowledgment by payment of interest except copies of the capital and income accounts of Cheston's firm with the trustees taken from the firm's books. The defendant, Lord Amherst, raised no objection to the use of copies, but he objected that the books themselves were not evidence against him.

D WARRINGTON, J., dealing with the uninvested balances, held that the solicitors' books were merely a record, kept by a person having pecuniary transactions with another, of the state of account between them from time to time, and he failed to see how statements forming part of such record could be evidence against the other party to such transactions, unless it could be shown that the record was in some way approved or adopted by him. It was contended that the books were in reality the accounts of the trustee, which it was his duty to keep, but that was not so. The accounts were not accounts of the dealings of the trustee with the trust estate kept as between him and the cestui que trust, but were the accounts of the solicitors kept by them in that capacity as a record of their pecuniary dealings between them and their client. The statements were not statements by the trustee or made under his authority, but were statements made by persons accountable to him in fulfilment of their duty as accounting parties. There is, therefore, no evidence to support the plaintiff's contention as to payment of interest. The plea of the statute must, therefore, prevail in favour of Lord Amherst and Captain Dowler so far as the claim of the plaintiff, Mary Fountaine, was concerned as to the universal balances regarding which the cause of action arose prior to Aug. 17, 1906. As to three sums amounting in all to £31,000 the trustees were responsible and liable to make them good. The tenant for life appealed against the decision so far as it related to the uninvested balances.

Upjohn, K.C., and *P. F. Wheeler* (with them *Begg*) for the plaintiff, the tenant for life.

Buckmaster, K.C., and *Underhill* for the defendants, the representatives of Lord Amherst, were not called upon to argue.

H **SIR HERBERT COZENS-HARDY, M.R.**—This is an appeal from a decision of WARRINGTON, J., raising points undoubtedly of great importance to the parties, the discussion of which has involved considerations of law. But, having listened attentively to the argument of counsel for the tenant for life, I see no reason to doubt that the judgment of WARRINGTON, J., was correct.

I The action is brought by the tenant for life, Mary Fountaine, and Charles Andrew Fountaine, who is absolutely entitled in remainder subject to her life interest, to very considerable properties, of which the plaintiffs and Lord Amherst were the trustees. The plaintiffs were appointed trustees with Lord Amherst in 1902. The action alleges, and with truth, that a considerable part of the trust estate was lost by reason of the fraud of Mr. Charles Cheston, a partner in the firm of Messrs. Cheston & Sons, in circumstances under which Lord Amherst, and also the estate of Captain Dowler—I will not mention him again because it is not necessary to distinguish between him and Lord Amherst—though entirely innocent of fraud or

anything of that kind, are undoubtedly responsible to a certain extent. The learned judge in the court below has held, and it is not disputed here, that Lord Amherst, or as I should say now, Lord Amherst's estate, for Lord Amherst has died since this action was tried, is liable to make good three sums amounting to £31,000, which sums, it is alleged in the statement of claim, were received by Mr. Cheston, and not invested under such circumstances as render Lord Amherst liable to make them good. That is a declaration which is not appealed against and should not be appealed against on behalf of Lord Amherst. A

But a further question was raised—What is the position of the plaintiff the tenant for life? Is, or is not s. 8 of the Trustee Act, 1888, an answer to her demand? For this purpose it is right to consider the action as though the tenant for life were the sole plaintiff. In the defence the Trustee Act, 1888, was pleaded, and, by way of reply, by permission of the learned judge in the court below, an amendment was introduced pleading acknowledgment by payment of interest within six years before the commencement of the action. B

The learned judge says that whether such acknowledgment has been proved is the only difficult question in the case. The only attempt to prove it was by production of certain books—because copies of the books were treated the same as the books themselves—which books I have now occasion to refer to. There was no evidence whatever that those books were kept by Messrs. Cheston & Sons on the instructions of the trustees in such circumstances as would make them their books. The learned judge in the court below said that no evidence had been tendered as to any authority given to Mr. Cheston or his firm beyond that implied in the relation of solicitor and client to the extent to which that relation has admittedly existed. On that ground, therefore, those books cannot be put in evidence as being Lord Amherst's books. C Then we have heard a very elaborate and learned argument to the effect that, though that may be so, yet Mr. Cheston being dead, those books are admissible as being evidence on the ground that they contain entries by the deceased person against his interest. But there is a fundamental error in that assertion: they are not Mr. Cheston's books; they are the books of Messrs. Cheston & Sons. We have, as I have already stated, copies of them. The firm of Messrs. Cheston & Sons have the original books. To suppose that you can make the books of a firm evidence in such circumstances as the present under the principle of *Higham v. Ridgway* (1) merely because one member of the firm is dead, is to assert a proposition for which, in my view, there is no foundation in principle nor any authority. There is neither principle nor authority for such a proposition. That being so, there is not a vestige of evidence to support the amended reply which, and which alone, was asked to be allowed and granted by the learned judge at the trial of the action. It seems to me that the structure of law which has been sought to be raised upon such foundations as this cannot be supported and must fall to the ground. I, therefore, think that s. 8 of the Trustee Act, 1888, is applicable to the present case and it is not got rid of by the reply because there is no evidence to support that plea. D

Having thus dealt with the main part of the case there is one further point which I think it is necessary to deal with because of the form in which the order is drawn. E The judgment first of all deals with the specific items making up the total of £31,000, as to which items the parties elected to take the decision then and there, but there was an allegation that there were moneys uninvested in the hands of the trustees, and an inquiry was directed what balances of the trust funds had from time to time since Aug. 17, 1906—the date of the commencement of the action—been in the hands or under the control of Lord Amherst, and had not been invested other than and except what had been invested after the plaintiffs themselves became trustees. That raises this question. Counsel for the plaintiff says that in the inquiry as to balances which from time to time would have been in the hands of Lord Amherst uninvested his client ought not to be tied down to a period of six years before the issue of the writ and ought to be able to go back to any length of time which the circumstances of the case require—in the present case I think he suggests 1895 and that the court ought to do that because there might be an F

A implied promise to pay by reason of the receipt of subsequent interest from the trustees. That involves a consideration of s. 8 of the Trustee Act, 1888. We start with this idea quite plainly in our minds, that until that Act was passed the defence of the Statute of Limitations would not have applied to a case like the present. That Act did, with certain limits and with certain exceptions, give to trustees a protection similar to that afforded by the Statute of Limitations. By s. 8 (1) it enacts:

C “In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was a party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use the following provisions shall apply. . . . (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received. . . .”

D Two things are perfectly clear there. The Statute of Limitations, of course, is no answer against the plaintiff, Charles Andrew Fountaine, who is, as I have already mentioned, entitled in remainder, and that is the reason why the order under appeal cannot be objected to so far as he is concerned, but it is equally clear that the section is available in favour of Lord Amherst against the tenant for life if the true meaning of this subsection be that which it seems to me it really is.

E A beneficiary under a trust may be absolutely entitled to the corpus. In such a case a claim against a trustee would be to pay over the sum of £10,000, or whatever it might be, of the trust estate with interest from the date when it has ceased to be paid. To determine the rights of the parties under s. 8 the court would have to consider the case in exactly the same way as if it had been, what in truth it was not, an action for debt for money had and received. I agree with counsel for the plaintiff that no kind of reply which would have been available in an action for money had and received to recover that £10,000 with interest would be available here. How can that apply to the case of a tenant for life? The tenant for life never could recover the principal. The tenant for life is in the position of a person who has by virtue of some contract with another person a right to an income say of £100 a year during his life. If that payment is not made and an action is brought for money had and received, it seems to me to be too plain for argument that no payment of a subsequent instalment of that annuity can in any way be held to imply or to justify an inference of a promise to pay the past instalment of that annuity. In the ordinary case of a capital sum a payment of interest—not by itself, but coupled with some other circumstances—may justify an inference of liability to pay a capital sum in respect of which that interest is paid. But treating this section as having the meaning which I have attributed to it, a payment of interest to the tenant for life under a will or settlement can have no such effect as between the trustee and the tenant for life. I entirely decline to assent to the view of counsel for the plaintiff that it is quite enough to say that if the trustee admits the existence of the capital of the trust estate that is an admission for the benefit of the tenant for life as well as the remainderman, and takes the case out of the section. That argument, if given effect to, would do away with the beneficial portion of s. 8, and it is an argument to which I am not prepared to give any weight. I, therefore, think that the learned judge in the court below was quite right in saying that this action—which for the present purpose I treat as an action by the tenant for life as plaintiff alone against the trustees—was an action in which the tenant for life was not entitled to any account beyond the six years before the writ in the action was issued.

There is only one other point, which I will pass by with a few words. The learned judge in the court below has held, and, I think, with perfect correctness, that as the plaintiff the tenant for life is prevented by s. 8 from recovering interest on the sums making up the total of £31,000, the result is that Lord Amherst himself is entitled to the income of the fund when made good during the life of the plaintiff, the tenant for life. There was some apprehension which seems to me to be unfounded, but which it is just as well to remove, on counsel for the plaintiff's part. To meet that we will add to the order some words to which counsel for the defendants does not object and with which counsel for the plaintiff was ultimately satisfied. The addition of those words, however, does not in any way affect the substance of the case, and in my opinion this appeal must be dismissed, and must be dismissed with costs.

FARWELL, L.J.—I am of the same opinion. This is one of those unfortunate cases in which two innocent persons are disputing as to which of them is to suffer in consequence of the defalcations of a rogue. I can see nothing objectionable in a trustee taking advantage of any plea of the Statute of Limitations which is open to him, or of any failure to prove the case on the part of the plaintiff.

Two points are raised here. The first relates to interest on three specified sums of £15,000, £10,000, and £6,000, as to which a direct issue was raised at the trial and determined by the judge in the court below. If the trustees had, in fact, employed Messrs. Cheston & Sons as their agents to keep the trustees' accounts on their behalf and the plaintiff, Mary Fountaine, had proved that, then the question would have been decided in the contrary way, but the learned judge in the court below has found that there was no evidence that the trustees had done so, and it is quite clear that there was none. That point, therefore, fails. The accounts of the solicitors are their own accounts kept by the solicitors for their own purposes, and not as agents for the trustees.

The second point suggested was that the court could admit them as evidence, because they contained entries made by Messrs. Cheston & Sons or Mr. Cheston himself, he being dead; and that they were made, therefore, by a dead man, and were against his interest. The answer has been already given by the MASTER OF THE ROLLS. Mr. Cheston, it is true, is dead. There is no evidence to show that Mr. Cheston made the entries. They may have been made by one of his partners or by some person employed by the members of the firm. Certainly there is no ground that I can see, and it would be a most dangerous precedent, to admit books which, *ex hypothesi*, have to be regarded as being probably untrue as evidence in such a case as the present. That disposes of the specific sums which were raised as a distinct issue and disposed of by the learned judge in the court below.

Then comes a further question as to the form, or limit I should say, of the account. The plaintiff, the tenant for life, says that if she can prove the payments of income for a period beyond six years she will be entitled to an account for a greater period. I am unable to accept that view. It appears to me that we have now, since the Trustee Act, 1888, in a case like the present where the trustees come within the exception mentioned in s. 8 of that Act and are treated as innocent persons, to dismiss from our minds for the purpose of the consideration of a claim like this any question of trusteeship and treat the trustee as though he was simply a debtor. The section has been already read, and I will not read it again. In terms it provides that so far as the remainderman entitled to the corpus is concerned, the time does not begin to run against him until he comes into possession. The tenant for life claiming the annual income as a debt claims it as a succession of sums of money arising *de anno in annum*. A payment of each sum or part payment of one sum would extend to that one sum, and that one only. All the others are different and distinct sums. But there is another question here as regards the balance of the income of any one year. The question argued by counsel for the tenant for life was this. The tenant for life is entitled to the income of the fund. The payment of any sum on account of income is equivalent to an acknowledgment by the trustee

A of a promise to pay the principal sum, and the principal sum, therefore, if replaced, the tenant for life would be entitled to. I find it absolutely impossible to accept that argument, if I am right in saying that this was a question of debtor and creditor now, and not a question of trustee. A. L. SMITH, L.J., observed in *Re Somerset, Somerset v. Earl Poulett* (2) ([1894] 1 Ch. at p. 268):

B "It is said—and in this I agree—that the defence is to be treated as if it were a plea of the Statute of Limitations pleaded at common law to an action for money had and received."

Take an action at common law by a person entitled to an annual sum claiming a sum due in one, two, or three years. No part payment on behalf of any of those could possibly be read as a promise to pay the principal because the plaintiff is not entitled to the principal; and to say that you can infer from a payment to a person entitled to income alone a promise to pay the principal to which he is not entitled is, to my mind, to contradict the whole of the basis on which payment is treated as taking a case out of the Statute of Limitations. So far as I can see, the effect of the argument of counsel for the tenant for life's would be to deprive innocent trustees, ex hypothesi—because it only applies to innocent trustees—of the benefit of s. 8 of the Trustee Act, 1888, which the legislature intended to give them. I agree that the appeal must be dismissed with costs.

KENNEDY, L.J.—With regard to the more important point in this case—it being the point which stands at the threshold of the case—I desire to say a few words. The learned judge in the court below wavered as to whether or not he should admit or refuse to admit as evidence in regard to certain receipts and payments by the trustees copies of books which were the books of the firm of solicitors who undoubtedly to some extent acted for Lord Amherst. I think that the learned judge's opinion was right, and that those books were not admissible as evidence. But I agree that the grounds of the decision one way or the other in these cases are not separated by any broad line of distinction, and one has to be careful to get on the right side in any particular case. The books were not, as the MASTER OF THE ROLLS and FARWELL, L.J., have said in terms, books which were kept by Messrs. Cheston & Sons according to directions from the trustees that they should keep such accounts. If they had been, no doubt they would have been evidence as against the trustees, because what you direct your servant to keep may probably be used against you, as entries made by you if a question arises in which those entries become important.

Then it is said they are entries made by a deceased person, Mr. Cheston, who was one of the partners in the firm, and I will assume the principal partner in the sense of being the senior partner at the time. As entries made by a deceased person, it is well known to every lawyer that they may be admissible under either of two heads. One is that they are entries made, as it is called, against the interest of the person who is proved to have made them; and, secondly, that they are entries made by the deceased person in the ordinary course of his business. The various decisions under those two heads are fully discussed in SMITH'S LEADING CASES (11th Edn.) at pp. 320, 327, in notes to the cases of *Price v. Earl of Torrington* (3) and *Higham v. Ridgway* (1). This only becomes material where the entries in question are not entries of the parties to the action. I agree that, if it had been shown in this case that these entries were made by Mr. Cheston himself, or by his direction, a much more difficult question than the question we have to decide would have arisen, because there is no doubt, I think, that where you have entries made by a person which can fairly be described as *prima facie* against his interest those entries are admissible as evidence for all purposes irrespective of their effect or value when received. Speaking for myself I think that that is the law, and it is the law as laid down by SIR GEORGE JESSEL in *Taylor v. Witham* (4) in which he reviews the decisions in *Doe d. Gallop v. Vowles* (5), and in some of the earlier cases, particularly a judgment of PARKE, B., whose decision he prefers to the

decision of LITTERDALE, J., in *Doe d. Gallop v. Vowles* (5). But here it has not been shown that the entries are in fact in the handwriting of Mr. Cheston, nor are they shown to be the entries made by a clerk upon his direction, which would be equivalent, I agree, when proved, to his own handwriting. The books are not Mr. Cheston's books, so that no presumption could arise from that. They are the books of the firm in which he was a partner. It was a firm in which so far as I am aware there were—or, at any rate, at the time of the trial there were—other partners living. Certainly there is no proof in this case that they were entries made contemporaneously in the ordinary course of business.

It is said, and I think all the evidence supports it, and it is pointed out by my brother WARRINGTON, J., that the entries, so far as they are to be treated as entries of the firm, are entries made in its business. It is true in one sense that they are entries in dealing with the accounts as between themselves and the trustees. But they are by no means entries made in the ordinary course of business as relating to debts due from the trustees or payments made by the trustees to the cestuis que trust. I think that that is very fairly put in one sentence by my brother WARRINGTON, J., in the course of his judgment. He says (101 L.T. at p. 85):

“But, even if the account were admissible, it would, in my opinion, prove no more than a payment by the solicitors of interest on debts owing by them to the trustee, and not a payment of interest on a debt of the trustee himself.”

He is speaking no doubt of the value of the documents, if receivable. But the reasoning, it appears to me, is applicable if one had to test the question of the admissibility of this evidence and decide one way or the other on the question whether it was made in the ordinary course of business. If there was a course of business in which Mr. Cheston could be shown to have made, or directed to be made, these entries they might have become admissible on that ground. But it was not so much on that ground, as I follow counsel for the plaintiff, that he was putting his case as that these entries were entries against interest. The natural reason for that is, according to the view expressed by SIR GEORGE JESSEL in the case to which I have referred, *Taylor v. Witham* (4), and personally, as at present advised, I certainly agree with it. If you once get an entry admissible as against interest it lets in what one may call all the inferences which may appear in connection with the same entry for whatever they are worth. On the whole, for the reasons which I have given, I do not think that the learned judge in the court below was wrong in refusing to admit these books as evidence. On the question with which he proceeds to deal as to the position of the case as it stands if those entries were admitted, I desire to add nothing to what has fallen from the other members of the court.

Appeal dismissed.

Solicitors: *Duffield, Bruty & Co.; Lawrance, Webster, Messer & Taylor.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]



